



**Financial Services
Commission**

Guidance Note

Provision of Information, Client Reporting and
Record Keeping

Markets in Financial Instruments Directive (MiFID)

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Published by:

Financial Services Commission
PO Box 940, Suite 943, Europort, Gibraltar
Tel (+350) 40283
Fax (+350) 40282
E-Mail: info@fsc.gi
www.fsc.gi

1. Introduction

The Markets in Financial Instruments Directive (MiFID) came into effect on 01 November 2007, when it replaced the Investment Services Directive (ISD). MiFID has been implemented in Gibraltar via the Financial Services (Markets in Financial Instruments) Act 2006 ("the Act") and the Financial Services (Markets in Financial Instruments) Regulations 2007 ("the Regulations").

The aim of this Guidance Note is to supplement the legislation in regard to the Provision of Information, Client Reporting and Record Keeping.

1.1. Provision of Information and Client Reporting

The provision of information under MiFID requires a firm to advise clients of specific information, which is dependant on a number of factors including the client categorisation and the services provided to a client. These requirements are generally targeted at retail client business, as a more relaxed approach is adopted when dealing with professional clients. This is owed to the fact that such clients are better placed to identify for themselves the information required to enable them to make an informed decision, and where necessary, to ask the firm to provide the relevant information.

In the case of eligible counterparties exemptions to the requirements with which a firm has to comply exist. Firms that execute orders on behalf of clients, to deal on own account or to receive and transmit orders, may bring about or enter into transactions with eligible counterparties without being obliged to comply with sections 19, 21 and 22, of the Act, in respect of those transactions or in respect of any ancillary service directly related to those transactions. Additionally a firm should note that a client cannot be an eligible counterparty for the purposes of portfolio management or investment advice, and in such cases, such a client will need to be categorised as a professional or retail client for MiFID business.

Timeframes in which the information is to be provided are also specified, whether before the provision of services, in the form of a client agreement, or after the provision of services, in the form of a report.

1.2. Record Keeping

MiFID indicates the type of information that is to be recorded and allows the FSC to advise of recommended timeframes for storage of such information, the minimum being set at five years for MiFID business.

Firms are also required to observe certain organisational requirements to ensure that the relevant systems and controls are in place and that record keeping requirements are adhered to.

2. Provision of Information and Client Reporting

2.1. Fair, Clear and not misleading information

A firm must ensure that **all** information addressed to its retail clients is fair, clear and not misleading, ensuring that such is applied in a way that is appropriate and proportionate. This is also applicable to marketing communications and to information that a firm provides to a client on a voluntary basis.

Where information is only addressed to, and likely to be received by, professional clients, more general requirements will apply. However, when

dealing with professional clients, firms may consider it beneficial to observe some of the detailed requirements when complying with the requirement that information should be fair, clear and not misleading, even though such does not apply directly.

A firm should evaluate whether the information that is to be provided is sufficient for the relevant purposes, considering also the likely audience of the communication. For example a complicated technical document may be accurate, and therefore not misleading, although it may not be clear to an investor who does not have any experience in investments yet may be clear to somebody who already has been involved in similar investments.

Information must be accurate and in particular must not emphasise any potential benefits of an investment service or financial instrument without also giving a fair and prominent indication of any relevant risks. It must also be presented in a way that is likely to be understood by the average member of the group to whom it is addressed, or by whom it is likely to be received. This suggests that there may be some variation between different audiences within the wider category of retail investors.

Furthermore it must not disguise, diminish or obscure important items, statements or warnings. Likewise it must not use the name of any competent authority in such a way that would indicate or suggest endorsement or approval of the products or services offered by the firm.

Where the information refers to a particular tax treatment, a firm must also prominently state that the tax treatment depends on the individual circumstances of each client and may be subject to change in the future.

2.2. The firm and its services

A firm must provide retail clients, or potential retail clients, with the following information, where relevant, about itself and the services offered:

- The name and address of the firm along with the necessary contact details to enable the client to communicate effectively with the firm.
- The languages in which the client may communicate with the firm and receive documents and other information from the firm.
- The methods of communication to be used between the firm and the client, including where relevant those for the sending or receiving of orders.
- A statement of the fact that the firm is authorised and the name and contact address of the FSC.
- The nature, frequency and timing of the reports on the performance of the service to be provided by the firm to the client, where applicable, the costs associated with the transactions and services undertaken on behalf of the client.
- If the firm holds client financial instruments or funds, a summary description of the steps which it takes to ensure their protection, including summary details of any relevant investor compensation or deposit guarantee scheme that applies to the firm by virtue of its activities in Gibraltar.

- A description, which may be provided in summary form, of the conflicts of interest policy maintained by the firm in accordance with the conflicts of interest policy requirements¹.
- The firm must provide, at the client's request, further details of its conflicts of interest policy in a durable medium (or by means of a website provided that the relevant conditions, regarding information is not addressed personally to clients, are satisfied).

2.3. Financial instruments

The information requirements concerning financial instruments are applicable to both retail and professional clients in all but one instance, which relates to financial instruments subject to the Prospectus Directive or the UCITS Directive.

This exception applies where a firm provides a retail client with information about a financial instrument that is the subject of a current offer to the public and a prospectus has been published in connection with that offer under the Prospectus Directive. In such a case the firm is obliged to inform the client as to where that prospectus is made available to the public. However, if a firm actually provides a client with a copy of a prospectus (drawn up and published under the Prospectus Directive) for which the firm is not responsible for the information given in the prospectus, then in such an instance this is not classified as the provision of information by the firm. As a result the requirements set out in section 2.1 do not apply.

The level of detail of the information provided may vary according to the client's categorisation, and the nature and risk profile of the financial instruments that are being offered. However, such information must never be so general as to omit any essential elements. Furthermore, firms must provide adequate information on the nature of financial instruments and the associated risks, in order to allow the client to make each investment decision on a properly informed basis. To comply with such a requirement, a firm should consider and assess whether it is sufficient to only provide information about the type of instrument or be more product specific.

In the case of units in a UCITS, a copy of a simplified prospectus complying with Article 28 of the UCITS Directive is to be regarded as sufficient information in relation to the costs and associated charges related to the UCITS itself, including the exit and entry commissions. However firms distributing units in UCITS should additionally inform their clients about all the other costs and associated charges related to the provision of investment services in relation to units in UCITS.

If financial instruments incorporate a guarantee provided by a third party, the information about the guarantee must contain sufficient detail about the guarantor and the guarantee to enable a retail client to make a fair assessment of that guarantee.

2.4. Performance of financial instruments or services

Information on the performance of financial instruments or services in most cases will consist of either an actual past performance, simulated past performance or future performance (which by its nature will be simulated). Where this information is addressed to or likely to be received by a retail client,

¹ These requirements are outlined in the Managing Conflicts of Interest & related Organisational Requirements guidance note.

a firm must comply with the specific requirements for each type of performance information.

2.4.1. Past Performance

If the information contains an indication of the past performance of a financial instrument, a financial index or an investment service, the following must be satisfied:

- a) The indication must not be the most prominent feature of the communication;
- b) The information must include appropriate performance information covering the immediately preceding five years, or the whole period for which the financial instrument has been offered, the financial index has been established, or the investment service has been provided, if less than five years, or such longer period as the firm may decide, and in every case that performance information must be based on complete twelve-month periods;
- c) The reference period and the source of information must be stated clearly;
- d) The information must contain a prominent warning that the figures refer to the past and that past performance is not a reliable indicator of future results;
- e) Where the information relies on figures denominated in a currency other than that of the Member State in which the retail client is resident, the currency must be stated clearly, together with a warning that the return may increase or decrease as a result of currency fluctuations;
- f) Where the indication is based on gross performance, the effect of commissions, fees or other charges must be disclosed.

2.4.2. Simulated Past Performance

If information that is addressed or likely to be received by clients refers to simulated past performance, it must relate to a financial instrument or a financial index (therefore, firms may not provide simulated past-performance information to clients in relation to the provision of services, such as portfolio management or investment advice), and the following must be satisfied:

- The simulated past performance must be based on the actual past performance of one or more financial instruments or financial indices which are the same as, or underlie, the financial instrument concerned.

Therefore it is not possible for the firm to invent simulated past-performance information. An example in which simulated past-performance may be appropriate include where a firm creates a new product that is designed to track an existing index.

- The information must contain a prominent warning that the figures refer to simulated past performance and that past performance is not a reliable indicator of future performance.
- The conditions specified in Section 2.4.1 sub-paragraphs (a),(b),(c),(e) and (f) must be complied with.

2.4.3. Future Performance

Information that is addressed to or likely to be received by clients that refers to future performance, must:

- Not be based on or refer to simulated past performance.
- Be based on reasonable assumptions supported by objective data.
- Disclose the effect of commission, fees or other charges where the information is based on gross performance.
- Contain a prominent warning that such forecasts are not a reliable indicator of future performance.

2.4.4. Comparisons

Where information is addressed or likely to be received by retail clients and compares investment or ancillary services, financial instruments, or persons providing investment or ancillary services, the following conditions must be met:

- The comparison must be meaningful and presented in a fair and balanced way.
- The sources of the information used for the comparison must be specified.
- The key facts and assumptions used to make the comparison must be included.

It should also be noted that the Financial Services (Advertising) Regulations 1991 also sets out requirements concerning comparative advertising and should be considered by the firm if this approach is adopted.

2.5. Risk warnings

A firm must provide its clients with a general description of the nature and risks of financial instruments, taking into account the categorisation of the client, the nature of the client and the nature and risk profile of the instruments. This description must explain the nature of the specific type of instrument concerned, as well as the risks particular to that specific type of instrument, in sufficient detail to enable the client to make investment decisions on an informed basis.

The description of risks must include where relevant to the specific type of instrument concerned, and the status and level of knowledge of the client, the following:

- The risks associated with that type of financial instrument, including an explanation of leverage and its effects, and the risk of losing the entire investment.
- The volatility of the price of such instruments and any limitations to the available market for such instruments.
- The fact that as a result of transactions in such instruments, an investor might assume financial commitments and other additional obligations, including contingent liabilities, that are additional to the cost of acquiring the instrument.
- Any margin requirements or similar obligations applicable to instruments of that type.

Where the risks associated with a financial instrument are composed of two or more different financial instruments or services are likely to be greater than the risks associated with any of the components, the firm must also provide an adequate description of the components of that instrument and the way in which its interaction increases the risks.

Furthermore, under MiFID the FSC has the right to specify the precise terms or contents of the description of risks. Such information in relation to description of risks can be found in FSC Guidance Note 3 – *Dealing with and Advising Clients*.

2.6. Costs and associated charges

Firms are required to provide retail clients, and potential retail clients, with information on costs and associated charges when providing an investment service or in connection with a financial instrument. The information to be provided, where relevant, must include:

- The total price to be paid by the client in connection with the financial instrument or the investment or ancillary service, including all related fees, commissions, charges and expenses, and all taxes payable via the firm. If an exact price cannot be indicated, the firm should provide the basis for the calculation of the total price so that the client can verify it.

The commission charged by the firm must be separately itemised in every case.

- Where any part of the total price is to be paid in, or represents, a foreign currency, an indication of the currency involved and the applicable currency conversion rates and costs.
- Notice of the possibility that other costs, including taxes, related to the transactions in connection with the financial instruments or investment service, may arise for the client that are not paid via the firm or imposed by it.

This obligation only relates to the possibility of such costs, so it is not necessary for the firm to definitively identify the costs that will be relevant.

- The arrangements for payment or other performance.

The circumstances in which the arrangements for payment must be provided include where a financial instrument contract is cash settled.

The circumstances in which the arrangements for performance must be provided include where, upon termination, a financial instrument requires the delivery of an instrument or commodity.

These disclosure requirements do not cover the payment of commission or other benefits to a firm by a third party if they do not amount to the indirect payment of a fee or commission by the client to the firm.

Under the inducement requirement² a firm is permitted to disclose the essential terms of the arrangements relating to the fee, commission, and non-monetary benefits in summary form provided that it undertakes to disclose further details at the request of the client and provided that it honours that undertaking.

² Regulation 26 of the Regulations.

2.7. Execution Policy

A firm is required to have an execution policy in place to document the process and procedures it applies to client orders in order to obtain the best possible result for the client. The main areas that the execution policy must address are:

- The investment firm's execution approach for carrying out orders (including executing, placing an order and receiving or transmitting a client order) for execution, from the time that an order originates to the time that it is executed or settled, as the case may be.
- The execution venues or entities the firm uses and the role of execution quality and any other factors in selecting them.
- The different factors influencing the firm's execution approach for carrying out client orders.
- Why the firm's execution approach for carrying out client orders will deliver the best possible result for the execution of those client orders.

All firms must disclose appropriate information, including disclosure of fees and commission, to clients about the firm's execution policy, which should be sufficient to enable the client to make a properly informed decision about whether to utilise the execution services offered by the firm. In addition it should ensure that investors are able to distinguish the price of the instrument on a particular venue from the fee or commission charged by the firm for access to that venue.

How the policy is presented is at the firm's discretion and can take the form of one single policy with separate parts or as individual policies for each type of product/client. Either way it must be clear which policy or section applies to each type of product or client and must likewise be applied properly and appropriately to each client order. However a firm must ensure that on the whole information provided to clients is appropriate and proportionate and takes account of the status of a client, and reflects any significant variations in the execution approach for each class of instrument. Disclosure of the execution policy is only required insofar as it will be relevant for the client and the types of orders that the client may send to the firm.

There are differences in the provision of information requirements that apply to firms executing orders to those firms that receive and transmit client orders or place orders with entities for execution in the course of managing portfolios for clients.

For firms executing client orders it is a requirement that retail clients be provided with the following details of the firm's executing policy prior to the provision of the service:

- The relative importance the firm assigns to the price, cost, speed, likelihood of execution and settlement, size of order, nature of the order or any other consideration relevant to the execution of the order, or the process by which it determines the relative importance.
- A list of the execution venues on which the firm places significant reliance in meeting its best execution obligations.
- A warning to the client regarding the use of specific instructions.



Information should be provided in a durable medium and where the retail client agreement is required, as discussed in Section 2.12, such disclosure can be incorporated into the agreement.

Additionally a firm that executes client orders must also obtain client consent to the execution policy and be able to demonstrate, at a client's request, that it has executed that client's order in compliance with its execution policy. The latter requirement assists clients in assessing whether the service received from a particular firm is satisfactory and further reinforces the investor protection objective by requiring firms to demonstrate compliance with their execution policy.

Whereas firms such as portfolio managers and investment firms that receive and transmit orders to third parties, are required to implement a policy to achieve the best possible result for client orders and disclose appropriate information about their policy to clients, there is no requirement for the firm to demonstrate compliance in the manner detailed above. Furthermore there are no requirements in regard to obtaining client consent in regard to its execution arrangements.

Where prior consent is required this may be provided by signature in writing or via an equivalent means – for example, electronic signature, via a web page, clicking an acceptance button, or orally by telephone or in person, with appropriate record keeping in each case. A firm may be asked to show that it has supplied clients with the appropriate information on its execution policy.

Likewise where the policy provides for the possibility that client orders may be executed outside a regulated market or an MTF the firm is to inform its clients about this possibility and the firm must first obtain prior express consent from clients before proceeding to execute such orders. Consent can be sought in the form of a general agreement or in respect of individual transactions.

Firms dealing with professional clients are not subject to equivalent provisions relating to what appropriate information must be provided. It is expected that professional clients should, subject to limited exceptions, be able to identify for themselves the information that is necessary for them to make an informed decision, and to ask the firm to provide that information. In essence it is up to the investment firm to determine what level of information disclosure is appropriate for professional clients, through appropriate consultation with such clients if necessary.

Further information may be requested by clients. However, a firm is not specifically required to provide further information under the requirements. Where there are any information requests of this type, firms should endeavour to supply this additional information, provided the request is reasonable and proportionate.

Best execution and the execution policy are discussed further in the Suitability, Appropriateness and Best Execution Guidance Note.

2.8. Conflicts of Interest policy

Some firms may be required to implement a conflicts of interest policy, this is determined by a number of factors which are discussed in Section 2.1 of the Guidance Note – Managing Conflicts of Interest & related Organisational Requirements.

Where a firm is required to establish, implement and maintain a policy to deal with conflicts of interest, a summary of the policy is to be provided to retail, or

potential retail clients, although further details must be provided should the client require it.

The policy should identify:

- What reasonable steps the firm will take to identify conflicts of interest between the firm or any person directly or indirectly linked to it and a client, as well as between one client of the firm and another.
- The circumstances which constitute or may give rise to a conflict of interest entailing a material risk of damage to the interest of one or more clients.
- How the firm will assess whether it or a relevant person, or person directly linked by control to the firm:
 - Is likely to make a financial gain, or avoid a financial loss, at the expense of the client;
 - Has an interest in the outcome of a service provided to the client or of a transaction carried out on behalf of the client, which is distinct from the client's interest in that outcome;
 - Has a financial or other incentive to favour the interest of another client or group of clients over the interests of the client;
 - Carries on the same business as the client;
 - Receives or will receive from the person other than the client an inducement in relation to a service provided to the client, in the form of monies, goods or services, other than the standard commission or fee for that service;
- Procedures to be followed and measures to be adopted in order to manage such conflicts.
- The level below which small gifts and minor hospitality are irrelevant in relation to inducements

The policy must ensure that relevant persons engaged in different business activities involving a conflicts of interest carry on these activities independently of one another in a manner appropriate to the size and activities of the firm and group to which it belongs, and to the maturity of the damage envisaged to the interests of its clients.

Additionally firms must disclose, in a durable medium, to clients, or potential clients the general nature and/or sources of conflicts of interest before undertaking the business where its organisational or administrative arrangements to manage conflicts of interest are insufficient to ensure (with reasonable confidence) that risks of damage to client interests will be prevented. This disclosure should only be used where all methods of managing a conflict of interest have been tried and have been deemed as insufficient. It should not however be seen as a method of managing a conflict in itself.

Managing conflicts of interest is dealt with further in the Guidance Note – Managing Conflicts of Interest & related Organisational Requirements.

2.9. Client categorisation

When notifying clients of their classification, firms must notify new clients, and existing clients that have been newly categorised, of their categorisation as a retail client, a professional client or an eligible counterparty.



Prior to the provision of services the firm must inform that client of:

- Their categorisation.
- Any right that client has to request to a different categorisation.
- Any limitations to the level of client protection that such a different categorisation would entail.

This information should be provided in a durable medium, prior to the provision of services.

The FSC will expect a firm to notify clients who were with the firm prior to 1 November 2007 of their categorisation under MiFID if these existing clients have **not** been previously notified by the firm of their categorisation. This may be in the form of a one-way notice and also applies to firms that decide to unilaterally classify all clients as “retail” (where clients have not been previously notified of their categorisation).

Where a firm intends to re-classify or re-categorise a client, the FSC will also expect that firm to notify its clients of such. In this case, however, the firm will need to obtain written consent to the change from the client, prior to transacting any further business. A one-way notice from the firm to the client will therefore not suffice for these purposes.

Client categorisation is covered in more detail in the Client Categorisation guidance note.

2.10. Portfolio management services

Where a firm proposes to provide portfolio management services to a retail client, or potential retail client, it is required to provide the following information, as is applicable:

- Information on the method and frequency of valuation of the financial instruments in the client portfolio.
- Details of any delegation of the discretionary management of all or part of the financial instruments or funds in the client portfolio.

Where outsourcing takes place a firm will need to have due regard to the principles set out in the FSC’s Outsourcing Guidance Note.

- A specification of any benchmark against which the performance of the client portfolio will be compared.

In support of this requirement, a firm that provides portfolio management services must establish an appropriate method of evaluation and comparison, such as a meaningful benchmark. This must be based on the investment objectives of the client and the types of financial instruments contained in the client’s portfolio. It should enable the client to assess the firm’s performance.

- The types of financial instruments that may be included in the client portfolio and the types of transaction that may be carried out in such instruments, including any limits.
- The management objectives, the level of risk to be reflected in the manager’s exercise of discretion and any specific constraints on that discretion.



Additionally each client of the firm must be provided with a periodic statement in a durable medium of the portfolio management activities carried out on behalf of said client. This reporting requirement does not apply if such a statement is provided by another person.

There is specific content required if the periodic statement is provided to retail clients, and in such a case the periodic statement must include, where relevant, the following:

- a) The name of the firm.
- b) The name or other designation of the retail client's account.
- c) A statement of the contents and the valuation of the portfolio including details of each financial instrument held, its market value (or fair value if market value is unavailable) and the cash balance at the beginning and at the end of the reporting period. It should also include the performance of the portfolio during the reporting period.
- d) The total amount of the fees and charges incurred during the reporting period. This should at least itemise the total management fees and total costs associated with execution. Where relevant, it should also include a statement to the effect that a more detailed breakdown will be provided on request.
- e) A comparison of performance during the period covered by the statement with the investment performance benchmark, if any, agreed between the firm and the client.

When providing portfolio management service to retail clients a firm must specify an appropriate means of evaluation and comparison of the service, such as a meaningful benchmark. This must be based in the objectives of the client and the types of financial instruments contained in the client's portfolio and should enable the client to assess the firm's performance.

- f) The total amount of dividends, interest and other payments received during the reporting period in relation to the client's portfolio.
- g) Information about corporate actions giving rights in relation to financial instruments held in the portfolio.

Furthermore the information set out in sub-paragraphs (c) to (g) above must be provided to retail clients, where relevant, for each transaction executed during the period. If however, the retail client elects to receive information about executed transactions on a transaction-by-transaction basis, the essential information concerning that transaction must be provided promptly to the retail client, in a durable medium.

2.10.1. Confirmation Notices

A notice confirming the transaction must be issued to clients no later than the first business day following execution. Where the firm has transmitted the order to a third party for execution, the notice must be sent no later than the first business day following receipt of the confirmation from the third party.

A firm would therefore need to assess what it needs to do for those clients for whom it holds mail facility. It would need to inform these clients of the firm's obligations in relation to issuing confirmation to clients and perhaps arrange to send these confirmations by fax/email if clients want to receive this (although

the clients may still wish for these confirmations to be held for them) and this is acceptable as long as has been properly documented.

There needs to be evidence that the firm is issuing these confirmations to their clients on file, irrespective of whether the confirmation is actually sent to the client to their home or other address, or whether alternatively is kept in hold mail.

In the case of retail clients, the notice must include the following information, as is applicable and where relevant:

- The reporting firm identification.
- The name or other designation of the client.
- The trading day (on which the transaction was executed).
- The trading time.

For transaction reporting purposes, this is expressed as the time at which the transaction was executed, reported in local time of the competent authority to which the transaction will be reported and the basis in which the transaction is reported expressed as Coordinated Universal Time (UTC) +/- hours).
- The type of the order.

This should be understood as referring to its status as a limit order, market order, or other specific type of order.
- The venue identification.
- The instrument identification.

This is generally a unique code used for transaction reporting purposes, but can include the name of the instrument (or the characteristics of the contract in the case of a derivative) if the financial instrument does not have a code.
- The buy/sell indicator.
- The nature of order if other than buy/sell.

This should be understood as referring to orders to subscribe for securities, or to exercise an option, or similar client order.
- The quantity (i.e. the number of units if the financial instruments, the nominal value of bonds or the number of derivative contracts concluded in the transaction).
- The unit price.

If the order is executed in tranche, the firm may supply the client with information about the price of each tranche or the average price. If it supplies the average price, it must provide the client with the price of each tranche on request.
- The total consideration.
- A total sum of the commission and expenses charged and, where the retail client so requests, an itemised breakdown.
- The client's responsibilities in relation to the settlement of the transaction, including the time limit for payment or delivery as well as

the appropriate account details (unless these details and responsibilities have been previously notified to the client).

- If the client's counterparty is the firm or a member of its group or another client of the firm, the fact that this was the case unless the order was executed through a trading system that facilitates anonymous trading.

The above requirements do not apply where the confirmation would contain the same information as a confirmation that is to be promptly dispatched to the retail client by another person.

2.10.2. Reporting of certain losses

If the client portfolio includes an uncovered open position in a contingent liability transaction³, the firm must also report to the client any losses exceeding any predetermined threshold agreed between the firm and the client. This report must be provided no later than the end of the business day on which the threshold is exceeded (or if it is exceeded on a non-business day, by the close of the next business day).

2.10.3. Frequency of periodic reporting to retail clients

Periodic statements must be sent to retail clients every six months, except in the following circumstances:

- Where the client so requests, the periodic statement must be provided every three months.

Firms must inform retail clients that they have the right to make such requests.

- In cases where the firm provides transaction confirmations on a transaction-by-transaction basis, the periodic statements must be provided every twelve months.

However, this option is not available if the portfolio includes transactions in warrants or derivatives.

- Where the agreement between a firm and a retail client for a portfolio management service caters for a leveraged portfolio, the periodic statement must be provided at least once a month.

2.11. Execution of orders (other than portfolio management services)

The requirements set out below apply where a firm carries out an order on behalf of a client other than in relation to the provision of portfolio management services.

Where a firm has carried out an order on behalf of a client, it must promptly provide the client with the essential information concerning the execution of that order in a durable medium. At the request of the client a firm must also supply the client with information concerning the status of his order.

³ A contingent liability is one that involves any actual or potential liability for the client that exceeds the cost of acquiring the instrument.

In the case of retail client business, the essential information concerning the execution of the order must take the form of a notice confirming execution of the order, again issued in a durable medium.

The information to retail clients must be sent to the client as soon as possible and no later than the first business day following execution, where the firm executes directly. If the confirmation is received from a third party then the firm must send the client notice no later than the first business day following receipt of the confirmation from the third party. However this does not apply where the confirmation would contain the same information as a confirmation that is to be promptly despatched to the retail client by another person.

Firms should note that the above requirement does not apply to orders executed on behalf of clients that relate to bonds funding mortgage loan agreements with said clients. In such cases, the report on the transaction shall be made at the same time as the terms of the mortgage loan are communicated, however this must be no later than one month after the execution of the order.

An exception is also provided where a client executes orders on a periodic basis for a retail client and those orders relate to units or shares in a collective investment undertaking. In this instance, the firm must either provide the confirmation notice on a transaction-by-transaction basis in the normal manner or it must provide the client with a notice at least once every six months containing the information provided in Section 2.9.1 in respect of these transactions.

2.12. Safeguarding client assets

If a firm holds client financial instruments or funds for a client, it must send that client a statement at least once a year in a durable medium, showing these financial instruments or funds. Firms that hold financial instruments or funds **and** which carry out portfolio management for a client, are permitted to include the statement of client assets in the periodic statement provided to that client.

The statement of client assets must include, as is relevant:

- Details of all of the financial instruments or funds held by the firm for the client at the end of the period covered by the statement.

If the portfolio includes the proceeds of one or more unsettled transactions, this information may be based on either the trade date or the settlement date, as long as the same basis is used consistently in the statement.

- The extent to which any client financial instruments or client funds have been the subject of securities financing transactions⁴.
- The extent of any benefit that has accrued to the client by virtue of participation in any securities financing transactions and the basis on which that benefit has accrued.

This would include any securities lending fees that have accrued by virtue of lending securities held in the account.

⁴ Securities financing transaction cover securities lending agreements, repurchase or reverse repurchase agreements and buy-sell back or sell-buy back transactions.

The statement requirement **does not** apply to a credit institution authorised under the Banking Consolidated Directive, in respect of deposits within the meaning of that Directive held by that institution. However this exception would not be available if the credit institution is not liable for the repayment of that deposit, for example if it holds the money in a trust account with another credit institution.

In addition, a firm is obliged to advise the client if accounts that contain financial instruments or funds belonging to that client are or will be subject to the law of a jurisdiction other than that of a Member State. If this is the case, the firm must also indicate that the rights of the client relating to those funds or financial instruments may differ accordingly.

A firm must also inform a client about the existence and terms of any security interest or lien that the firm has or may have over the client's financial instruments or funds, or any right of set-off it holds in relation to those instruments or funds. Where applicable, it shall inform the client of the fact that a depositary may have a security interest or lien over, or right of set-off in relation to, those instruments or funds.

The requirements detailed above do not differ depending on whether the firm is dealing with a retail or professional client. However there is further information a firm should provide, under certain circumstances, when client financial instruments or funds are held on behalf of a retail client. These are detailed below.

2.12.1. Retail Clients

A firm must additionally inform a retail client, where relevant:

- If the financial instruments or funds, of the client, may be held by a third party on behalf of the firm and set out the responsibility of the firm, under local law, for any acts or omissions of the third party and the consequences for the client of the insolvency of the third party.
- If the financial instrument may be held by a third party in an omnibus account⁵, and shall provide a prominent warning of the resulting risks.

For example, these risks may include the fact that the client will share in any shortfall in the assets held in that omnibus account.

- If it is not possible under national law for client financial instruments held with a third party to be separately identifiable from the proprietary financial instruments of that third party or of the firm. In such a case, a prominent warning of the resulting risks is to be provided.

These may include the fact that on the insolvency of the firm or the third party, the client may not have a claim against those assets and may only rank as an unsecured creditor.

- Before entering into securities financing transactions in relation to financial instruments held by it on behalf of a client, or before otherwise using such financial instruments for its own account or the account of another client, a firm must in good time before the use of

⁵ An omnibus account is an account maintained by the firm with a third party that holds financial instruments belonging to a number of clients of the firm.

those instruments provide the client, in a durable medium⁶, clear, full and accurate information on the obligations and responsibilities of the firm with respect to the use of those financial instruments, including the terms for their restitution, and on the risks involved⁷.

- A summary description of the steps it takes to ensure their protection, including summary details of any relevant investor compensation or deposit guarantee scheme which applies to the firm by virtue of its activities in a Member State.

2.13. Client agreements

Where a firm provides an investment service other than investment advice to a retail client, the firm must enter into a written (or other durable medium) basic agreement with the client setting out the essential rights and obligations of the firm and the client. However it is not necessary for all of the relevant provisions to be contained in the same document as, for example, references may be incorporated into the agreement to other documents or legal texts.

Where portfolio management services are provided, be it on a discretionary or non-discretionary basis, the requirement to have an agreement in place will apply.

Entering into a client agreement is only applicable where the relevant investment services are provided to the client for the first time after 1 November 2007. Thus a certain degree of grandfathering is therefore provided in relation to pre-existing client relationships. However where agreements entered into prior to this date do not cover all the relevant MiFID disclosures a firm should consider its overall duty to act honestly, fairly and professionally in accordance with the client's best interests and if necessary enter into a new agreement or issue a side letter to the original agreement.

The FSC is not obliged to approve the content of the basic agreement between a firm and its retail clients. However the FSC is not prevented from doing so, insofar as any such approval is based only on the firm's compliance with its obligations to act honestly, fairly and professionally in accordance with the best interests of its clients. In this regard the FSC would expect firms to incorporate the relevant disclosures to ensure that the client agreement is compliant with the relevant requirements.

A written agreement, between a firm and a client, is also required when the firm agrees to reclassify a professional client as a retail client. The agreement should explain to the client that he will not be treated as a professional client for the purposes of the applicable conduct of business regime. Furthermore it should also specify whether this applies to one or more particular services or transactions or to one or more types of products or services.

Where an agreement is required this should be signed by the client and returned to the firm.

⁶ Where this disclosure requirement applies it does not appear possible for the firm to disclose via a website that does not satisfy the definition of a durable medium.

⁷ This requirement supplements the detailed organisational requirements concerning the holding of financial instruments belonging to clients, which states that a firm must make adequate arrangements so as to safeguard a client's ownership rights and to prevent the use of a client's instrument on own account except with the client's express consent.

2.13.1. Terms of agreement

Where a retail client is bound by the terms of any agreement for the provision of investment services or ancillary services, the client must be provided with the terms of that agreement and any of the information specified in section 2.2 and 2.9 relating to the agreement or those investment or ancillary services. This requirement is also applicable if the client is bound by an agreement relating to the provision of investment advice or an ancillary service.

Such information must be provided **before** the client is bound by the agreement or before the provision of the relevant investment or ancillary services, if earlier.

The required information can be provided to a retail client **immediately after** the client is bound by any agreement for the provision of such services under the following circumstances:

- At the request of the client, the agreement was concluded using a means of distance communication which prevents the firm from providing relevant information
- Where Schedule 1(3) of the Financial Services (Distance Marketing) Act 2006 concerning distance contracts does not otherwise apply, the firm complies with the requirements of that section in relation to the retail client or potential retail client, as if that client or potential client were a "consumer" and the firm were a "supplier" within the meaning of that Act.

2.14. Marketing information

Firms must ensure that information contained in a marketing communication is consistent with any information that the firm provides to its clients in the course of carrying on investment and ancillary services.

MiFID requires marketing communications to be identifiable as such. By this it implies that the reader should be able to identify that such information is marketing material, for example, where marketing communications are presented as other forms of information i.e. editorial articles or investment research. It may be necessary to include an express statement informing that the material is to be classed as a marketing communication.

Firms that produce, or arrange for the production of, investment research, intended to be subsequently provided to clients of the firm or to the public (be that under their own responsibility or that of a member of their group) must ensure that all the relevant measures are complied with in relation to financial analysts involved in the production of the investment research, and other relevant persons whose responsibilities or business interests may conflict with the interests of the persons to whom the investment research is disseminated.

Firms that disseminate investment research produced by another person to the public or to clients are exempt from complying with the above if the following criteria are met:

- The person that produces the investment research is not a member of the group to which the firm belongs;
- The firm does not substantially alter the recommendations within the investment research;
- The firm does not present the investment research as having been produced by it;

- The firm verifies that the producer of the research is subject to requirements equivalent to the requirements in relation to the production of research, or has established a policy setting such requirements.

2.14.1. Retail clients

Where a marketing communication contains an offer or invitation of the following nature:

- An offer to enter into an agreement in relation to a financial instrument or investment or ancillary service with any person who responds to the communication.
- An invitation to any person who responds to the communication to make an offer to enter into an agreement in relation to a financial instrument or investment or ancillary service.

and specifies the manner of response or include a form by which any responses may be made, then the information outlined in Sections 2.2, 2.3, 2.6 and 2.9 and 2.11 as is relevant to that offer or invitation must be included.

The content requirements referred to above do not apply if, in order to respond to an offer or invitation contained in the marketing communication, the client must refer to another document or documents that contain such information, be it alone or in combination.

2.15. Updating a client

A firm must notify a client in good time about any material change to any information provided in regard to:

- Information about the firm (Section 2.2).
- Financial instruments (as per Section 2.3)
- Costs and associated charges (as per Section 2.6)
- Information a firm is to provide a retail client where it proposes to provide portfolio management services (as per Section 2.9).
- Information requirements regarding the safeguarding of client assets – not in relation to statements (as per Section 2.11)

This update must be given in a durable medium if the information to which it relates was given in a durable medium. This obligation only applies where the changed information is relevant to a service that the firm is providing to that client. Therefore, it normally should not apply where the firm no longer provides a relevant service to the client.

3. Record Keeping

MiFID requires a firm to maintain adequate and orderly records of its internal organisation and to arrange for records to be kept of all services and transactions it undertakes, in respect of investments and services covered by MiFID. The scope of all services and transactions includes for example oral advice and telephone orders.

Records must be retained in a medium that allows the storage of information in a way accessible for future reference by the FSC, and in such a manner that the following is met:



- The FSC must be able to access these readily and to reconstitute each key stage of the processing of each transaction.
- It must be possible for any corrections or other amendments, and the contents of the records prior to such corrections or amendments, to be easily ascertained.
- It must not be possible for the records otherwise to be manipulated or altered.

Furthermore such records should be sufficient for the FSC to determine, and monitor, that the firm has complied with all the relevant obligations, in respect of clients or potential clients. This concept ensures that the firm can evidence a transparent audit trail, which in effect would be prudent commercial practice - to the extent that there may be contractual claims if evidence of trading is not kept properly.

When considering these requirements a firm should take into account the nature, scale and complexity of its business and the nature and range of the investment services and activities undertaken by the firm. In order to comply with the relevant record keeping requirements, firms should review existing record-keeping arrangements and identify gaps and consider training of staff. Branches of firms should also note that the FSC must have direct access to records.

Records must be kept for at least five years, however firms should note that further obligations under other legislative provisions may require records to be kept for a longer period.

Exceptions to this general five year period include client agreements and terms of business which set out the rights and obligations of the firm and its clients. Such information should be maintained for at least the duration of the relevant client relationship. This requirement also applies regardless of whether the firm was required to enter into the agreement under MiFID or chose to enter into it for other purposes.

Furthermore, the FSC may, in exceptional circumstances, exercise its right to require firms to retain any or all of those records for such longer period as is justified by the nature of the instrument or transaction, if such is necessary to enable the exercise of its supervisory functions. For example, following the termination of the authorisation of a firm, the FSC may request that the firm retain records for the outstanding term of the five year period.

The requirement to maintain records for five years, also applies to telephone conversations or electronic communications where no alternative records are maintained.

In the case of telephone records, these must be capable of being converted to a written record, subject to this being in such a form and manner that would allow the FSC to reconstitute each key stage of the processing of each transaction.

3.1. Client orders and decisions to deal

A firm must, in relation to every order received from a client, and in relation to every decision to deal taken in providing the service of portfolio management, immediately make a record of the following details, to the extent they are applicable to the order or decision to deal in question:

- The name or other designation of the client;

- The name or other designation of any relevant person acting on behalf of the client;
- The buy/sell indicator
- The instrument identification
- The unit price
- The quantity notation

This is to be understood as an indication as to whether the quantity is the number of units of financial instruments, the nominal value of bonds or the number of derivative contracts.

- The price notation;
This is the currency in which the price is expressed. If, in the case of a bond or other form of securitised debt, the price is expressed as a percentage, that percentage must be included.
- The quantity;
- The nature of the order if other than buy or sell;
- The type of order;
- Any other details, conditions and particular instructions from the client that specify how the order must be carried out;
- The date and exact time of the receipt of the order or of the decision to deal, by the firm.

3.2. Transactions

MiFID also specifies what information should be maintained in regard to the record-keeping of transactions. Immediately after executing a client order, or, in the case of firms that transmit orders to another person for execution, immediately after receiving confirmation that an order has been executed, firms shall record the following details of the transaction in question:

- The name or other designation of the client;
- The trading day;
- The trading time;
- The buy/sell indicator;
- The instrument identification;
- The unit price;
- The price notation;
- The quantity;
- The quantity notation;
- The counterparty;
Identification of the counterparty to the transaction⁸.
- The venue identification;

⁸ As per Table 1 of Appendix B of the Transparency Requirements guidance note.



- The total price, being the product of the unit price and the quantity;
- The nature of the transaction if other than buy or sell;
- The natural person who executed the transaction or who is responsible for the execution.

If a firm transmits an order to another person for execution, the firm must immediately record the following details after making the transmission:

- The name or other designation of the client whose order has been transmitted;
- The name or other designation of the person to whom the order was transmitted;
- The terms of the order transmitted;
- The date and exact time of transmission.

Where a firm records the information required under Section 3.1 and Section 3.2 on the same document, for example, on a dealing slip, there is no need to maintain duplicate fields for entries covering the same information. It is up to the firm how it records the required information as long as the content of the information specified in Sections 3.1 and 3.2 is maintained in a clear and legible format, and in a manner that allows the FSC easy access to this information.

3.3. Client Categorisation

A firm must keep a record, at the time of categorisation, of each notification and each agreement made when categorising its clients.

A record must be made in relation to:

- The categorisation established for the client, including sufficient information to support that categorisation;
- Evidence of dispatch to the client of any notice required to be made;
- A copy of any agreement entered into with the client.

3.4. List of minimum records

The FSC is obliged to establish and maintain a list of the minimum records that firms are required to keep. The list overleaf provides details of the period for which a firm must maintain records and may be amended as deemed suitable.



DOCUMENT	WHEN RECORD IS TO BE MADE	Retention period (years)
Accounting		
Records and accounts to enable the firm to distinguish financial instruments held for one client from those held for another and the firm's own.	Ongoing	As specified in the Financial Services (Accounting and Financial) Regulations
Agreements		
Documents setting out rights and obligations between the firm and the client.	From date of agreement	Duration of the relationship or 5 years, whichever is the longest.
Client categorisation and supporting information, evidence of dispatch to client of any notice (the notice itself where this differs from standard form) and a copy of any agreement entered into.	From time of categorisation	From when the firm ceases to carry on business with or for that client: 5 years.
Costs		
Fee, commission or non-monetary benefit.	When benefit is given	5 years.
Marketing		
Financial promotions communicated or approved.	When communicated or approved	5 years.
Organisation		
Details of each complaint received by a firm and the measures taken for its resolution.	Ongoing	5 years.
Details of the instances in which a conflict has arisen or may arise, stating in particular the services and activities where it has been identified.	When identified	5 years
Firm's business and internal organisation, including all services and transactions.	Ongoing	5 years.
Services		
Data relating to transactions in financial instruments, including the identity of the client and information required under the Money Laundering Directive.	Ongoing	5 years.



Details of the kinds of service and activities carried out by the firm in which a conflict of interest has arisen or may arise.	Ongoing	5 years.
Statements/Notices		
Details of the personal transaction notified to the firm.	From date of notification	5 years.
Copy of execution confirmation notices.	From date of despatch to client	5 years.
A copy of the periodic statement sent to a client.	From date of despatch to client	5 years.
Details of orders received from clients or decisions to deal.	Immediately on reception of order from client or decision to deal	5 years.
Details of orders executed for clients.	Immediately after executing a client order or receiving confirmation that an order has been executed	5 years.
Details of orders transmitted for execution	Immediately after transmitting the order for execution	5 years.
Standard form notice and agreement to clients.	From when standard form is first used.	Relevant period from when the firm ceases to carry on business with clients under that standard form.

3.5. Organisational requirements

Organisational requirements must be followed to ensure that the firm has effective control and safeguard arrangements for its information processing systems.

Taking into account the nature, scale and complexity of the business of the firm, and the nature and range of investment services and activities undertaken in the course of that business, a firm must:

- Establish implement and maintain decision-making procedures and an organisational structure which clearly, and in a documented manner, specifies reporting lines and allocates functions and responsibilities.
- Ensure that relevant persons⁹ are aware of the procedures which must be followed for the proper discharge of their responsibilities.

⁹ Is defined under the Regulations as any of the following (a) a director, partner or equivalent, manager or tied agent of the firm; (b) a director, partner or equivalent, or manager of any tied agent of the firm; (c) an



- Establish, implement and maintain adequate internal control mechanisms designed to secure compliance with decisions and procedures at all levels of the firm.
- Employ personnel with the skills, knowledge and expertise necessary for the discharge of the responsibilities allocated to them.
- Establish, implement and maintain effective internal reporting and communication of information at all relevant levels.
- Maintain adequate and orderly records of its business and internal organisation.
- Ensure that the performance of multiple functions by relevant persons do not, and is not likely to, prevent those persons from discharging any particular function soundly, honestly and professionally

The systems and procedures employed by a firm must be adequate to safeguard the security, integrity and confidentiality of information. Firms must adopt an adequate business continuity policy, aimed at ensuring the preservation (or timely recovery) of essential data and functions in the event of an interruption to their systems and procedures.

All systems, internal control mechanisms and arrangements must be monitored, and regularly evaluated, with the appropriate measures taken to address any deficiencies.

employee of the firm or of a tied agent of the firm, as well as any other natural person whose services are placed at the disposal and under the control of the firm or a tied agent of the firm and who is involved in the provision by the firm of investment services and activities; (d) a natural person who is directly involved in the provision of services to the firm or its tied agent under an outsourcing arrangement for the purpose of the provision by the firm of investment services and activities”.