Financial Supervisory Authority

Regulation no. 5/2017 on the amendment and supplement of certain regulations of the National Securities Commission to establish certain measures

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In line with the provisions of Art. 1 par. (2), Art. 2 par. (1) sub-pars. a) and d), Art. 6 par. (2) and Art. 14 of the Government Emergency Ordinance no. 93/2012 on the establishment, organization and operation of the Financial Supervisory Authority (ASF), approved as amended and supplemented by Law no. 113/2013, as subsequently amended and supplemented,

Pursuant to the provisions of Art. 16 of (EU) Regulation no. 1.095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision no. 716/2009/EC and repealing Commission Decision 2009/77/EC,

Whereas the Guidelines on certain aspects of the MiFID compliance function requirements, issued by the European Securities and Markets Authority (ESMA) based on Art. 16 of (EU) Regulation no. 1.095/2010 represent ESMA and European competent authorities's vison on how to apply the provisions transposing Art. 6 of EC Directive no. 39/2004 on markets in financial instruments (MiFID) and Art. 6 of the MiFID Implementing EC Directive 73/2006,

as per deliberations held in the meeting of the Financial Supervisory Authority's Board of 19/07/2017,

The Financial Supervisory Authority hereby issues this regulation:

Art. I. - Regulation No. 32/2006 of the National Securities Commission regarding financial investment services, approved by Order no. 121/2006 of the National Securities Commission, published in the Official Journal of Romania, Part I, nos. 103 and 103 bis of 12 February 2007, as subsequently amended and supplemented is amended and supplemented as follows:

1. In Article 2 paragraph (2), a new sub-paragraph, j^{1}) is added after paragraph j) to read as follows:

" **j^{1})** forex rolling spot contract – financial instrument set out under Art. 2 par. (1) point 17 sub-par. d) of Law no. 24/2017 on issuers of financial instruments and market operations, hereinafter referred to as Law no. 24/2017, which refers to:

1. A futures contract (i.e. the rights and obligations arising from a contract on the sale of a commodity whose delivery is determined at a subsequent date and whose price is determined upon contract's conclusion), other than a futures

contract traded or expressly indicated to be traded on a recognized stock exchange, where the commodity to be sold as per the contract is a foreign currency or RON; or

2. a contract for difference (CFD), if the profit is to be secured or the loss is to be avoided depending on the foreign currency's fluctuations,

if, in both cases, the respective contract is concluded for speculative purposes".

2. In Article 2 paragraph (2), a new subparagraph r^1) is inserted after subparagraph r), to read as follows:

" **r^1)** binary option – financial contract form in the financial instruments category provided under Art. 2 par. (1) point 17 sub-par. d) of Law 24/2017, whereby a fixed amount of cash is paid if the option is exercised or expires "in-the-money" or nothing at all if the option is exercised or expires "out-of-money";

3. In Article 2 paragraph (2), two new subparagraphs are inserted- v^1) and v^2) after subparagraph v), to read as follows:

" **v^1)** placing of financial instruments without a firm commitment- investment service provided by an intermediary to an issuer whereby the intermediary commits to disseminate to the public, on issuer's behalf, the financial instruments subject to a public offer

v^2) placing of financial instruments on a firm commitment basis – investment service provided by an intermediary to an issued whereby the intermediary commits to disseminate to the public, on issuer's behalf, the financial instruments subject to a public offer and undertakes to purchase the remaining financial instruments not disseminated, on its own;.

4. In Article 2 paragraph (2), a new subparagraph is inserted, y^1) after subparagraph j) to read as follows:

" **y^1)** underwriting of financial instruments on a firm commitment basis – investment service provided by an intermediary to an issuer whereby the issuer undertakes to purchase the financial instruments subject to a public offer on its own and to place /resell them on its own behalf under the terms and period agreed upon with the issuer, by complying with the provisions of Law no. 24/2017".

5. In Article 6, paragraph (3), subparagraph e) shall be amended to read as follows:

" **e)** S.S.I.F. must have the minimum initial capital corresponding to the business purpose proposed, in accordance with the provisions of Art. 7 of Law no. 297/2004 and with the provisions of Arts. 11^2 and 11^3 of this regulation;"

6. In Article 6, paragraph (6) shall be amended to read as follows:

" **(6)** Senior management within a S.S.I.F. may not be licensed as representatives of the respective S.S.I.F.'s internal control department. Senior management of a S.S.I.F. may be licensed as agents for financial investment services of the respective S.S.I.F."

7. In Article 11, paragraph (11) subparagraph e) shall be amended to read as follows:

" **e)** financial auditor's report as regards a company's status on its activity's cessation date, as well as the manner in which S.S.I.F. honoured its debts toward clients".

8. In Article 11, a new paragraph, paragraph (3), is inserted after paragraph (2) to read as follows:

" **(3)** S.S.I.F. shall follow the following procedure for clients S.S.I.F. was unable to contact with a view to returning their assets in its custody:

a) Transfer the financial instruments into an individual account opened with the central securities depository under each client's name;

b) Open an account with any credit institution on the Romanian territory, in favour of clients, where it is to transfer the cash deposits belonging to them, which shall comprise the list with each client's identification data and the cash deposits owed to each client".

9. Another section, 1^1, is inserted after Article 11^1 comprising Articles 11^2-11^5, to read as follows:

" **SECTION 1^1**

Provision of certain services and investment activities and related services

Art. 11^2. - (1) Within the meaning of the provisions of Art. 7 par. (2) of Law no. 297/2004, S.S.I.F. providing the service of placing of financial instruments without a firm commitment basis have at their disposal an initial capital level equal to the equivalent into Lei of the sum of Euros 125,000.

(2) S.S.I.F. providing the service of placing of financial instruments on a firm commitment basis have at their disposal an initial capital level equal to the equivalent into Lei of the sum of Euros 730,000.

Art. 11^3. - The related services provided under Art. 5 par. (1^1) sub-par. a) -g) of Law no. 297/2004 may be provided by S.S.I.F., irrespective of the initial capital's level at their disposal, except for the related service provided under Art. 5 par. (1^1) sub-par. a) of Law no. 297/2004, which cannot be provided by S.S.I.F. having an initial capital equal to the equivalent into Lei of the sum of Euros 50,000.

Art. 11^4. - (1) S.S.I.F. may replenish clients' discretionary account with own sums needed to complete transactions being settled only if, although on the date an order is being executed, S.S.I.F. has made an assessment and ascertained client's ability to hold the funds and financial instruments needed on the settlement date, for exceptional reasons, the sums needed are unavailable on the settlement date.

(2) The exceptional cases provided under Art. (1) must be documented in writing by the internal control department's representative and notified to S.S.I.F.'s management.

(3) The sum indicated under par. (1) may not exceed the client's available assets for which S.S.I.F. covered the settlement needed, in S.S.I.F.'s custody.

(4) S.S.I.F. shall determine, in the contract concluded with the customer, the manner of assessing financial instruments belonging to the client and in S.S.I.F.'s custody as well as the criteria for inclusion of financial instruments in the category of liquid financial instruments.

(5) S.S.I.F. grants the sum set out under par. (1) to clients whose intermediation contracts comprise provisions foreseeing the possibility that S.S.I.F. may employ the assets in its custody.

(6) The brokerage contract entered into by S.S.I.F. and the client shall comprise provisions relating to bearing costs arisen from the operation provided under par. (1).

(7) The client is obliged, within maximum two business days as of the settlement date, to return the respective sums.

(8) Should the client fail to return the sum set out under par. (1) within the time-limit set out under par. (7), S.S.I.F. shall be prohibited from entering any buying orders for the respective client until the client returns the sum owed.

(9) S.S.I.F. shall, within 10 days as of the settlement date, take the steps needed to recover the sums not returned by the client.

(10) The internal control department's representative and the person to ensure the risk management position shall monitor the compliance with the maximum sum set out as per par. (3), as well as the steps carried out by S.S.I.F. to recover debts.

(11) S.S.I.F. make available to A.S.F. at any time, upon its request, the monitoring result set out under par. (10).

(12) S.S.I.F. shall keep records of cases where clients' liabilities have been covered, which shall comprise:

a) client's name;

c) Date S.S.I.F. replenished the account;

d) Sum covered by S.S.I.F.;

e) Justification of the exceptional situation having led to client's failure to replenish the discretionary account on the settlement date;

f) Client portfolio's value on the debt registration date;

g) Manner in which S.S.I.F. considers to recover the sum owed by the client;

c) measures imposed on the client to recover the sum owed.

(13) A.S.F. may prohibit S.S.I.F., based on a grounded decision, to carry out the operation provided under par. (1), taking regard of S.S.I.F's conduct, indicators level calculated for the purposes of assessing prudential requests, risk generated by its financial standing and transactions carried out by it.

Art. 11^5. - (1) S.S.I.F. is obliged to report to A.S.F. in line with sending the reporting on the liquidity coverage requirement as per the Commission Implementing Regulation (EU) No. 680/2014 of 16 April 2014 laying down implementing technical standards with regard to supervisory reporting of institutions according to Regulation (EU) no. 575/2013 of the European Parliament and of the Council, hereinafter referred to as Commission Implementing Regulation (EU) No. 680/2014, within 15 days at most as of the expiry date of the reporting period, names of clients whose accounts were replenished according to Art. 11^4 par. (1) and who have not returned the sums owed within the time-limit set out under Art. 11^4 par. (7).

(2) Credit institutions acting as intermediaries report to A.S.F., at the same time they send to B.N.R. the reporting on the requirement to cover the cash needed according to the Commission Implementing Regulation (EU) No. 680/2014, within at most 15 days as of the reporting period's expiry date, names of clients whose accounts were replenished according to Art. 11^4 par. (1) and who have not returned the sums owed within the time-limit set out under Art. 11^4 par. (7) ".

10. In Article 15, paragraph (1), subparagraph c) shall be amended to read as follows:

" **c)** proof that the registered capital was paid up in full into a specially-created account to such purpose with a banking company and the report on S.S.I.F.'s compliance with the legal provisions relating to operations of registered capital's increase/ reduction, drawn-up by a financial auditor endorsed by A.S.F., for the change provided by Art. 13 par. (1) sub-par. a)".

11. In Article 17, a new subparagraph is inserted, (1^1), after paragraph (1), to read as follows:

" **(1^1)** S.S.I.F. may set up branch offices on another member state's territory with due respect for the operational requirements set out under par. (2)- (8)".

12. In Article 17, a new paragraph is inserted, (6^1), after paragraph (6), to read as follows:

" **(6^1)** If S.S.I.F. provides services and investment activities on another member state's territory by setting up a branch office, a natural person is prohibited from acquiring the capacity as person appointed to ensure the respective branch office's management at the same time as that of such branch office's internal control department representative".

13. In Article 32, paragraph (1) shall be amended to read as follows:

" **Art. 32. - (1)** Provisions of Art. 11^4, as well as those of titles III, IV and V, except for Art. 81 par. (4), Art. 84, Art. 153 par. (1) sub-par. a), d)-g) and par. (2) sub-pars. a) and e) and Art. 192, shall appropriately apply for credit institutions too with regard to investment services and activities and related services they provide".

14. In Article 32, paragraph (3) shall be amended to read as follows:

" **(3)** Credit institutions are obliged to send A.S.F. the following situations and documents in connection with the activity conducted the previous year:

a) The report indicated under Art. 79 for the activity carried out on the capital market, by 31 March of the following year at the latest;

b) Report drawn-up by the organisational structure's manager related to the operations on the capital market with regard to the activity carried out by the credit institution in this field, by 31 March of the following year at the latest;

c) Reports set out under Art. 153 par. (1) sub-par. b) and par. (2), sub-pars. b), c) and d) within the time limits set out under Art. 153. The report set out under Art. 153 par. (2) sub-par. d) takes account of the activity carried out on the capital market".

15. In article 36, paragraph (1) shall be amended to read as follows:

" **Art. 36. - (1)** The trader shall transmit the following reporting to A.S.F.:

a) Semi-annual report within the statutory deadline set out by A.S.F.'s regulations, to comprise semi-annual accounting reporting made up of the statement on assets, liabilities and equity, profit and loss account and informative data;

b) Annual report, within the statutory deadline set out by A.S.F.'s regulations, to comprise:

1. Annual financial statements;

2. Managing Directors' report;

3. Financial auditor's report".

16. In Article 45, paragraph (3) shall be amended to read as follows:

" **(3)** Withdrawal of an investment consultant's license under the conditions of par. (1) sub-par. b) shall be made within 30 business days as of the deadline to submit the progress report on advisory services provided during the previous year, set out under Art. 50 par. (2) sub-par. c), Art. 51 respectively, if the investment consultant is unable to provide proof as to

having rendered such activity during the period comprised between the end of the reporting year and the deadline to submit the report".

17. In Article 50 paragraph (2), sub-paragraph a) and point 1 of sub-par. b) shall be amended to read as follows:

" **a)** the semi-annual report, within the statutory deadline set out by A.S.F.'s regulations, to comprise semi-annual accounting reporting made up of the statement on assets, liabilities and equity, profit and loss account and informative data;

. . . . . .

1. annual financial statements;".

18. Article 51 shall be amended to read as follows:

" **Art. 51. -** Investment consultants who are natural persons not conducting their activity on behalf of a legal person investment consultant shall submit annually, by 31 March of the following year at the latest, the progress report on the advisory services on investments provided during the previous year".

19. Article 69 shall be amended to read as follows:

" **Art. 69. - (1)** S.S.I.F. authorized to provide investment services, activities and ancillary services set out under point 1 sub-pars. a), b), d) and e) and point 2 sub-pars. a), c), d) and e) from Annex no. 9 shall have at least one representative within the internal control department.

(2) S.S.I.F. authorized to provide investment services and activities relating to an initial capital equal to the equivalent into Lei of Euros 730,000 shall have at least 2 representatives within the internal control department.

(3) S.S.I.F. provided under par (2), which do not fall within the significant S.S.I.F. category as per the provisions of Art. 7 of the Financial Supervisory Authority's Regulation no. 3/2014 on certain matters related to the application of Government Emergency Ordinance no. 99/2006 on credit institutions and capital adequacy and Regulation (EU) no. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) no. 648/2012 not actually providing the investment activities and services set out under point 1 sub-pars. c), f) and h) of Annex no. 9, may have just one representative within the internal control department, subsequently to the notification of A.S.F., as per provisions of par. (4).

(4) If S.S.I.F.'s statutory body decides to stop providing services set out under point 1 sub-pars. d), f) and h) of Annex no. 9, S.S.I.F. shall notify A.S.F. to such effect.

(5) The notification provided under par. (4) shall be accompanied by S.S.I.F.'s statutory body decision to stop carrying out the respective activity, shall comprise the date the respective activity shall cease and it shall be sent to A.S.F within 24 hours as of the decision's approval date.

(6) Following the notification received as per par. (4), A.S.F. takes note of this situation and confirms via an individual document (certificate) the investment activities, services and ancillary services that S.S.I.F. shall continue to pursue, as well as the period in which the services notified as per par. (4) shall not be provided.

(7) Resumption of activities notified as per the provisions of par. (4) shall occur only after the requirements set out by the regulations in force on the respective activity are complied with, including staff-related ones and A.S.F. shall be previously notified, at least 24 hours before".

20. In Article 78, paragraph (2) shall be amended to read as follows:

" **(2)** If the internal control department's representative becomes aware, during their activity, either in consequence of their own inquiries, or after having received a notice to such effect, of potential violations of the legal regime applicable to the capital market, including of the company's internal procedures, they are obliged to notify the board of directors/ senior management and internal auditors of S.S.I.F."

21. Article 79 shall be amended to read as follows:

"**Art. 79. -** At the end of each year, by 31 January of the following year, the internal control department shall send a report on the activity carried out, inquiries conducted, deviations found out, propositions made and inquiries plan/ schedule proposed for the following year to S.S.I.F.'s board of directors. The report, endorsed propositions and inquiries plan approved by the board of directors shall be sent to A.S.F.by it by 31 March of the following year at the latest".

22. Five new articles, Articles 79^1-79^5, shall be inserted after Article 79 to read as follows:

" **Art. 79^1. - (1)** A.S.F. implements the Guidelines on certain aspects of the MiFID compliance function requirements, hereinafter referred to as Guidelines, comprised by Annex no. 12, in pursuing its activity of supervision and control of compliance with the legal provisions transposing EC Directives no. 39/2004 and no. 73/2006, applicable to the internal control within the meaning of Law no. 297/2004 and within the meaning of this regulation.

(2) The following exemptions from the application of Guidelines shall be established:

a) S.S.I.F. cannot outsource the internal control activity, which reads as laid down by Law no. 297/2004 as well as by this regulation;

b) The same person may not hold both the position of internal control department's representative and the one of internal auditor;

(3) The following shall be taken account of with a view to applying the Guidelines:

a) The compliance function of Guidelines should correspond to the internal control department's representative function of Law no. 297/2004 as well as to this regulation;

b) The internal control concept from Guidelines should comprise the internal control, risk management and internal audit of Law no. 297/2004 as well as from this regulation.

Art. 79^2. - (1) S.S.I.F. are obliged to take all measures with a view to applying the Guidelines.

(2) S.S.I.F. must ensure at least one internal control department's representative is present during S.S.I.F.'s business hours.

Art. 79^3. - (1) If the internal control department's representative is absent or the internal control department's representative position is vacant, S.S.I.F. shall appoint on a temporary basis, using internal procedures, a person within S.S.I.F. to fulfil the duties of the internal control department's representative.

(2) The person fulfilling the duties of the internal control department's representative shall notify A.S.F. within 48 hours as of the respective duties fulfilment commencement, and shall not carry out any other activity within S.S.I.F. during the fulfilment of such duties.

(3) The period in which duties of the internal control department's representative are fulfilled by a person appointed in compliance with this article's provisions may not sum up more than 120 days in a calendar year.

(4) In exceptional circumstances, justified in writing by S.S.I.F., A.S.F. may grant a 30 days extension of the deadline set out under par. (3).

Art. 79^4. - (1) By way of exception from the provisions of Art.79^3, in case of a S.S.I.F. provided by Art. 69 par. (2), where there is a vacancy in the position of internal control department's representative, until such time as A.S.F. authorizes a new internal control department's representative, the job description for the vacant position of representative of the internal control department may be taken-up by the authorized internal control department's representative, listed in A.S.F.'s Registry.

(2) The period in which duties of the vacancy in the internal control department's representative are fulfilled by the internal control department's representative authorized by A.S.F. in line with this article's provisions may not exceed 120 days.

(3) The provisions of par. (1) shall apply adequately to S.S.I.F. provided under Art. 69 par. (3) intending to resume provision of investment activities and services set out under point 1 sub-pars. c), f) and h) of Annex 9.

Art. 79^5. - The provisions of Art. 79^1 par. (1) shall also adequately apply to:

a) Credit institutions in Romania registered in A.S.F.'s Registry under the Intermediaries section;

b) Investment management companies licensed to pursue activities set out under Art. 5 par. (3) sub-pars. a) and b) point (i) of Government Emergency Ordinance no. 32/2012 regarding undertakings for collective investment in transferable securities and investment management companies, as well as amending and supplementing Law no. 297/2004 on the capital market, approved with amendments and supplements by Law no. 10/2015, as subsequently amended and supplemented".

23. In Article 81, paragraph (2) shall be amended to read as follows:

" **(2)** If the position of risk management is not exercised independently, and S.S.I.F. does not fall within the significant S.S.I.F. category as per the provisions of Art. 7 of Regulation 3/2014, the risk management function may be exercised by an employee within S.S.I.F. who does not hold an operational position".

24. In Article 81, a new paragraph is inserted after paragraph (2) - paragraph (2^1), to read as follows::

"(**2^1)** Within the meaning of Art. (2) and Art. 22 par. (3) of Regulation no. 3/2014, the following shall be included in the category of operational positions: financial investment services agent, tied agents, financial analyst, portfolio administrator, the person in charge with managing international sanctions, persons with responsibilities in enforcing statutory provisions concerning the prevention and fighting money laundering and financing of acts of terrorism (compliance officer and responsible person), as well as persons holding management and supervision positions thereof".

25. In Article 81, a new paragraph, (3^1), is inserted after paragraph (3), to read as follows:

" **(3^1)** The person to ensure the risk management function is subject to A.S.F.'s licensing and must register with A.S.F.'s Registry".

26. In Article 81, paragraph (4) shall be amended to read as follows:

" **(4)** To be licensed by A.S.F. as a person ensuring the risk management function, the natural person must meet the following requirements:

a) Be employed under individual employment contract and have risk management duties only within that S.S.I.F.;

b) Have had attended training courses and have passed the test on knowledge of legislation in force held by the professional training bodies certified by A.S.F."

27. In Article 81, a new paragraph, par. (5) is inserted after paragraph (4), to read as follows:

" **(5)** In addition to the requirements set out under par. (4), licensing of the person to ensure risk management position shall be made in line with the provisions of the Financial Supervisory Authority's Regulation no. 14/2015 regarding assessment and approval of the members of the management structure and the persons holding key functions in the entities regulated by the Financial Supervisory Authority".

28. In Article 90, paragraph (1) shall be amended to read as follows:

" **Art. 90. - (1)** S.S.I.F. is obliged to specifically highlight in its accounting the sums received from clients and to open and use separately, as per their purpose, bank accounts on their own behalf and bank accounts on behalf of clients. Also, clients' financial instruments shall be highlighted into separate accounts from those belonging to S.S.I.F."

29. In Article 112 paragraph (1), sub-paragraph m) shall be amended to read as follows:

" **m)** client's signature and of the authorized person within S.S.I.F."

30. In Article 112, paragraph (2) is repealed.

31. In Article 113 paragraph (1), sub-paragraph g) shall be amended to read as follows:

" **g)** annex: copy of the client's identity document or the person authorized to pass on orders on behalf of the client or the registration certificate issued by the Trade Register Office or the similar institution in the state of origin, as applicable".

32. In Article 153, the introductory part of paragraph (1) shall be amended to read as follows:

" **Art. 153. - (1)** In order that A.S.F. is able to supervise the activity carried out by S.S.I.F., it shall submit the following reports and documents:".

33. In Article 153 paragraph (1), sub-paragraph c) is repealed.

34. In Article 153 paragraph (1), subparagraphs d) and e) shall be amended to read as follows:

" **d)** the semi-annual report, within the statutory deadline set out by A.S.F.'s regulations, to comprise the semi-annual accounting reporting made up of the statement on assets, liabilities and equity, profit and loss account and informative data;

e) the annual report, within the statutory deadline set out by A.S.F.'s regulations, to comprise the annual financial statements drawn-up in accordance with the International Standards on financial reporting with components set out by these standards".

35. In Article 153 paragraph (2), sub-paragraphs b) -e) shall be amended to read as follows:

" **b)** the report on the managed individual portfolios structure of clients, to comprise the name of clients, cash amount and financial instruments held on the reporting date, profit/loss related to the portfolio at year-end;

c) Report on the disciplinary action taken by S.S.I.F. against executives, financial investment services agents, tied agents and internal control department's representatives and the reason why they were sanctioned;

d) List of contracts concluded with other intermediaries, in force on the reporting date, their subject matter and compensation scheme in which the intermediary with which S.S.I.F. from Romania has concluded the contract participates;

e) Report on the investment services, activities and ancillary services which were outsourced".

36. In Article 163, subparagraph a) is repealed.

37. In Article 163, subparagraph b) shall be amended to read as follows:

" **b)** loans, pledges or provision of guarantees on behalf of S.S.I.F. by using financial instruments which belong to clients or third parties, without the client's prior express consent in writing".

38. In Article 163, a new subparagraph b^1), is inserted after paragraph b) to read as follows:

" **b^1)** loans or provision of guarantees on behalf of a S.S.I.F. by using funds belonging to a client".

39. In Article 163, subparagraph c) is repealed.

40. In Article 163, two new subparagraphs are inserted - c^1) and c^2) after paragraph c), to read as follows:

" **c^1)** alienation or direct or indirect use of client's financial instruments or rights relating to financial instruments deriving from ownership over them, without the client's express written consent;

c^2) alienation or S.S.I.F. direct or indirect use of a client's funds or rights relating to funds deriving from ownership over them".

41. In Article 163, subparagraph k) is repealed.

42. In Article 163, two new subparagraphs, k^1) and k^2), shall be inserted after subparagraph k), to read as follows:

" **k[1])** covering the obligations arising from the transactions made in an intermediary/ client's own account using a client's financial instruments, without their prior express written consent to such effect;

k[2]) covering the obligations arising from transactions made in a S.S.I.F./ client's account by using funds belonging to a client".

43. In Article 182 paragraph (1), subparagraph c) shall be amended to read as follows:

" **c)** documents certifying to the client's usual address as well as a mailing address the client is going to use in the relationship with the intermediary".

44. In Article 182, paragraph (2) shall be amended to read as follows:

" **(2)** S.S.I.F. shall acknowledge receipt of the above-mentioned documents by sending the investor a registered letter with acknowledgment of receipt at the mailing address indicated under par. 91) subpar. c)".

45. In Article 183 paragraph (1), subparagraph c) is repealed.

46. In Article 183, two new paragraphs: (3) and (4) shall be inserted after paragraph (2) to read as follows:

" **(3)** S.S.I.F. is obliged to establish control mechanisms and procedures whereby to ensure their clients shall dispose of the funds and instruments needed at the time of settlement.

(4) Provisions of Art. 11^4 shall properly apply for Internet trading".

47. In Article 184, paragraph (1) shall be amended to read as follows:

" **Art. 184. - (1)** If S.S.I.F. holds the investors' money funds and financial instruments, a system must be in place to check the account automatically in order to ensure compliance with the provisions of Art. 11^4 par. (3).

48. In Article 184, paragraph (2) is repealed.

49. In Article 193, paragraph (2) shall be amended to read as follows:

" **(2)** To grant credit and lend financial instruments, S.S.I.F. must register the related service provided by Art. 5 par. (1^1) l subpar. b) of Law no. 297/2004 in its business purpose".

50. In Article 195, a new paragraph, (1^1), shall be inserted after paragraph (1) to read as follows:

" **(1^1)** When opening the margin account, the client is obliged to lodge a security equal to 50% at least of the total amount of the credit granted, this percentage being maintained over the margin account's entire existence".

51. A new article, 196^1, shall be inserted after Article 196, to read as follows:

" **Art. 196^1. -** Financial instruments traded in a regulated market bought by transactions in margin on the client's behalf may be used to lodge the margin subsequently after their settlement".

52. In Article 206 paragraph (2), a new subparagraph d) is inserted after paragraph c) to read as follows:

" **d)** belonging to clients of a different S.S.I.F., being borrowed by S.S.I.F. from them, based upon the contract concluded between the two parties".

53. In Article 206, the introductory part of paragraph (3) shall be amended to read as follows:

" **(3)** S.S.I.F. may act as agent in the lending operations for financial instruments taken or given as a loan from the clients of the respective S.S.I.F. from, respectively to:".

54. In Article 206 paragraph (3), a new subparagraph c) is inserted after subparagraph b), to read as follows:

" **c)** clients of another S.S.I.F."

55. A new article, Article 206^2, shall be inserted after Article 206^1 to read as follows:

" **Art. 206^2. - (1)** If the lending operations are made by an intermediary who is not a participant in the central securities depository system, the obligation provided under Art. 206 par. (4) subpar. b) shall be fulfilled on contractual bases by a participant in the central securities depository system.

(2) The participant intermediary in the central securities depository system notifying the lending operation to the central securities depository as per par. (1) is obliged to report the lending purpose as per Art. 4 par. (1) of C.N.V.M. Regulation no. 5/2010.

(3) The intermediary who is not a participant in the central securities depository system, carrying out the lending intermediation operations is obliged to observe the provisions of this chapter".

56. Two new articles – Article 236^1 and 236^2, shall be inserted after Article 236, to read as follows:

" **Art. 236^1. - (1)** Submittal of originals of documents set out by C.N.V.M./A.S.F. regulations by S.S.I.F., upon request from judicial bodies or other public authorities, shall be made by observing the following conditions:

a) A copy of every document sent in original shall be kept at S.S.I.F.'s registered office, under the same conditions as the original document;

b) S.S.I.F.'s legal representative and, as applicable, the representative of the internal control department of S.S.I.F. shall certify each copy's conformity with the original;

c) The copy must bear the mention "certified true copy" and the legal representative's signature and ,as applicable, of the internal control department's representative of S.S.I.F.;

c) Proof that documents were sent in original, which shall be archived along with the copy mentioned under subpar. a).

(2) The provisions of par. (1) shall properly apply to credit institutions registered as intermediaries with A.S.F., for documents relating to service provision and investment activities.

Art. 236^2. - (1) Pursuant to the provisions of Arts. 11^2 and 11^3, individual acts issued by C.N.V.M./A.S.F. shall be deemed as amended as of right with regard to S.S.I.F.'s business purpose.

(2) In order to comply with the provisions of Arts. 11^2 and 11^3, S.S.I.F. proceeds to amendment of the articles of incorporation at the following general meeting of shareholders, under suitable notification of A.S.F. within 15 days at most after the general meeting of shareholders takes place".

57. Annex no. 7D is repealed.

58. Annex no. 9 is amended to read as provided by Annex 1 to this regulation.

59. Another annex, annex 12, shall be inserted after Annex 11, to read as set out by annex 2 to this regulation.

60. Annexes 1 and 2 are integral part to this regulation.

Art. II. - National Securities Commission Regulation no. 5/2010 on the use of global accounts system, implementation of mechanisms with or without pre-validation of financial instruments, performance of securities lending operations, operations of establishing associated guarantees and short selling operations, approved by Order of the National Securities Commission no. 10/2010, published in the Official Journal of Romania, Part I, no. 159 dated 16 March 2010, as subsequently amended and supplemented, shall be amended as follows:

1. Article 3 shall be amended to read as follows:

" **Art. 3. - (1)** Use of the global accounts system and mechanism with and without pre-validation of financial instruments for trading and highlighting possession of financial instruments in the central securities depository shall be made by cumulatively fulfilling the following conditions:

a) No transfer between the house account and the global clients account or in between clients' individual subaccounts within the global account, highlighted in the intermediary's own back office system – participant in the central securities depository system, may occur if there is no transaction, except for:

(i) Operations of financial instruments lending;

(ii) Operations of financial collateral being lodged by property transfer made up of securities;

(iii) Operations of collateral's appropriation without property transfer made up of securities;

(iv) The following operations for financial instruments for which the central securities depository is not assigned the issuer's central securities depository:

1. Inheritance and severance of joint tenancy;

2. Mergers, divisions or liquidations;

3. Enforcement of a final judgment;

4. Documents against payment or free of charge concluded between relatives or in-laws going to fourth degree included and/or legal persons controlled by such persons, provided that these legal persons' activity is not subject to A.S.F.'s licensing and supervision, under fulfilment of all the following conditions:

4.1. None of the stakeholders in a transaction of this kind is not or, as a result of such a transaction, does not become a significant shareholder;

4.2. These transactions' aggregate volume does not exceed 1% of the total number of securities of the same type and class, put into circulation by the respective issuer within a 12 – month period;

4.3. The document concluded between the parties mentioned must be authenticated by a notary public;

b) Intermediaries are prohibited, except for market makers, as per Art. 24, from concluding short selling operations on global accounts, unless the requirements set out under Art. 12 of Regulation (EU) no. 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, hereinafter referred to as Regulation (EU) no. 236/2012, respectively the requirements set out by the technical standards issued in its application are fulfilled;

c) Intermediaries are responsible for permanent monitoring from the point of view of complying with the statutory provisions incidental, financial instruments lending operations, as well as those of lodging guarantees related thereof, made within global accounts, on clients' name, and registered in the intermediaries own back office systems;

d) Intermediaries who are participants in the central securities depository system and any other intermediary if there is a chain of custody, respectively participants in the central securities depository or other indirect participants are in charge of debit/ credit transfer of financial instruments accounts and/or cash accounts of clients in their own records, in accordance with corporate events in liaison with the financial instruments highlighted in these accounts and in accordance with instructions received from clients, if applicable.

(2) Transfers of property over the financial instruments set out under par. (1) subpar. a) point (iv) shall be operated by the intermediary – participant in the central securities depository system within 3 days as of the application is submitted and after the documentation at the basis of the transfer, which demonstrates classification in the situations mentioned, is presented in original.

(3) The participant in the central securities depository system set out under par. (2) is responsible for direct transfers of property over financial instruments and he has the following obligations:

a) To keep copies of the documentation lying at the basis of the transfer of property, bearing the mention "certified true copy", placed by the agent for financial investments services taking over the transfer application, to whom the documentation in original has been submitted;

b) To report to A.S.F., within 3 business days as of registration, the applications for direct transfer of property over the financial instruments deemed contradictory or interpretable, as well as objections received with regard to the transfers already made;

c) To send to A.S.F., within 3 business days as of the A.S.F.'s request, if by the respective request there is no mention of another term, information and documents with regard to the transfers made".

2. In Article 4 paragraph (1), subparagraph a) shall be amended to read as follows:

" **a)** with a view to carrying out short selling operations, including if the financial instruments are initially lent by intermediaries to be lent subsequently to their own clients or to clients of another S.S.I.F. with a view to carrying out short selling operations".

Art. III. - In Article 5 paragraph (1) of the National Securities Commission Regulation no. 4/2009 on the Public Registry of the National Securities Commission, approved by Order of the National Securities Commission no. 26/2009, published in the Official Journal of Romania, Part I, no. 343 of 22 May 2009, as subsequently amended and supplemented, point 13^2 shall be amended to read as follows:

" **13^2.** Section 13^2- Risk management function (FARA).

Art. IV. - A new article, Article II1, shall be inserted after Article II of the Financial Supervisory Authority's Regulation no. 1/2017 for the amendment and supplement of Regulation no. 2/2006 on regulated markets and alternative trading systems, approved by Order of the National Securities Commission no. 15/2006, published in the Official Journal of Romania, Part I, no. 282 of 21 April 2017, hereinafter referred to as A.S.F. Regulation no. 1/2017, to read as follows:

" **Art. II^1. -** Authorizations as the internal control department's representative of the market operator delivered by A.S.F. based upon the provisions of the Order of measures of the National Securities Commission no. 11 of 28/03/2012 shall be deemed as compliance officer authorizations awarded by A.S.F. based upon Art. 24^4 of Regulation no. 2/2006 on regulated markets and alternative trading systems, approved by Order of the National Securities Commission no. 228 of 14 March 2006, as subsequently amended and supplemented".

Art. V. - For lending operations whose subject is financial instruments issued by issuers for whom an entity licensed by the Financial Supervisory Authority is appointed as central securities depository, and the respective operations are made outside the Romanian territory by an intermediary not registered with the Financial Supervisory Authority's Registry, the following provisions shall apply:

1. The lending operation shall be notified to the central securities depository under the format set out by the central securities depository's regulations, by a participant in the central securities depository system on contractual basis;
2. The lending operation shall be carried out by complying with the provisions of Art. 4 of the National Securities Commission Regulation no. 5/2010 as subsequently amended and supplemented.

Art. VI. - Pursuant to the provisions of Art. II^1 of A.S.F. Regulation no. 1/2017, The Financial Supervisory Authority shall, within 30 days as of this regulation's entry into force, deregister the respective persons specified under section 13 – Representatives of the internal control department (RCCI) and shall register them as of right under section 13^1- Representatives of the compliance department (RCCO) in the National Securities Commission Registry, without special approaches from the market operator for which the respective person pursues their activity being needed.

Art. VII. - Upon this regulation's entry into force, the following shall be repealed:

a) Order of measures of the National Securities Commission no. 6 of 23/07/2008;

c) Decision made by the National Securities Commission no. 217 of 10/02/2009;

d) Order of measures of the National Securities Commission no. 6 of 14/03/2013.[1]

[1] Documents set out under Art. VII were not published in the Official Journal of Romania, Part I.

Art. VIII. - This regulation shall be published in the Official Journal of Romania, Part I, in the Bulletin and on the website of the Financial Supervisory Authority and shall enter into force on its publication date in the Official Journal of Romania, Part I.

President of the Financial Supervisory Authority,

Leonardo Badea

Bucharest, 20 July 2017.
No. 5.

ANNEX No. 1
(Annex no. 9 to Regulation no. 32/2006)

The investment activities, services and ancillary services that S.S.I.F. may carry out are:

1. Investment services and activities;
a. Reception and transmission of orders in respect of one or several financial instruments;
b. Execution of orders on behalf of clients;
c. Deal on own account;
d. Manage portfolios;
e. Investment advice;
f. Underwrite financial instruments and/ or placing of financial instruments on a firm commitment basis;
g. Placing of financial instruments without a firm commitment;
g) manage an alternative trading system.
2. Ancillary services:
a) Safekeeping and management of financial instruments on behalf of clients, including custody and services related thereof, such as management of funds or guarantees;
b) Granting of credits or loans to an investor, in order to allow them to carry out a transaction with one or several financial instruments, if the respective financial investment services company granting the credit or the loan is involved in the transaction;
c) Advice given to entities with regard to capital structure, industrial strategy and matters related thereof, as well as advice and services on an entity's mergers and acquisitions;
d) Foreign exchange services in liaison with the investment services provided;
e) Investment research and financial analysis or other general recommendation forms as regards transactions with financial instruments;
f) Services in liaison with underwriting of financial instruments on a firm commitment basis;

g) Investment services and activities set out under par. (1) as well as related services of the type provided under subpars. a) - f) related to the underlying asset of derivative instruments included in Art. 2 par. (1) point 17 subpars. e), f), g) and h) of Law no. 24/2017 on issuers of financial instruments and market operations, if they are related to the provisions on investment activities, services and ancillary services.

ANNEX No. 2
(Annex no. 12 to Regulation no. 32/2006)

GUIDELINES
on certain aspects of the MiFID compliance function requirements

Date: 25 June 2012
ESMA/2012/388

I. Scope

Who?

1. These guidelines apply to investment firms [as defined in Art. 4 par. (1) point (1) of MiFID, including credit institutions that provide investment services, UCITS management companies [1)] and competent authorities.

1) These guidelines only apply to UCITS management companies when they are providing the investment services of individual portfolio management or of investment advice [within the meaning of Article 6 paragraph (3) subparagraphs (a) and (b) of UCITS Directive].

What?

2. These guidelines apply in relation to the provision of the investment services and activities listed in Section A and the auxiliary services listed in Section B of annex I to the Markets in Financial Instruments Directive (MiFID).

When?

3. These guidelines apply from 60 calendar days after the reporting requirement date referred to in paragraph 10.

II. Definitions

4. Unless otherwise specified, terms used in the Markets in Financial Instruments Directive and the MiFID Implementing Directive have the same meaning in these guidelines. In addition, the following definitions apply:

Markets in Financial Instruments Directive (MiFID) – Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, as subsequently amended.

MiFID Implementing Directive- Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive

Compliance function – the function within an investment firm responsible for identifying, assessing, advising, monitoring and reporting on the investment firm's compliance risk;
Compliance risk – the risk that an investment firm fails to comply with the obligations under MiFID and the respective national laws, as well as applicable standards set out by the European Securities and Markets Authority (ESMA – AEVMP- in Romanian) and competent authorities as regards these provisions.

5. Guidelines do not reflect absolute obligations. For this reason, the word "should" is often used. However, the words "must" or "are required" are used when describing a MiFID requirement.

III. Purpose

6. The purpose of these guidelines is to clarify the application of certain aspects of the MiFID compliance function requirements in order to ensure the common, uniform and consistent application of Article 13 of the Markets in Financial Instruments Directive (MiFID), Art. 6 of the MiFID Implementing Directive and specified related provisions.

7. AEVMP (ESMA) expects these guidelines to promote greater convergence in the interpretation of, and supervisory approaches to, the MiFID compliance function requirements, by emphasising a number of important issues, and thereby enhancing the value of existing standards. By helping to ensure that firms comply with regulatory standards, ESMA anticipates a corresponding strengthening of investor protection.

IV. Compliance and reporting obligations

Status of the guidelines

8. This document contains guidelines issued under Article 16 of the ESMA Regulation [2]. In accordance with Article 16 par. (30 of the ESMA Regulation, competent authorities and financial market participants shall make every effort to comply with guidelines.

2 Regulation (EC) no. 1095/2010 of the European parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision no. 716/2009/EC and repealing Commission Decision 2009/77/EC.

9. Competent authorities to whom guidelines apply should comply by incorporating them into their supervisory practices, including where particular guidelines are directed primarily at financial market participants.

Reporting requirements

10. Competent authorities to whom these guidelines apply must notify ESMA whether they comply or intend to comply with these guidelines, with reasons for any non-compliance. Competent authorities must notify ESMA within two months of publications of the translations by ESMA to **compliance.388@esma.europa.eu**. In the absence of a response by this deadline, competent authorities will be considered non-compliant. A template for notifications is available on the ESMA website.

11. Financial market participants are not required to report whether they comply with these guidelines.

V. Guidelines on certain aspects of the MiFID compliance function requirements

12. As part of its responsibility for ensuring that the investment firm complies with its obligations under MiFID, senior management must ensure that the compliance function fulfils the requirements set out in Art. 6 of the MiFID Implementing Directive.

13. Guidelines should be construed with the principle of proportionality provided under Art. 6 par. (1) of the MiFID Implementing Directive. The guidelines apply to investment firms, having regard to the nature, size and complexity of their activity, as well as the

nature and range of investment services and activities provided/ carried out within their activity.

V.I. Responsibilities of the compliance function

Compliance risk assessment

Relevant legislation: Article 6 paragraph (1) of the MiFID Implementing Directive

General guideline 1

14. Investment firms should ensure the compliance function takes a risk-based approach in order to allocate the function's resources efficiently. A compliance risk assessment should be used to determine the focus of the monitoring and advisory activities of the compliance function. The compliance risk assessment should be performed regularly to ensure that the focus and the scope of compliance monitoring and advisory activities remain valid.

Supporting guidelines

15. MiFID requires investment firms to establish, implement and maintain adequate policies and procedures designed to detect any risk of failure by the investment firm to comply with its obligations under MiFID. As part of this, the compliance function should identify the level of compliance risk the investment firm faces, taking into account the investment services, activities and ancillary services provided by the investment firm, as well as the types of financial instruments traded and distributed,

16. The compliance risk assessment should take into account the applicable obligations under MiFID, national implementing regulation and the policies, procedures, systems and controls implemented within the firm in the area of investment services and activities. The assessment should also take into account the results of any monitoring activities and of any relevant internal or external audit findings.

17. The compliance function's objectives and work programme should be developed and set up on the basis of this compliance risk assessment. The identified risks should be reviewed on a regular basis as well as ad-hoc when necessary to ensure that any emerging risks are taken into consideration (for example, resulting from new business fields or other changes in the investment firm's structure).

Monitoring obligations of the compliance function

Relevant legislation: Art. 6 par. (2) subpar. (a) of the MiFID Implementing Directive

General guideline 2

18. Investment firms should ensure that the compliance function establishes a monitoring programme that takes into consideration all areas of the investment firm's investment services, activities and any relevant ancillary services. The monitoring programme should establish priorities determined by the compliance risk assessment ensuring that compliance risk is comprehensively monitored.

Supporting guidelines

19. The aim of a monitoring programme should be to evaluate whether the investment firm's business is conducted in compliance with its obligations under MiFID and whether its internal guidelines, organisation and control measures remain effective and appropriate.

20. Where an investment firm is part of a group, responsibility for the compliance function rests with each investment firm in that group. An investment firm should therefore ensure that its compliance function remains responsible for monitoring its own compliance risk. This includes where a firm outsources compliance tasks to another firm within the group. The compliance function within each investment firm should, however, take into account the group of which it is a part - for example, by

working closely with audit, legal, regulatory and compliance staff in other parts of the group.

21. The risk-based approach to compliance should form the basis for determining the appropriate tools and methodologies used by the compliance function, as well as the extent of the monitoring programme and the frequency of monitoring activities performed by the compliance function (which may be recurring, ad-hoc and/or continuous). The compliance function should also ensure that its monitoring activities are not only desk-based, but that it also verifies how policies and procedures are implemented in practice, for example through on-site inspections at the operative business units. The compliance function should also consider the scope of reviews to be performed.

22. Suitable tools and methodologies for monitoring activities that could be used by the compliance function include (but are not limited to):

- **a.** the use of aggregated risk measurements (for example, risk indicators);
- **b.** the use of reports warranting management attention, documenting material deviations be- tween actual occurrences and expectations (an exceptions report) or situations requiring resolution (an issues log);
- **c.** targeted trade surveillance, observation of procedures, desk reviews and/or interviewing relevant staff.

23. The monitoring programme should reflect changes to the investment firm's risk profile, which may arise, for example, from significant events such as corporate acquisitions, IT system changes, or reorganization. It should also extend to the implementation and effectiveness of any remedial measures taken by the investment firm in response to breaches of MiFID.

24. Monitoring activities performed by the compliance function should also take into account:

- **a.** the business area's obligation to comply with regulatory requirements;
- **b.** the first level controls in the investment firm's business areas (i.e. controls by the operative units, as opposed to second level controls performed by compliance); and
- **c.** reviews by the risk management, internal control function, internal audit function or other control functions in the area of investment services and activities.

25. Reviews by other control functions should be coordinated with the monitoring activities performed by the compliance function while respecting the different functions' independence and mandate.

26. The compliance function should have a role in overseeing the operation of the complaints process and it should consider complaints as a source of relevant information in the context of its general monitoring responsibilities. This does not require compliance functions to have a role in determining the outcome of complaints. In this regard, investment firms should grant the compliance function access to all customer complaints received by the firm.

Reporting obligations of the compliance function

Relevant legislation: Art. 6 par. (3) subpar. (b) and Art. 9 of the MiFID Implementing Directive

General guideline 3

27. Investment firms should ensure that the regular written compliance reports are sent to senior management. The reports should contain a description of the implementation and effectiveness of the overall control environment for investment services and

activities and a summary of the risks that have been identified as well as remedies undertaken or to be undertaken. Reports must be prepared at appropriate intervals and at least annually. Where the compliance function makes significant findings, the compliance officer should, in addition, report these promptly to senior management. The supervisory function, if any, should also receive the reports.

Supporting guidelines

28. The written compliance report to senior management should cover all business units involved in the provision of investment services, activities and ancillary services. Where the report does not cover all of these activities of the investment firm, it should clearly state the reasons.

29. The following matters should be addressed in these written compliance reports, where relevant:

- **a.** a description of the implementation and effectiveness of the overall control environment for investment services and activities;
- **b.** a summary of major findings of the review of the policies and procedures;
- **c.** a summary of on-site inspections or desk-based reviews performed by the compliance function including breaches and deficiencies in the investment firm's organisation and compliance processes that have been discovered and appropriate measures taken as a result;
- **d.** risks identified in the scope of the compliance function's monitoring activities;
- **e.** relevant changes and developments in regulatory requirements over the period covered by the report and the measures taken and to be taken to ensure compliance with the changed requirements (where senior management has not previously been made aware of these through other channels);
- **f.** other significant compliance issues that have occurred since the last report; and
- **g.** material correspondence with competent authorities (where senior management has not previously been made aware of these through other channels).

30. The compliance function should report to senior management, in a timely manner, on an ad-hoc basis when significant compliance matters have been discovered, such as material breaches of MiFID and the respective national requirements. The report should also contain advice on the necessary remedial steps.

31. The compliance function should consider the need for additional reporting lines to any group compliance function.

32. ESMA notes that some competent authorities require investment firms to provide them with compliance function reports on a regular or *ad hoc* basis. One competent authority also requires senior management to provide it with an annotated version of the report containing explanations of the compliance function's findings.[3] These practices provide competent authorities with first-hand in- sight into an investment firm's compliance activities, as well as any breaches of regulatory provisions.

[3] This description of specific practices of competent authorities aims to provide the reader with additional information on differing approaches of competent authorities without setting up additional requirements for investment firms or competent authorities (and thereby triggering the obligation under Article 16(3) of the ESMA Regulation to comply or explain).

Advisory obligations of the compliance function

Relevant legislation: Art. 6 par. (2) of the MiFID Implementing Directive**.**

General guideline 4

33. Investment firms should ensure that the compliance function fulfils its advisory responsibilities including: providing support for staff training; providing day-to-day assistance for staff and participating in the establishment of new policies and procedures within the investment firm.

Supporting guidelines

34. Investment firms should promote and enhance a 'compliance culture' throughout the firm. The purpose of the compliance culture is not only to establish the overall environment in which compliance matters are treated, but also to engage staff with the principle of improving investor protection.

35. The investment firm needs to ensure that its staff are adequately trained. The compliance function should support the business units in the area of investment services and activities (i.e. all staff involved directly or indirectly in the provision of investment services and activities) in performing any training. Training and other support should focus particularly, but not exclusively, on:

- **a.** the internal policies and procedures of the investment firm and its organisational structure in the area of investment services and activities; and
- **b.** MiFID, the relevant national laws, the applicable standards and guidelines set out by ESMA and competent authorities, and other supervisory and regulatory requirements that may be relevant, as well as any changes to these.

36. Training should be performed on a regular basis, and needs-based training should be performed where necessary. Training should be delivered as appropriate – for example, to the investment firm's entire staff as a whole, to specific business units, or to a particular individual.

37. Training should be developed on an on-going basis so that it takes into account all relevant changes (for example, new legislation, standards or guidelines issued by ESMA and competent authorities, and changes in the investment firm's business model).

38. The compliance function should periodically assess whether staff in the area of investment services and activities hold the necessary level of awareness and correctly apply the investment firm's policies and procedures.

39. Compliance staff should also provide assistance to staff from the operative units in their day-to-day business and be available to answer questions arising out of daily business activity.

40. Investment firms should ensure that the compliance function is involved in the development of the relevant policies and procedures within the investment firm in the area of investment services, activities and ancillary services. In this context, the compliance function should be enabled, for example, to provide compliance expertise and advice to business units about all strategic decisions or new business models, or about the launch of a new advertising strategy in the area of investment services and activities. If the compliance function's advice is not followed, the compliance function should document this accordingly and present it in its compliance reports.

41. Investment firms should ensure that the compliance function is involved in all significant modifications of the organisation of the investment firm in the area of investment services, activities and ancillary services. This includes the decision-making process when new business lines or new financial products are being

approved. In this context, the compliance function should be given the right to participate in the approval process for financial instruments to be taken up in the distribution process. Senior management should therefore encourage business units to consult with the compliance function regarding their operations.

42. Investment firms should ensure that the compliance function is involved in all material non-routine correspondence with competent authorities in the area of investment services and activities.

V.II. Guidelines on the organisational requirements of the compliance function

Effectiveness of the compliance function

Relevant legislation: Art. 6 par (3) subpar. (a) and Art. 5 par. (1) subpar. (d) of the MiFID Implementing Directive

General guideline 5

43. When ensuring that appropriate human and other resources are allocated to the compliance function, investment firms should take into account the scale and types of investment services, activities and ancillary services undertaken by the investment firm. They should also provide compliance staff with the authority necessary to exercise their duties effectively, as well as access to all relevant in- formation concerning the investment services and activities as well as ancillary services undertaken.

44. The compliance officer should have sufficiently broad knowledge and experience and a sufficiently high level of expertise so as to be able to assume responsibility for the compliance function as a whole and ensure that it is effective.

Supporting guidelines

45. The number of staff required for the tasks of the compliance function depends to a large extent on the nature of the investment services, activities and ancillary services and other services provided by the investment firm. Where an investment firm's business unit activities are significantly extended, the investment firm should ensure that the compliance function is similarly extended as necessary in view of changes to the firm's compliance risk. Senior management should monitor regularly whether the number of staff is still adequate for the fulfilment of the duties of the compliance function.

46. In addition to human resources, sufficient IT resources should be allocated to the compliance function.

47. Where the investment firm establishes budgets for specific functions or units, the compliance function should be allocated a budget that is consistent with the level of compliance risk the firm is ex- posed to. The compliance officer should be consulted before the budget is determined. All decisions for significant cuts in the budget should be documented in writing and contain detailed explanations.

48. In ensuring compliance staff have access to the relevant information for their tasks at all times, investment firms should provide access to all relevant databases. In order to have a permanent over- view of the areas of the investment firm where sensitive or relevant information might arise, the compliance officer should have access to all relevant information systems within the investment firm as well as any internal or external audit reports or other reporting to senior management or the supervisory function, if any. Where relevant, the compliance officer should also be able to attend meetings of senior management or the supervisory function. Where this right is not granted, this should be documented and explained in writing. The compliance officer should have in-depth knowledge of the investment firm's organisation, corporate

culture and decision-making processes in order to be able to identify which meetings are important to attend.

49. In order to ensure that compliance staff have the authority required for their duties, the senior management of the investment firm should support them in the exercise of these duties. Authority implies possessing adequate expertise and relevant personal skills, and may be enhanced by the in- vestment firm's compliance policy explicitly acknowledging the specific authority of the compliance staff.

50. All compliance staff should have at least knowledge of MiFID and of the respective national laws and all applicable standards and guidelines issued by ESMA and competent authorities on these provisions, as far as these are relevant for the performance of their tasks. Compliance staff should be regularly trained in order to maintain their knowledge. A higher level of expertise is necessary for the designated compliance officer.

51. The compliance officer should demonstrate sufficient professional experience as is necessary to be able to assess the compliance risks and conflicts of interest inherent in the investment firm's business activities. The required professional experience may have, amongst others, been acquired in operational positions, in other control functions or in regulatory functions.

52. The compliance officer should have specific knowledge of the different business activities provided by the investment firm. The relevant expertise required may differ from one investment firm to an- other, as the nature of the main compliance risks that firms face will differ. In respect of Article 5(1)(d) of the MiFID Implementing Directive, a newly employed compliance officer may therefore need additional specialised knowledge focused on the specific business model of the investment firm even if the person has previously been the compliance officer for another investment firm.

Permanence of the compliance function

Relevant legislation: Art. 6 par. (2) subpar. (a) of the MiFID Implementing Directive

General guideline 6

53. MiFID requires investment firms to ensure that the compliance function performs its tasks and responsibilities on a permanent basis. Investment firms should therefore establish adequate arrangements for ensuring the responsibilities of the compliance officer are fulfilled when the compliance officer is absent, and adequate arrangements to ensure that the responsibilities of the compliance function are performed on an ongoing basis. These arrangements should be in writing.

Supporting guidelines

54. The investment firm should ensure, e.g. through internal procedures and stand-in arrangements, that the responsibilities of the compliance function are fulfilled adequately during any absence of the compliance officer.

55. The responsibilities and competences as well as the authority of the compliance staff should be set out in a 'compliance policy' or other general policies or internal rules that take account of the scope and nature of the investment firm's investment services and activities. This should include information on the monitoring programme and the reporting duties of the compliance function as well as information on the compliance function's risk-based approach to monitoring activities. Relevant amendments to regulatory provisions should be reflected promptly by adapting these policies/rules.

56. The compliance function should perform its activities on a permanent basis and not

only in specific circumstances. This requires regular monitoring on the basis of a monitoring schedule. The monitoring activities should regularly cover all key areas of investment services and activities taking into ac- count the compliance risk associated with the business areas. The compliance function should be able to respond rapidly to unforeseen events, thereby changing the focus of its activities within a short timeframe if necessary.

Independence of the compliance function

Relevant legislation: Art. 6 par. (3) of the MiFID Implementing Directive

General guideline 7

57. Investment firms should ensure that the compliance function holds a position in the organisational structure that ensures that the compliance officer and other compliance staff act independently when performing their tasks. The compliance officer should be appointed and replaced by senior management or by the supervisory function.

Supporting guidelines

58. While senior management is responsible for establishing an appropriate compliance organisation and for monitoring the effectiveness of the organisation that has been implemented, the tasks per- formed by the compliance function should be carried out independently from senior management and other units of the investment firm. In particular, the investment firm's organisation should ensure that other business units may not issue instructions or otherwise influence compliance staff and their activities.

59. Where senior management deviates from important recommendations or assessments issued by the compliance function, the compliance officer should document this accordingly and present it in the compliance reports.

Exemptions

Relevant legislation: Art. 6 par. (3) of the MiFID Implementing Directive

General guideline 8

60. Where an investment firm considers that it may not be proportionate for it to comply with the requirements set out in Article 6 par. (3) subpar. (c) or (d) of the MiFID Implementing Directive, it should assess whether the effectiveness of the compliance function is compromised by the proposed arrangements. This assessment should be reviewed regularly.

Supporting guidelines

61. Investment firms should decide which measures, including organisational measures and the level of resources, are best suited to ensuring the effectiveness of the compliance function in the firm's particular circumstances. In deciding this, investment firms should take the following criteria (inter alia) into account:

- **a.** the types of investment services, activities and ancillary services and other business activities provided by the investment firm (including those not related to investment services, activities and ancillary services);
- **b.** the interaction between the investment services and activities and ancillary services and other business activities carried out by the investment firm;
- **c.** the scope and volume of the investment services, activities and ancillary services carried out (absolute and relative to other business activities), balance sheet total and income of the investment firm from commissions and fees and other income in the context of the provision of investment services, activities and ancillary services;
- **d.** the types of financial instruments offered to clients;

e. the types of clients targeted by the investment firm (professional, retail, eligible counterparties);
f. staff headcount;
g. whether the investment firm is part of an economic group within the meaning of Article 1 of the Seventh Council Directive of 13 June 1983 on consolidated accounts (Directive 83/349/EC);
h. services provided through a commercial network, such as tied agents, or branches;
i. cross-border activities provided by the investment firm;
j. organisation and sophistication of the IT systems.

62. Competent authorities may also find these criteria useful in determining which types of investment firms may benefit from the proportionality exemption under Article 6 par. (3) of the MiFID Implementing Directive.

63. An investment firm may fall, for example, under the proportionality exemption if the performance of the necessary compliance tasks does not require a full-time position due to the nature, scale and complexity of the firm's business, and the nature and range of the investment services, activities and ancillary services offered.

64. While a compliance officer must always be appointed, it may be disproportionate for a smaller investment firm with a very narrow field of activities to appoint a separate compliance officer (i.e. one that does not perform any other function). Where an investment firm makes use of the exemption, conflicts of interest between the tasks performed by the relevant persons should be minimised as much as possible.

65. An investment firm that does not need to comply with all the requirements set out in Article 6 par. (3) of the MiFID Implementing Directive under the proportionality principle, may combine the legal and compliance function. However, an investment firm with more complex activities or greater size should generally avoid such combination, if it could undermine the compliance function's independence.

66. Where an investment firm makes use of the proportionality exemption, it should record how this is justified, so that the competent authority is able to assess this.

Combining the compliance function with other internal control functions

Relevant legislation: Article 6 par. (3) of the MiFID Implementing Directive.

General guideline 9

67. An investment firm should generally not combine the compliance function with the internal audit function. The combination of the compliance function with other control functions may be acceptable if this does not compromise the effectiveness and independence of the compliance function. Any such combination should be documented, including the reasons for the combination so that competent authorities are able to assess whether the combination of functions is appropriate in the circumstances.

Supporting guidelines

68. Compliance staff should generally not be involved in the activities they monitor. However, a combination of the compliance function with other control units at the same level (such as money laundering prevention) may be acceptable if this does not generate conflicts of interests or compromise the effectiveness of the compliance function.

69. Combining the compliance function with the internal audit function should generally be avoided as this is likely to undermine the independence of the compliance function because the internal audit function is charged with the oversight of the

compliance function. However, for practical reasons (for example, decision making), and in certain circumstances (for example, in firms of only two persons), it may be more appropriate to have one person responsible for both functions. In this regard, firms should consider discussing the combination with the relevant supervisory authority. In addition, where this combination occurs, the firm must, of course, ensure that the responsibilities of each function are discharged properly (i.e. soundly, honestly and professionally).

70. Whether staff from other control functions also perform compliance tasks, should also be a relevant consideration in the determination of the relevant number of staff necessary for the compliance function.

71. Whether or not the compliance function is combined with other control functions, the compliance function should coordinate its activities with the second-level control activities performed by other units.

Outsourcing of the compliance function

Relevant legislation: Article 6 and 14 of the MiFID Implementing Directive.

General guideline 10

72. Investment firms should ensure that all applicable compliance function requirements are fulfilled where all or part of the compliance function is outsourced.

Supporting guidelines

73. The MiFID outsourcing requirements for critical or important functions apply in full to the outsourcing of the compliance function.

74. The requirements that apply to the compliance function are the same whether or not any or all of the compliance function is outsourced; the responsibility for the fulfilment of the existing requirements rests with a firm's senior management.

75. The investment firm should perform a due diligence assessment before choosing a service provider in order to ensure that the criteria set out in Articles 6 and 14 of the MiFID Implementing Directive are met. The investment firm should ensure that the service provider has the necessary authority, resources, expertise and access to all relevant information in order to perform the outsourced compliance function tasks effectively. The extent of the due diligence assessment is dependent on the nature, scale, complexity and risk of the tasks and processes that are outsourced.

76. Investment firms should also ensure that when outsourced partially or fully, the compliance function remains permanent in nature, i.e. the service provider should be able to perform the function on an ongoing basis and not only in specific circumstances.

77. Investment firms should monitor whether the service provider performs its duties adequately, which includes monitoring the quality and the quantity of the services provided. Senior management is responsible for supervising and monitoring the outsourced function on an ongoing basis, and should have the necessary resources and expertise to be able to fulfil this responsibility. Senior management may appoint a specific person to supervise and monitor the outsourced function on their behalf.

78. Outsourcing of the compliance function within a group does not lead to a lower level of responsibility for the senior management of the individual investment firms within the group. However, a centralised group compliance function may, in some cases, provide the compliance officer with better access to information, and lead to greater efficiency of the function, especially if the entities share the same premises.

79. If an investment firm, due to the nature, size and scope of its business activities, is unable to employ compliance staff who are independent of the performance of

services they monitor, then outsourcing of the compliance function is likely to be an appropriate approach to take.

V.III. Competent authority review of the compliance function

Review of the compliance function by competent authorities

Relevant legislation: Art. 7 and 17 of MiFID

General guideline 11

80. Competent authorities should review how investment firms plan to meet, implement and maintain the MiFID compliance function requirements. This should apply in the context of the authorisation process, as well as, following a risk-based approach, in the course of on-going supervision.

Supporting guidelines

81. Article 7 of MiFID states that a competent authority shall not grant authorisation to an investment firm unless and until such time as it is fully satisfied that the applicant complies with all requirements under the provisions adopted pursuant to MiFID. Accordingly, the competent authority should assess whether a firm's compliance function is adequately resourced and organised and whether adequate reporting lines have been established. It should require that any necessary amendments are made to the compliance function as a condition for authorisation.

82. Additionally, as part of the ongoing supervisory process, a competent authority should – following a risk-based approach – assess whether the measures implemented by the investment firm for the compliance function are adequate, and whether the compliance function fulfils its responsibilities appropriately. Investment firms are responsible for determining whether amendments to the resources and organisation of the compliance function are required due to changes in the business model of the investment firm. Competent authorities should also, as part of their ongoing supervision and following a risk based approach, assess and monitor - where and if appropriate - whether such amendments are necessary and have been implemented. The competent authority should pro- vide a reasonable timeframe for the firm to make amendments. However, investment firms' amendments are not necessarily subject to approval by the competent authorities.

83. Some competent authorities license or approve the nominated compliance officer following an assessment of the qualifications of the compliance officer. This assessment may include an analysis of the compliance officer's curriculum vitae, as well as an interview with the designated person. This sort of licensing process may help to strengthen the position of the compliance function within the investment firm and in relation to third parties.

84. Other regulatory approaches impose the responsibility for the assessment of the compliance officer's qualification solely on the senior management of the investment firm. Senior management assesses the prospective compliance officer's qualifications before appointment. Whether the investment firm properly complies with this requirement is then assessed within the general review of the firm's compliance with the relevant MiFID requirements.

85. Some Member States require investment firms to notify the competent authorities of the appointment and replacement of the compliance officer. In some jurisdictions, this notification must also be accompanied by a detailed statement on the grounds for the replacement. This can help competent authorities gain insight into possible tensions between the compliance officer and senior management which could be an indication of deficiencies in the compliance function's independence.

86. The above practices could be helpful to other competent authorities.[4]

[4] This description of specific practices of competent authorities aims to provide the reader with additional information on differing approaches of competent authorities without setting up additional requirements for investment firms or competent authorities (and thereby triggering the obligation under Article 16(3) of the ESMA Regulation to comply or explain).