

## Chapter 4

### Sales Process and Selling Practices

#### **Introduction**

When selling their Products and Services to Clients, Regulated Persons have an obligation to act honestly, fairly and in accordance with the best interest of such Clients. They must also behave with utmost good faith, integrity, due skill, care and diligence vis-à-vis their Clients. Accordingly, Regulated Persons are required to do everything which is possible to satisfy the needs and requirements of their Clients and shall place the interests of the latter before all other considerations.

In particular, Regulated Persons which fall under points (i) or (ii) of the definition of “Regulated Person” in the Glossary to these Rules are obliged to classify their clients as Eligible Counterparties, Professional Clients or Retail Clients. This classification is important because it reflects the level of protection given to such clients. Accordingly, Eligible Counterparties are afforded the least level of protection because they are deemed to be very knowledgeable about and experienced in the Products and Services which the Regulated Person is offering. On the other hand, Retail Clients are afforded the greatest amount of protection because they are deemed to possess little, if any, knowledge and experience in the Services and Products concerned.

Furthermore, when providing Advice or Portfolio Management Services with respect to Financial Instruments and/or Insurance Based Investment Products, Regulated Persons are required to carry out a suitability assessment. This is done to establish whether a particular Financial Instrument or Insurance Based Investment Product meets the objectives of the Client, whether the client can withstand the proposed investment in the light of his/her financial circumstance, and whether the latter has sufficient knowledge and experience in such Financial Instruments or Insurance Based Investment Products. When the Regulated Person is offering Services other than portfolio management and advice in relation to Financial Instruments and Insurance Based Investment Products, it is required to carry out an assessment to ensure that the Client has sufficient knowledge and experience in the said Instruments or Insurance Based Investment Products. **The ‘promote and sell’ regime which featured in Investment Services Rules for**

**Investment Services Providers is hereby being abolished and all Services must be offered either on an advisory basis or on a non-advisory basis.**

Closely related, but separate, to the overall information and disclosure requirements are the rules relating to client agreements. The requirement of having a written (or equivalent) agreement between Regulated Persons and Clients is considered to be important in providing a high level of legal certainty. In fact, although until now Regulated Persons were not required to enter into a written (or equivalent) agreement with Professional clients, this was nevertheless a common practice adopted on the market.

This Chapter also deals with the requirement for Regulated Persons to keep a record including the document or documents agreed between the Regulated Person and the Client setting out the rights and obligations of the parties, as well as any other terms on which the Regulated Person will provide services to the client. These Rules also set out a requirement for Regulated Persons who provide an investment service or certain specific ancillary services to both Retail and Professional Clients, to enter in a written basic agreement, in paper or another durable medium, which agreement should set out the essential rights and obligations of the Regulated Person and the Client to whom such service is being provided. This requirement has also been extended to Regulated Persons offering Advice, however only when such Regulated Person provides a periodic assessment of the suitability of the Financial instrument or Service being recommended to the Client. Moreover, this Chapter also provides a clearer indication as to what constitutes the 'essential rights and obligations' which should be covered by the written agreement.

Finally, this Chapter also contains a Section regulating the manner in which Regulated Persons should handle complaints by their clients.

## **Section 1: General Principles**

### **Application**

- R.4.1.1 The Rules and the relative Guidance set out under Part A are applicable to all Regulated Persons.
- R.4.1.2 The Rules set out under Part B are applicable to persons falling under point (iv) of the definition of 'Regulated Person' in the Glossary to these Rules.
- R.4.1.3 The Rules set out under Part C are applicable to Regulated Persons falling under point (i) of the definition of Regulated Person in the Glossary to these Rules.

### **Part A: Rules Applicable to all Regulated Persons**

#### General Principles

- R.4.1.4 When providing Products, Services and/or, where appropriate, Ancillary Services to Clients, a Regulated Person shall:
- a) Act honestly, fairly and professionally in accordance with the best interests of its Clients;
  - b) At all times carry out the regulated activities with utmost good faith, integrity, due skill, care and diligence;
  - c) Do everything which is reasonably possible to satisfy the needs and requirements of its Clients and shall place the interests of those Clients before all other considerations. Subject to these requirements and interests, a Regulated Person shall have proper regard for others;
- R.4.1.5 Regulated Persons must ensure that they abide by the following requirements:
- a) They review their business model and strategy on a regular basis so as to ensure that the conduct of their business and the manner in which they treat their clients is at the centre of their operations;
  - b) Identify conduct risks and set up processes to ensure that such risks are measured, mitigated and monitored;

- c) Conduct risks are known to key personnel within the Regulated Person, including members of the Board of Directors. Members of the Board of Directors may be required to address any concern/s the Authority may have with respect to the Regulated Persons operation;
- d) There are clear level of responsibilities, clear establishment of target markets, appropriate distribution channels, and clear communication with Clients;
- e) They monitor the performance management, employee development and reward programmes incentivising staff members to ensure that the way a Regulated Person remunerates or assesses performance of its staff does not conflict with its duty to act in the best interests of its Clients.

R.4.1.6 The Management Body of the Regulated Person shall ensure that it, in all the decisions it takes with respect to the operation of the Regulated Person, it gives paramount importance to the conduct of its business vis –a –vis the clients of the Regulated Person.

R. 4.1.7 In order to comply with the requirements of Rule 4.1.4 above, a Regulated Person shall, *inter alia*:

- a) Seek from its Clients information relevant to the Product or Service requested;
- b) In the completion of any document, make it clear that all the answers or statements regarding the Client’s personal details and circumstances are the Client’s own responsibility. The Client should always be required to assume responsibility for the completed document and advised that, incomplete and/or inaccurate information may prejudice the Client’s rights and, in the case of an insurance contract, may result in a claim being repudiated;
- c) Not withhold from the Client any written evidence or documentation relating to the Product or Service or Ancillary Service without adequate and justifiable reasons being disclosed in writing and without delay to the Client;
- d) Not recklessly, negligently or deliberately mislead a Clients to the real or perceived advantages or disadvantages of any Product, Service or Ancillary Service;

- e) Ensure that all instructions from or on behalf of a Client are processed properly and promptly;
- f) Have proper regard for the wishes of a Client who seeks to terminate any agreement with it to carry out business;
- g) Seek to avoid conflicts of interest;
- h) Not exert undue pressure or undue influence on a Client ;
- i) Give Advice only on those Products, Services or Ancillary Services in which the Regulated Person is knowledgeable and seek or recommend other specialist Advice when necessary;
- j) Treat all information supplied by the Client with complete confidentiality
- m) Not requesting Clients to sign declarations to the effect that s/he has understood and accepts certain features of the product or that s/he is relying on his/her own skill, judgement and expertise in order to make the investment in Products when it is the obligation of the Regulated Person to assess the suitability or the appropriateness of such Products vis-à-vis the Client.

R.4.1.8 Any information acquired by a Regulated Person from a Client shall not be used or disclosed except in the normal course of negotiating, maintaining or renewing a Product or Service for that Client or in accordance with the provisions of specific legislation or unless the consent of the Client has been obtained.

R.4.1.9 Where a Regulated Person deals with a person who is acting for a Client under a power of attorney, the Regulated Person shall:

- a) obtain a certified copy of the power of attorney;
- b) ensure that the power of attorney allows the person to act on the Client's behalf; and
- c) operate within the limitations set out in the power of attorney.

R.4.1.10 When providing Products ,Services or Ancillary Services from a place of business or from any other place accessible to the public, the Regulated Person shall display the licensing, authorisation, enrolment or registration certificate or an official copy thereof issued by the Authority, in a prominent position in that place and in a part thereof to which the public has access.

R.4.1.11 The Regulated Person shall:

- (a) Acknowledge receipt to the Client of all money received in connection with a Product, Service or Ancillary Service and that any charge or fee imposed shall be disclosed separately.

Provided in the case of an insurance contract, the Regulated Person shall distinguish the premium, document duty and motor vehicle licence fee, where applicable, and amount due by the Client and the disclosures required in this Rule may be shown either on the invoice or on the receipt which would then refer to the invoice ;

- (b) Have printed on the receipt or contract note, the full name, business address, licence number (where applicable) of the Regulated Person;
- (c) Show the full name and address and official means of identification of the Client in the receipt, invoice or contract note;
- (d) Make reference in the receipt, invoice or contract note to the type of Product or Service in respect of which the money was paid including, where applicable, the policy number or other reference number;
- (e) Show, on the receipt, invoice or contract note, the name and address of the Product manufacturer offering or issuing the Product;
- (f) Sign and date the receipt or contract note and give a copy to the Client.

The original receipt or contract note shall be given to, and be retained by, the Client.

R.4.1.12 A Regulated Person shall not –

- (a) Make inaccurate or unfair criticism of any other Regulated Person or any Product offered by such other Regulated Persons ;
- (b) Make comparisons with other types of Products or Services unless the differing characteristics of each Product or Service are made clear;
- (c) Persuade or attempt to persuade a Client to surrender or cancel any Product or Service which such Client may have already purchased, if such surrender or cancellation is not in the best interest of the client.

- (d) In general, entice Clients to purchase products or services it offers by giving or promising to give gifts to such Clients. Any gifts which the Regulated Person may offer its Clients must be related to the Product or Service being offered and/or enhance the value thereof. Such gifts should not be of a substantial value

*G.4.1.1 In offering gifts to Clients, Regulated Persons should have regard to the following:*

- *the value of such gifts,*
- *the timing of when such gifts are given (e.g. gifts should not be given at appointment stage, prior to the provision of the Product or Service).*
- *The relation between the nature of the gift and the Services/Products being sold by the Regulated Person and the possibility of such gift to enhance the Product or Service being provided.*

*Any gifts offered by Regulated Persons to their Clients should:*

- *Not be of a high value (e.g. cruises, holidays, jewellery, electronic gadgets);*
- *Not be given at the stage where the client merely makes an appointment with the Regulated Person with a view to discuss a Product or Service offered by the latter;*
- *be related to the nature of the service being provided or enhance the nature of the Product or Service (for example roadside membership assistance with motor insurance would be acceptable).*

R.4.1.13 A Regulated Person shall explain to the Client words and expressions of a technical nature which are used in a document in either the Maltese or the English language depending on which language the Client understands better.

*Personal visits and contact with Clients*

R.4.1.14 Regulated Person shall avoid making unsolicited or unarranged calls to Clients unless otherwise requested by a Client. When such calls are made the Regulated Person shall identify himself/herself by showing identification documents. The Regulated Person shall make known his regulated status (and disclose the name and any other relevant particulars of the Regulated Person, licence number (where applicable) and show the Regulated Person's business card). In the case of a Tied

Insurance Intermediary or a Tied Agent, the Regulated Person shall disclose the fact that that he/she is a Tied Insurance Intermediary of another Regulated Person.

R.4.1.15 The Regulated Person shall ensure that staff who deal with Clients only engage in unsolicited calls (“cold calls”) on condition that they:

- a) Are civil and considerate,
- b) Do not use undue pressure, deception or artificiality,
- c) Make plain their purpose,
- d) Avoid contacts during unsocial hours observe the Conduct of Business Rules in this section and ensure that no deals are finalised on the sole basis of a telephone conversation unless previously agreed otherwise in writing with the Client, and
- e) Do not promote any complex products by means of cold calling;

R.4.1.16 The Regulated Person shall ensure that staff engaged in the sale of Products do not harass or cajole Clients or force them to purchase a Product or Service. The sales person shall not continue with the sales dialogue if requested by the Client to desist.

R.4.1.17 The Regulated Person shall not provide Services and Products in the home of the Client without having obtaining the client’s explicit consent therefor. The Regulated Person shall keep record of such consent accordingly.

Provided that the requirements of this Rule shall not extend to visits carried out by Regulated Persons falling under t point (iii) and (iv) of the definition of Regulated Person in the Glossary to this Rulebook, for the purposes of carrying out surveys for insurance purposes.

R.4.1.18 Where the Regulated Person engages in more than one Regulated Activity, it shall not make use of Client information held by it or any other entity within its group, with respect to the provision of a particular Regulated Activity, for the purposes of marketing another Regulated Activity to such Clients unless it obtains the explicit consent of the Client in question.

The Regulated Person shall accompany the request for such consent with a warning that the nature and risks of the Products and Services which are going to be offered to the Client differ from those of the Products and Services which have been offered to the Client to date. The Regulated Person should also warn Clients that they should seek to ensure that they clearly understand all the relevant risks before purchasing any new Products and/or Services.

#### Telephone Contact with Clients

- R.4.1.19 A Regulated Person may make telephone contact with a Client who is an existing Client, only if:
- (a) The Regulated Person has, within the previous twelve months, provided that Client with a Product or Service similar to the purpose of the telephone contact; or
  - (b) The Client holds a Product, which requires the Regulated Person to maintain contact with the Client in relation to that Product; and
  - (c) The Client has given his or her consent to being contacted in this way by the Regulated Person.
- R.4.1.20 A Regulated Person shall ensure that, where it makes a telephone contact on the basis of a referral, it retains a record of the referral.

Personal Visits and Telephone Contact

- R.4.1.21 When making a personal visit or telephone contact in accordance with this Rule Book, the representative of a Regulated Person shall immediately and in the following order:
- (a) Identify himself or herself by name, and the name of the Regulated Person on whose behalf he or she is being contacted and the commercial purpose of the contact;
  - (b) Inform the Client that the meeting is being recorded, if this is the case;
  - (c) Where relevant, disclose to the Client, the source of the business lead or referral supporting the telephone contact;
  - (d) Explain the purpose(s) for which a personal visit is to be/being made, including the types of Products and Services to be discussed during the personal visit;
- R.4.1.22 A Regulated Person shall abide by a request from a Client not to make a personal visit or telephone contact to him or her again and this request shall be recorded by the Regulated Person.

Record Keeping Requirements

R 4.1.23 In addition to any record keeping requirements resulting from this Rulebook the Regulated Persons shall record in a Durable medium written minutes or notes all relevant information related to relevant face-to face conversations with Clients. The information recorded is at the discretion of the Regulated Person but shall include at least the following:

- a) Date of meeting;
- b) Location of meeting;
- c) Identity of the attendees;
- d) Initiator of the meeting;
- e) The reason as to why the unsolicited call was made; and
- f) Other relevant information about the order or the insurance contract entered into.

*G.4.1.2 For the purposes of this Rule, an email communication which satisfies the above requirements with respect to content would be considered sufficient.*

**Part B: Rules applicable to persons falling under point (iv) of the definition of Regulated Person in the Glossary to these Rules.**

R.4.1.24 For the purposes of this Part, the term Regulated Person shall mean a person falling under point (iv) of the definition of Regulated Person in the Glossary to these Rules.

R.4.1.25 If the Client advises the Regulated Person enrolled as a Tied Insurance Intermediary of an incident which might give rise to a claim, the Regulated Person shall, without delay, inform the insurance undertaking of that incident and give prompt Advice to the Client to pursue the matter further with the insurance undertaking concerned.

R.4.1.26 Where a Regulated Person enrolled as a tied insurance intermediary is a credit institution, and, in the course of its transactions:

- (a) the Regulated Person is in the process of granting credit or loan facilities to a Client against security of a policy of life assurance, or

- (b) carries out tied insurance intermediaries activities in general business classes 1, 2 and 16 restricted to payment protection insurance contracts issued in relation to loan repayments and class 14 restricted to export credit f insurance contracts,

that Regulated Person shall refrain from exerting any undue or improper pressure on its Clients but shall allow them the greatest possible freedom of choice with regard to such Insurance contracts and shall, in this context, abide by the requirements of Part E of in Chapter 1 (Disclosures) of this Rulebook.

**Part C: Rules applicable to persons falling under point (i) of the definition of Regulated Person in the Glossary to these Rules.**

R.4.1.27 For the purposes of this Part, the term Regulated Person shall mean a person falling under point (i) of the definition of Regulated Person in the Glossary to these Rules.

R.4.1.28 A Regulated Person may appoint a Tied Agent which is:

- (a) established in Malta , provided that such Tied Agent is registered by the Authority , or
- (b) established in aMember State or EEA State provided that such Tied Agent is either:
  - i. registered as a Tied Agent in such Member State or EEA State, or
  - ii. registered in Malta if the Member State or EEA State in which such Tied Agent is established does not provide for the registration of Tied Agents within its jurisdiction.

R.4.1.29 The responsibility for the control and monitoring of the activities of Tied Agents rests with the senior management of the Regulated Person. In this regard, the Regulated Person shall ensure that the Tied Agents it appoints:

- (a) Report to it on a regular basis with respect to the activities carried out by the Tied Agent;

- (b) Pass on to the Regulated Person all the necessary documentation for processing and/or record keeping purposes, promptly;
- (c) Continue to satisfy the registration requirements and the eligibility criteria referred in Part A of the Investment Services Rules for Investment Services Providers on an on-going basis;
- (d) Do not hold or control clients' money or assets;
- (e) Comply with the requirements of the Conduct of Business Rules and Investment Services Rules for Investment Services Providers which are relevant to the activities they carry out on behalf of the Regulated Person. Particular attention should be given by the Regulated Person to ensuring compliance, by the Tied Agent, with the relevant requirements in this Section and in Chapter 1 (Disclosures).

R.4.1.30 The Regulated Person shall ensure that the Tied Agents it appoints, shall, where appropriate make a prior appointment to call Clients.

R.4.1.31 The Regulated Person shall look into any concerns that may arise at any time regarding its Tied Agents' fit and proper status and take the necessary action. The necessary action may include, for example, increased monitoring or, if appropriate, suspension or termination of the appointment. In all cases, the Regulated Person should report any concerns it may have in this regard, to the Authority, without delay.

R.4.1.32 The Regulated Person shall take reasonable steps to ensure that each of its Tied Agents:

- (a) carry on only those activities which are permissible in terms of the definition of Tied Agent in the Glossary to these Rules and provided such activities are in line with the terms of the terms of the Tied Agent's appointment by the Regulated Person;
- (b) carries on the activity for which the Regulated Person has accepted responsibility in a way which is, and is held out as being, clearly distinct from any of the Tied Agent's other business, irrespective of whether such other business is regulated or not.

- R.4.1.33 The Regulated Person will be held responsible for any breaches of the applicable Rules committed by any of the Tied Agents it appoints.
- R.4.1.34 When carrying out Tied Agent activities from a place of business or from any other place accessible to the public, the Regulated Person shall require the Tied Agent to display in a prominent position in that place, or in a part thereof to which the public has access, the certificate of registration or an official copy thereof issued by the Authority.
- R.4.1.35 The Regulated Person shall maintain all records, including those relating to customer due diligence” procedures and evidence that the Tied Agent has carried out the necessary suitability and/or appropriateness tests in terms of this Rulebook as necessary pertaining to the activities performed by the Tied Agents on the Regulated Person’s behalf, as are necessary to demonstrate compliance by the Tied Agent with the relevant provision of these Rules. Such records shall be made available to MFSA officials during Compliance Visits.
- R.4.1.36 The Regulated Person shall ensure that its Tied Agents:
- i. do not act as such for other Regulated Persons; and
  - ii. are not involved in any activities which may give rise to a conflict of interest which could be detrimental to the Regulated Person’s clients.
- R.4.1.37 The Regulated Person is to inform the Authority of any decision to terminate a Tied Agent’s appointment and shall confirm whether such a decision was taken due to any issues of a regulatory nature or concern.

## Section 2: Client Categorisation

### Application

R.4.2.1 For the purposes of this Section, the term 'Regulated Person' shall refer to persons falling under points (i) or (ii) of the definition of Regulated Person in the Glossary.

### General Rules

R.4.2.2 A Regulated Person shall, before providing a Service within the meaning of points (i) and (ii) of the definition of Service in the Glossary to these Rules, classify a Client to whom the Service is to be offered as a Professional Client, as a Retail Client or as an Eligible Counterparty.

*G.4.2.1 A Regulated Person shall allow a Client to request re-categorisation as a Client that benefits from a higher degree of protection. In such cases, a Regulated Person shall notify a Client that is categorised as a professional Client or an eligible counterparty of its right to request a different categorisation whether or not the Regulated Person will agree to such requests.*

R.4.2.3 A Regulated Person shall:

- a) Notify a new Client of its categorisation as a Retail Client, Professional Client or Eligible Counterparty in accordance with this chapter; and
- b) Prior to the provision of Services, inform a Client in a durable medium about:
  - i. any right which that Client has to request a different categorisation; and
  - ii. any limitations to the level of Client protection that such a different categorisation would entail.

### Professional Clients

R.4.2.4 A Professional Client may be either a *per se* professional Client or an Elective Professional Client.

R.4.2.5 The Regulated Person shall inform Professional Clients that they are responsible for keeping the Regulated Person informed about any change, which could affect

their current categorisation. Should the Regulated Person become aware however that the Client no longer fulfils the initial conditions, which made him/her eligible for professional treatment, the Regulated Person shall take appropriate action.

#### Per Se Professional Clients

R.4.2.6 The Regulated Person shall deem a person which falls under the definition of Professional Client in terms of the Glossary to these Rules as a *Per Se Professional Client* unless and to the extent that it may be considered to be an Eligible Counterparty or is given a different categorisation under this Section.

#### Elective Professional Clients

R.4.2.7 A Regulated Person may treat a Client as an Elective Professional Client if it complies with (a) , (b) and (c) below:

- a) The Regulated Person undertakes an adequate assessment of the expertise, experience and knowledge of the Client, undertaken by the Regulated Person, gives reasonable assurance, in the light of the nature of the transactions or Services envisaged, that the Client is capable of making his own investment decisions and of understanding the risks involved (“the qualitative test”).
- b) In the course of the assessment referred to (a) above, as a minimum, two of the following criteria shall be satisfied:
  - i. The Client has carried out transactions, in significant size, on the relevant market at an average frequency of 10 per quarter of the previous four quarters;
  - ii. The size of the Client’s Instrument portfolio, defined as including cash deposits and Instruments exceeds EUR 500 000;
  - iii. The Client works or, which requires knowledge of the transactions or Services envisaged.
  - iv. The Client has worked in the financial sector for at least one year in a professional position ; (“the quantitative test”); and

- c) The following procedure is followed:
- i. they shall state in writing to the Regulated Person that they wish to be treated as a Professional Client, either generally or in respect of a particular Service or transaction or type of transaction or Product;
  - ii. the Regulated Person shall give such Clients a clear written warning of the protections and investor compensation rights they may lose;
  - iii. Clients shall state in writing in a separate document from the contract, that they are aware of the consequences of losing such protections.

R.4.2.8 If the Client is not a natural person, the qualitative test should be performed in relation to the person authorised to carry out transactions on its behalf.

*G.4.2.2 The fit and proper assessment applied to senior officials and directors of Regulated Persons is an example of the assessment of expertise and knowledge involved in the qualitative test.*

R.4.2.9 Before deciding to accept any request for re-categorisation as an elective professional Client, a Regulated Person must take all reasonable steps to ensure that the Client requesting to be treated as an elective professional Client satisfies the qualitative test and the quantitative test referred to above.

*G.4.2.3 Professional Clients are responsible for keeping the Regulated Person informed about any change that could affect their current categorisation.*

R.4.2.10 If a Regulated Person becomes aware that a Client no longer fulfils the initial conditions that made it eligible for categorisation as an elective professional Client, the Regulated Person must take the appropriate action. Where such appropriate action involves re-categorising that Client as a Retail Client, the Regulated Person must notify that Client of its new categorisation.

*Eligible Counterparties.*

R.4.2.11 An Eligible Counterparty is a Client that is either a per se Eligible Counterparty or an Elective Eligible Counterparty.

A Client can only be an Eligible Counterparty in relation to Eligible Counterparty business.

Per Se Eligible Counterparties

R.4.2.12 Regulated Persons authorised to execute orders on behalf of Clients and/or to deal on own account and/or to receive and transmit orders, may bring about or enter into transactions with Eligible Counterparties without being obliged to comply with the following rules in respect of those transactions or in respect of any ancillary service directly relating to those transactions: R.3.2, R.2.7, R.4.4.8 R.1.2.5, R.4.4.50, R.4.3.6, R.3.37, R.3.10. R.3.24, R.1.4.9, R.1.4.10, R.4.4.5, R.4.4.12, R.4.4.13, R.4.4.35, R.4.4.25, R.4.4.39, R.4.4.41, R.4.4.52, R.5.3, R.5.26, R.5.30, R.5.32, R.5.49, R.5.6, R.5.33. R.1.3.14, R.5.23. R.5.11 R.5.35, R.5.15 R.5.17.

R.4.2.13 Each of the following is an Eligible Counterparty (including an entity that is not from an Member State or an EEA State that is equivalent to any of the following) unless and to the extent it is given a different categorisation under this Chapter:

- a) An investment firm
- b) A credit institution
- c) An insurance company;
- d) A UCITS or a UCITS management company;
- e) A pension fund or a pension fund management company;
- f) Another financial institution authorized or regulated under EU Law or the national law of an EU Member State;
- g) Undertakings which are exempt from the requirements of the MIFID in terms of Article 2 (1) (k) and (l) thereof;
- h) A national government and its corresponding offices including public bodies that deal with public debt;
- i) Central bank and supranational organization.

R.4.2.14 Classification as an Eligible Counterparty by a Regulated Person shall be without prejudice to the right of such entities to request, either on a general form or on a trade-by-trade basis, treatment as Professional or Retail Clients.

Elective Eligible Counterparty

R.4.2.15 In addition to the categories which are explicitly set out in R. 4.2.1.13 above, an undertaking falling within a category of Clients who are to be considered Professional clients as defined in the Glossary to this Rulebook may be recognised as Eligible Counterparties

R.4.2.16 Regulated Persons may recognise and treat as Eligible Counterparties, other undertakings meeting pre-determined proportionate requirement, including quantitative thresholds. In the event of a transaction where the proposed Counterparties are located in different jurisdictions, the Regulated Person shall defer to the status of the Client undertaking as determined by the law or measures of the Member State in which that undertaking is established.

When it enters into a transaction in with a Client undertaking in accordance with this Rule, the Regulated Person shall obtain the express confirmation from the Client that it agrees to be treated as an Eligible Counterparty. The Regulated Person may obtain such confirmation either in the form of a general agreement or in respect of each individual case.

R. 4.2.17 Where a client requests to be treated as an eligible counterparty, in accordance with Rule, 4.2.16 (above), the following procedure shall be followed:

- a) The Regulated Person shall provide the Client with a clear written warning of the consequences for the Client of such a request, including the protections they may lose ;
- b) The Client shall confirm in writing the request to be treated as an eligible counterparty either generally or in respect of one or more Services or a transaction or type of transaction or product and that they are aware of the consequences of the protection they may lose as a result of the request.

A Regulated Person shall request the Client to confirm, in writing, that it wishes to be treated as an Elective Eligible Counterparty either generally or in respect of a particular Service or transaction or type of transaction or

Product and that it is aware of the consequences in terms of the protections it may lose.

#### Transactions Executed with Eligible Counterparties

- R.4.2.18 The Regulated person may treat as Eligible Counterparties third country entities equivalent to those categories of entities as referred to in the definition of “Eligible Counterparty” in the Glossary .
- R.4.2.19 A Regulated Person may also recognise as Eligible Counterparties third country undertakings such as those referred to in R.4.2.16 on the same conditions and subject to the same requirements as those laid down in R.4.2.16 and R.4.2.17.
- R.4.2.20 In its relationship with Eligible Counterparties Regulated Person shall act honestly, fairly and professionally and communicate in a way which is fair, clear and not misleading, taking into account the nature of the eligible counterparty and of its business.

#### **Retail Clients**

- R.4.2.21 The Regulated Person shall treat as a Retail Client any Client which does not satisfy the requirements of either the classification of an “Eligible Counterparty” or of the Professional Investor, or any Client who has requested to be treated as a Retail Client

#### Higher Level of Protection

- R.4.2.22 Where pursuant to Rule 4.2.15 a per se Eligible Counterparty requests treatment as a client whose business with a Regulated Person is subject to Rules of Section 4 of this Chapter, R.1.2.56, R.1.3.14, R.5.3, R.5.6, R.5.10, R.5.13, R.5.14, R.5.20, R.5.30-R.5.32, R.5.34 , and 5.36 , the request should be made in writing, and shall indicate whether the treatment as retail client or professional client refers to one

or more investment services or transactions, or one or more types of transaction or product.

R.4.2.23 In the cases referred to in R.4.4.22 above, the following procedure shall be followed:

(a) The Regulated Person shall provide the client with a clear written warning of the consequences of the client of such a request, including the protections they may lose;

(b) The client shall confirm in writing the request to be treated as an Eligible Counterparty either generally or in respect of one or more services or a transaction or type of transaction or product and that they are aware of the consequences of the protection they may lose as a result of the request.

R.4.2.24 Where an Eligible Counterparty requests treatment as a client whose business with a Regulated Person in the Glossary to these Rules is subject to Rules of Section 4 of this Chapter, R.1.2.56, R.1.3.14, R.5.3, R.5.6, R.5.10, R.5.13, R.5.14, R.5.20, R.5.30-R.5.32, R.5.34, and 5.36 but does not expressly request treatment as a retail client, the said Regulated Person shall treat that Eligible Counterparty as a Professional Client.

R.4.2.25 Where a per se Eligible Counterparty expressly requested treatment as a Retail Client, the Regulated person shall treat the eligible counterparty as a retail client, applying the provisions in respect of non-professional treatment specified in the second, third and fourth sub-paragraphs of the definition of “professional client” in the Glossary to this Rulebook.

R.4.2.26 If a per se Professional Client or a per se Eligible Counterparty requests treatment as a Retail Client, the Client will be classified as a Retail Client if it enters into a written agreement with the Regulated Person to the effect that it will not be treated as a professional Client or Eligible Counterparty for the purposes of the applicable conduct of business regime.

This agreement shall specify the scope of the re-categorisation, such as whether it applies to one or more particular services or transactions, to one or more types of Product or transactions.

Policies and Procedures to Categorise Clients

R.4.2.27 The Regulated Person shall implement appropriate written internal policies and procedures to categorise Clients.

G.4.2.4 *The Regulated Person should have proper organisational requirements enabling it to classify Clients in a quick and easy manner. This notwithstanding, it should be ensured that the classification given by the Regulated Person is appropriate and any Services offered to the Client are to be provided on the basis of that classification.*

G.4.2.5 *A Regulated Person's Client classification policy should cater for the procedure which the Regulated Person's employees shall adopt in order to classify Clients under one of the following sub-headings (a), (b) or (c) below. Such procedures may be structured as follows:*

**(a) First Tier Classification: - Eligible Counterparties**

*Does the **Client** have any one of the following statuses?*

- i) An investment firm;*
- ii) A credit institution;*
- iii) An insurance company;*
- iv) A UCITS or a UCITS management company;*
- v) A pension fund or a pension fund management company;*
- vi) Another financial institution authorized or regulated under EU Law or the national law of an EU Member State;*
- vii) Undertakings which are exempt from the requirements of the MIFID in terms of Article 2 (1) (k) and (l) thereof;*

- viii) *A national government and its corresponding offices including public bodies that deal with public debt;*
- ix) *Central bank and supranational organization.*

*If so, the Client may be classified as an 'eligible counterparty'.*

**(b) Second Tier Classification: - Professional Clients**

**Professional Client Test – No 1:**

*Does the **Client** fall in any one of the following categories?*

**[1]** *An entity which is required to be authorised or regulated to operate in financial markets. The list below should be understood as including: [i] all authorised entities carrying out the characteristic activities of the entities mentioned: [ii] entities authorised by a Member State under a Directive, [iii] entities authorised or regulated by a Member State without reference to a Directive, and [iv] entities authorised or regulated by a non- Member State:*

- (a) *Credit Institutions;*
- (b) *Investment Firms;*
- (c) *Other authorised or regulated financial institutions;*
- (d) *Insurance Companies;*
- (e) *Collective investment schemes and management companies of such schemes;*
- (f) *Pension funds and management companies of such funds;*
- (g) *Commodity and commodity derivatives dealers;*
- (h) *Locals;*
- (i) *Other institutional investors.*

**[2]** *Is the Client an entity which meets two of the following requirements?*

- i) *Balance sheet total: EUR 20,000,000*
- ii) *Net turnover: EUR 40,000,000*
- iii) *Own funds: EUR 2,000,000*

**[3]** National and regional governments, public bodies that manage public debt, Central banks, international and supranational institutions such as the World Bank, the IMF, the ECB, the EIB and other similar international organisations.

**[4]** Other institutional investors whose main activity is to invest in financial instruments, including entities dedicated to the securitisation of assets or other financing transactions.

If the Client falls under anyone of [1] – [4] above, it may be classified as a ‘Professional Client’.

Professional Client Test – No 2:

A Client who does not fall under any of the above categories may also be treated as a professional Client upon request if further to an assessment, such Client is found to possess sufficient experience, knowledge and expertise to enable him/her to make his/her own investment decisions and properly assess the risks that such investment incurs.

In the course of this assessment, two of the following criteria should be satisfied:

- a) the Client invests at an average frequency of ten transactions per quarter during the previous four quarters, subject to the transactions being of a significant size;
- b) the Client’s financial instrument portfolio exceeds EUR 500,000;
- c) the Client has worked in the financial sector for at least one year in a professional position.

In addition to satisfying two of the above-mentioned criteria, Clients which have requested to be treated as Professional Clients shall:

- i) state in writing that they wish to be treated as a professional client, either generally or in respect of a particular investment Service or transaction or type of transaction or Product;

- ii) *be given a clear written warning of the protections and invest or compensation rights they may lose; and*
- iii) *state in writing in a separate document from the contract, that they are aware of the consequences of losing such protections.*

**(c) Third Tier Classification:- Retail Clients:**

*Clients who are not categorised as eligible counterparties or Professional Clients shall be classified as Retail Clients.*

**Record Keeping Requirements**

R.4.2.28 Without prejudice to the requirement of R.4.4.24, Records which set out the respective rights and obligations of the Regulated Person and the client under an agreement to provide services, or the terms on which the Regulated Person provides services to the Client, shall be retained for at least the duration of the relationship with the Client.

G.4.2.6 *A Regulated Person shall make a record in relation to each Client :*

- (a) *of the categorisation established for the Client under this section, including sufficient information to support that categorisation;*
- (b) *who elects to be treated as a Professional Client. Such record should include documentation evidencing satisfaction of the relevant requirements indicated in this Section;*
- (c) *of evidence of despatch to the Client of any notice/warning required under this section and a copy of the actual notice provided; and*
- (d) *of any agreement entered into with the Client under this section.*

G.4.2.7 *If a Regulated Person provides the same form of notice to more than one Client, it need not maintain a separate copy of it for each Client, provided it keeps evidence of despatch*

**Vulnerable Clients**

*G.4.2.8 A vulnerable client is a natural person who is a Retail Client and who:*

- a) has the capacity to make his or her own decisions but who, because of individual circumstances, may require assistance to do so (for example, hearing impaired or visually impaired persons); and/or*
- b) has limited capacity to make his or her own decisions and who requires assistance to do so (for example, persons with intellectual disabilities or mental health difficulties).*

*G.4.2.9 A Regulated Person should recognise that vulnerability is not restricted to the client's situation but might actually be aggravated by the actions or processes of the Regulated Person itself. Examples could include complex telephone menu systems and automated services, with limited or no possibility for human interaction; or the provision of complex and lengthy information, making it hard for clients to differentiate between promotional material and important messages / warnings about products. Such occurrences could give rise to added pressures on vulnerable clients, thus resulting in consequential detriment.*

*G.4.2.10 In relation to vulnerable clients Regulated Persons should adopt more cautious practices in their operations. The following is an indicative list of what may constitute good practices to be adopted by a Regulated Person in this regard:-*

- a) Offering of clear and straightforward financial products which do not include any hidden surprises which might only surface in adverse situations;*
- b) Employing a marketing strategies which in no way exploit vulnerabilities;*
- c) Having a number of available options for communication in relation to the method of communication and delivery of service. Such means should be designed in an inclusive manner to meet the needs of different clients with varying circumstances;*

- d) Providing clients with tailored treatment in the event of a change in circumstances which would require a flexible approach;*
- e) Having procedures in place to escalate vulnerability issues to someone who has the authority and discretion to adapt terms and conditions to a particular situation;*
- f) Ensuring that vulnerable clients are given sufficient time in order to be able to assess and reflect upon the product or service that they are being sold, including any related terms and conditions.*

## Section 3 Advice and Non-Advice

### *Application*

- R.4.3.1 The Rules and the relative Guidance set out under Part A shall apply to all Regulated Persons.
- R.4.3.2 The Rules and the relative Guidance set out under Part B shall apply to persons falling under points (i), (ii) and (iv) of the definition of “Regulated Person” in the Glossary to these Rules.
- R.4.3.3 The Rules and relative Guidance set out Part C are applicable to Regulated Persons falling under point (i) of the definition of Regulated Persons in the Glossary to these Rules.

## Part A: Rules applicable to All Regulated Persons

### *General Principles*

- R.4.3.4 A Regulated Person shall be deemed to provide Advice for the purposes of these Rules if it provides a Personal Recommendation to a client, either or at the request of the Client in question or on its own initiative, with respect to Products.

### *G.4.3.1 There are three main elements to a Personal Recommendation:*

- *there shall be a recommendation;*
- *the recommendation shall be presented as suitable or purported to be suitable for the person to whom it is made or based on the person’s circumstances; and*
- *the recommendation shall relate to taking certain steps in respect of a particular Product or financial instrument, for example "I recommend that you buy XYZ Company shares".*

*Whether or not a Personal Recommendation is given depends in part on whether the client is led to think that one is being given. Therefore it is important for the Regulated Person to clearly indicate whether it is providing advice or not.. .*

- G.4.3.2 To establish whether an activity constitutes Advice, Regulated Persons should consider whether the process is limited to, and likely to be perceived by the Client*

*as assisting them to make their own choice of Product that has the particular features that the Client regards as important. Reference should also be made to Appendix 2 of this Chapter for further guidance as to what constitutes Advice*

- G.4.3.3 A Product might be presented as suitable to a Client either explicitly or implicitly. A Product would be explicitly presented as suitable if a Regulated Person were to say to a Client ‘this Product would be the best option for you’.*
- G.4.3.4 Where a Regulated Person provides only selective information to a Client, for example, when comparing one Product against another, or when a Client has indicated the benefits he seeks in a Product, such selective information, depending on the circumstances may amount to an implied recommendation and hence Advice.*
- G.4.3.5 If a Product was presented to a Client in some other way that would influence the Client to take a course of action in relation to a specific Product over others, this is likely to be an implicit recommendation.*
- G.4.3.6 A clear, prominent and understandable disclaimer stating that no Advice is being provided or that no recommendation is being made is unlikely to be sufficient to avoid having presented a recommendation for the purposes of determining whether Advice has actually been given. Accordingly, the fact that a Regulated Person states that its Product would suit a particular Client’s need and includes a disclaimer saying that this was not Advice, would not necessarily change the basic nature of the communication and it may still constitute a Personal Recommendation and hence the provision of Advice.*
- G.4.3.7 In clarifying the circumstances when a Personal recommendation is being given, a Regulated Person is expected to take into account the Questions and Answers entitled ‘Understanding the definition of Advice under MiFID’ as issued by the Committee of European Securities Regulators (CESR) . This Paper may be downloaded from ESMA’s website: [http://www.esma.europa.eu/mt/system/files/10\\_293.pdf](http://www.esma.europa.eu/mt/system/files/10_293.pdf) (copy and paste in browser).*
- G.4.3.8 The difference between ‘information’ and ‘Advice’ is the element of opinion or judgement on the part of the Regulated Person. In making a Personal recommendation, and hence providing Advice, the Regulated Person would need to make a judgement or assessment that would result in one or more Products being identified as suitable a Client , whether as a result of information that Client provides or otherwise.*

G.4.3.9 *Merely providing information to Clients should not itself normally amount to Advice, provided that the Client is left to exercise their own opinion on the action to take*

**Part B: Rules applicable to persons falling under points (i), (ii) or (iv) of the definition of “Regulated Person” in the Glossary to these Rules**

R.4.3.5 For the purposes of this Part, the term Regulated Person shall refer to a person falling under point (i), (ii) or (iv) of the definition of Regulated Person in the Glossary to these Rules.

*Regulated Persons providing Independent Advice*

R.4.3.6 Where a Regulated Person informs the Client that Advice is provided on an independent basis, that Regulated Person shall conduct a fair and comprehensive analysis of the market by assessing a sufficient range of Products available on the market which shall be sufficiently diverse with regard to their type and issuers or Product providers to ensure that the Client’s needs and objectives can be suitably met and shall not be limited to Products issued or provided by:

- (a) the Regulated Person itself or by entities having close links with the Regulated Person; or
- (b) other entities with which the Regulated Person has such close legal or economic relationships, such as contractual relationships, as to pose a risk of impairing the independent basis of the Advice provided.

**Part C: Rules applicable to persons falling under point (i) or (ii) of the definition of ‘Regulated Person’ in the Glossary to these Rules.**

R.4.3.7 For the purposes of this Part, the term Regulated Person shall refer to a person falling under point (i) or (ii) of the definition of Regulated Person in the Glossary to these Rules.

R.4.3.8 A Regulated Person informing a Client that Advice is provided on an independent basis shall define and implement a selection process to assess and compare a sufficient range of Products available on the market. The selection process should include all of the following elements:

- a) the number and variety of Products considered is proportionate to the scope of investment advice services offered by the Regulated Person;
- b) the number and variety of Products considered is adequately representative of Financial Instruments available on the market;
- c) the quantity of Products issued by the Regulated Person itself or by entities closely linked to the Regulated Person itself is proportionate to the total amount of Products considered; and
- d) the criteria for comparing the various Products should include all relevant aspects such as risks, costs and complexity as well as the characteristics of the Regulated Person's Clients, and shall ensure that the selection of the Products that may be recommended is not biased.

R.4.3.9 If such a comparison would not be possible because of the business model or the specific scope of the Service provided, the Regulated Person providing Advice should not be allowed to claim itself as "independent".

R.4.3.10 A Regulated Person that provides Advice on an independent basis and that focuses on certain categories or a specified range of Products should comply with the following requirements:

- a) the Regulated Person market itself in a way that it is intended only to attract Clients with a preference for certain categories or a range of Products;
- b) the Regulated person shall require Clients to indicate that they are only interested in investing in the specified category or range of Products;

prior to the provision of the service, the Regulated Person shall ensure that its service is appropriate for each new client on the basis that its business model matches the client's needs and objectives, and the range of products that area suitable for the Client. Where this is not the case, the Regulated Person shall not provide such a service to the Client. Regulated Persons providing both independent and Non-Independent

R.4.3.11 Non-Independent Advice is any advice which does not qualify as Independent Advice within the meaning of R. 4.3.6.

R.4.3.12 A Regulated Person shall explain in a clear and concise way whether and why Advice qualifies as independent or non-independent and the type and nature of the restrictions that apply, including, when providing Advice on an independent basis, the prohibition to receive and retain inducements.

- R.4.3.13 Where Advice is offered or provided to the same client on both an independent and non-independent basis, Regulated Persons shall explain the scope of both services to allow investors to understand the differences between them and not present itself as an independent investment advisor for the overall activity. Regulated Persons shall not give undue prominence to their independent investment advice services over non-independent investment services in their communications with Clients.
- R.4.3.14 A Regulated Person providing investment advice, on an independent or non-independent basis, shall explain to the Client the range of financial instruments that may be recommended, including its relationship with the issuers or providers of the instruments.
- R.4.3.15 A Regulated Person shall provide a description of the types of financial instruments considered, the range of financial instruments and providers analysed per each type of instrument according to the scope of the service, and when providing independent investment advice on an independent basis and the factors taken into consideration in the selection process used by the Regulated Person to recommend financial instruments, such as risks, costs and the complexity of the financial instruments.
- R. 4.3.16 When the range of financial instruments assessed by the Regulated Person providing investment advice on an independent basis includes the Regulated Person's own financial instruments or those issued or provided by entities having close links or any other close legal or economic relationship with the Regulated Person as well as other issuers or providers which are not linked or related, the Regulated Person shall distinguish, for each type of financial instrument, the range of the financial instruments issued or provided by entities not having any links with the Regulated Person.
- R.4.3.17 A Regulated Person offering Advice on both an independent basis and on a non-independent basis shall comply with the following obligations:
- a) In good time before the provision of its Services, the Regulated Person should inform Retail Clients, in a durable medium, whether the Advice will be independent or non-independent and make the relevant disclosures as required in the Chapter entitled Disclosures.
  - b) The Regulated Person should not hold itself out as "independent" for its business as a whole. However a Regulated Person may hold itself out as acting independently in respect of the Services for which it provides independent Advice; and

- c) The Regulated Person has adequate organisational requirements and controls in place to ensure that both types of Advice, Services and Advisers are clearly separated from each other and that clients are not likely to be confused about the type of Advice they are receiving and are giving the type of Advice that is appropriate to them. The Regulated Person shall not allow a natural person to provide both independent and non-independent advice

#### **Section 4: Assessment of Client's Suitability and Appropriateness**

##### *Application*

- R.4.4.1 The Rules and the relative Guidance set out in Part A shall apply to Regulated persons falling under points (i) and (ii) of the definition of "Regulated Person" in the Glossary to these Rules and to Regulated Persons falling under points (iii) and (iv) of the definition of "Regulated Person" in the Glossary to these Rules only insofar as the latter are providing Advice in relation to Insurance Based Investment Products, except as otherwise indicated.
- R.4.4.2 The Rules and relative Guidance set out under Part B shall apply to persons falling under point (i) or (ii) of the definition of Regulated Persons in the definition of 'Regulated Persons' in the Glossary to these Rules.
- R. 4.4.3 The Rules and the relative Guidance set out in the Part C shall apply to Regulated Persons falling under points (iii) and part (iv) of the definition of Regulated Person in the Glossary to these Rules.

**Part A: Rules applicable to Regulated persons falling under points (i) and (ii) of the definition of "Regulated Person" in the Glossary to these Rules and to Regulated Persons falling under points (iii) and (iv) of the definition of "Regulated Person" in the Glossary to these Rules only insofar as the latter are providing Services in relation to Insurance Based Investment Products, except as otherwise indicated.**

- R. 4.4.4 For the purposes of this Part the term 'Regulated Person' shall refer to persons falling under points (i) and (ii) of the definition of "Regulated Person" in the Glossary to these Rules and to Regulated Persons falling under points (iii) and (iv) of the definition of "Regulated Person" in the Glossary to these Rules only insofar as the latter are providing Advice in relation to Insurance Based Investment Products.
- R.4.4.5 Regulated Persons shall ensure and demonstrate to the Authority, that natural persons giving advice or information about Products or Services to Clients on

behalf of the Regulated Person possess the necessary knowledge and competence to fulfil their obligations under these Rules.

*G.4.4.1 The Regulated Person should ensure that its staff members providing Services to clients, on its behalf, understand the role they play in the suitability assessment process and they possess the skills, knowledge and expertise necessary. This would include sufficient knowledge of the relevant regulatory requirements and procedures, to discharge their responsibilities.*

*G.4.4.2 The Regulated Person's staff must have the skills necessary to be able to assess the needs and circumstances of the client. They are also required to have sufficient expertise to understand the Products to be recommended (or purchased on the client's behalf), and to determine that the features of the Product match the needs and circumstances of the client*

#### Automated Advice

R. 4.4.6 The Regulated Person's responsibility to perform the suitability assessment in accordance with R. 4.4.8 and R.4.4.59 shall not be reduced due to the fact that advice on Products is provided in whole or in part through an automated or semi-automated system.

#### **Part A: Rules applicable to Regulated Persons falling under point (i) and (ii) of the definition of Regulated Persons in the Glossary to these Rules.**

R.4.4.7 For the purposes of this Section, the term 'Regulated Person' shall mean a person falling under points (i) and (ii) of the definition of Regulated Person in the Glossary to these Rules.

#### Suitability

R.4.4.8 A Regulated Person shall understand the Financial instrument it offers or recommends, assess the compatibility of the financial instruments with the needs of the Clients to whom it provides Services, also taking account of the identified target market of end Clients, and ensure that financial instruments are offered or recommended only when this is in the interest of the Client.

R.4.4.9 Regulated Persons shall implement policies and procedures to enable them to collect and assess all information necessary to conduct a suitability assessment for each Client.

R.4.4.10 Regulated persons shall not create any ambiguity or confusion about their responsibilities in the process when assessing the suitability of Products or

Services in accordance with Rule 4.4.12. When undertaking the suitability assessment, the firm shall inform clients or potential clients, clearly and simply, that the reason for assessing suitability is to enable the Regulated Person to act in the client's best interest.

*G.4.4.3 For the purposes of the above Rule, Regulated Persons may use questionnaires completed by their Clients or during discussions with them.*

#### Assessment of Suitability

R. 4.4.11 Information on Advice and, Portfolio Management services, should include information about the suitability assessment. 'Suitability assessment' should be understood as meaning the whole process of collecting information about a Client, and the subsequent assessment of the suitability of a given Product for that Client.

*G.4.4.4 Information about the suitability assessment should help Clients to understand the purpose of the requirements and should encourage them to provide accurate and sufficient information about their knowledge, experience, financial situation and investment objectives. Regulated Persons should highlight to the client that it is important to gather complete and accurate information so that the Regulated Person can recommend suitable Products or Services for the client. It is up to the Regulated Person to decide how they will inform their clients about the suitability assessment and such information can be provided in a standardised format. The format used should however enable a posteriori controls to check if the information was provided.*

*G.4.4.5 Regulated Persons should take steps to ensure that the client understands the notion of investment risk as well as the relationship between risk and return on investments. To enable the client's understanding of investment risk, Regulated Persons should consider using indicative, comprehensible examples of the levels of loss that may arise depending on the level of risk taken, and should assess the client's response to such scenarios. The client should be made aware that the purpose of such examples, and their responses to them, is to help determine the client's attitude to risk (their risk profile), and therefore the types of Products (and risks attached to them) that are suitable.*

R.4.4.12 When providing Advice or Portfolio management services to a Client, the Regulated Person must first obtain the necessary information regarding the Client's:

- a) knowledge and experience in the investment field relative to the specific type of the Product or Service;
- b) financial situation including his ability to bear losses; and
- c) investment objectives including risk tolerance;

so as to enable the Regulated Person to recommend to the Client, Products which are suitable for him and, in particular, are in accordance with his risk tolerance and ability to bear losses.

*G.4.4.6 Before providing Advice, or, Portfolio Management, Regulated Persons will always need to collect 'necessary information' about the Client's knowledge and experience, financial situation and investment objectives. The extent of information collected may vary. In determining what information is "necessary" and relevant, Regulated person should consider:*

*(a) The type of the Product or transaction that the Regulated Person may recommend or enter into (including the complexity and level of risk);*

*(b) The nature and extent of the Service that the Regulated Person may provide or which the client is requesting. .;*

*(c) The nature, needs and circumstances of the Client*

*G.4.4.7 Regulated Persons should consider the knowledge and experience of a Client and properly discuss with the Client the nature of the assessment of the risk they are willing and able to take. This should enable the Regulated Persons to secure the Client's engagement and check understanding. Where a Regulated Person does not adequately communicate and check understanding of the level of risk a Client is agreeing to take, this can lead to unsuitable recommendations.*

*G.4.4.8 Information necessary to conduct a suitability assessment includes different elements which may impact, for example, the client's financial situation or investment objectives. When determining what information is necessary, Regulated Persons should keep in mind the impact that any change regarding that information could have concerning the suitability assessment.*

*Information to be collected will also depend on the needs and circumstances of the Client. .*

*G.4.4.9 The level of information gathered by a Regulated Person should be appropriate to the nature and complexity of the Product or Service being sought by the Client, but shall be to a level that allows the Regulated Person to provide a professional Service and include details (where applicable) of the Client's:*

*(a) Needs and objectives including, where relevant:*

- i. the length of time for which the Client wishes to hold a Product or financial instrument or wishes to receive a Service,*
- ii. need for access to funds (including emergency funds),*
- iii. need for accumulation of funds.*

*(b) Personal circumstances including, where relevant:*

- i. age,*
- ii. level of education, including literacy level,*
- iii. health,*
- iv. marital status (especially the client's legal capacity to commit assets that may belong also to his partner)*
- v. family situation (evolutions in the family situation of a client may impact his financial situation e.g. a new child or a child of age to start university)*
- vi. dependents,*
- vii. employment status, including profession or relevant former profession (the fact for a client to lose his job or to be close to retirement may impact his financial situation or his investment objectives),*
- viii. known future changes to his/her circumstances.*

*(c) Financial situation including, where relevant:*

- i. income,*
- ii. savings,*
- iii. financial Products and other assets,*
- iv. debts and financial commitments.*
- v. Need for liquidity in certain relevant investments.*

*(d) Attitude to risk, in particular, the importance of capital security to the Client.*

**G.4.4.10** *While the extent of the information to be collected may vary, the standard for ensuring that a recommendation or an investment made on the Client's behalf is suitable for the Client will always remain the same. The principle of proportionality allows Regulated Persons to collect the level of information proportionate to the Products and Services they offer, or on which the Client requests specific Advice or Portfolio Management services. It does not allow Regulated Persons to lower the level of protection due to Clients.*

*G.4.4.11 When providing access to complex or risky Products, Regulated Persons should carefully consider whether they need to collect more in-depth information about the Client than they would collect when less complex or less risky Products are at stake. This is so Regulated Persons can assess the Client's capacity to understand, and financially bear, the risks associated with such Products.*

*G.4.4.12 In the case of illiquid Financial Instruments, as part of the suitability assessments being carried out by Regulated Persons, the 'necessary information' to be gathered will include information on the length of time for which the Client is prepared to hold the investment. As information about a Client's financial situation will always need to be collected, the extent of information to be collected may depend on the type of Financial Instruments to be recommended or entered into. For example, for illiquid or risky Financial Instruments, 'necessary information' to be collected may include all of the following elements as necessary to ensure whether the Client's financial situation allows him to invest or be invested in such instruments:*

- (a) the extent of the Client's regular income and total income, whether the income is earned on a permanent or temporary basis, and the source of this income (for example, from employment, retirement income, investment income, rental yields, etc);*
- (b) the Client's assets, including liquid assets, investments and real property, which would include what financial investments, personal and investment property, pension funds and any cash deposits, etc. the client may have. The Regulated Person should, where relevant, also gather information about conditions, terms, access, loans, guarantees and other restrictions, if applicable, to the above assets that may exist;*
- (c) the Client's regular financial commitments, which would include what financial commitments the client has made or is planning to make (Client's debts, total amount of indebtedness and other periodic commitments, etc)*

*G.4.4.13 In determining the information to be collected, Regulated should also take into account the nature of the Service to be provided. This means that:*

- (a) when advisory services are to be provided, Regulated Persons should collect sufficient information in order to be able to assess the ability of the Client to understand the risks and nature of each of the Financial Instruments that the Regulated Person envisages recommending to that Client;*
- (b) when Portfolio Management services are to be provided, as investment decisions are to be made by the Regulated Person on behalf of the client, the level of knowledge and experience needed by the Client with regard to all the*

*Products that can potentially make up the portfolio may be less detailed than the level that the Client should have when an advisory service is to be provided. Nevertheless, even in such situations, the Client should at least understand the overall risks of the portfolio and possess a general understanding of the risks linked to each type of Product that can be included in the portfolio. Regulated Persons should gain a very clear understanding and knowledge of the investment profile of the client.*

R.4.4.13 The Regulated Person shall ensure that where it provides Advice recommending a package of Services or Products bundled together, the overall bundled package is suitable.

G.4.4.14 *If a Regulated Person provides Advice to a Client about a type of Financial Instrument which it presents as suitable for, or based on a consideration of the circumstances of, that Client, and that Advice is not in fact suitable for the Client, or is not based on a consideration of his circumstances, the Regulated Person may, depending on the circumstances of the particular case, be acting in contravention of the requirements to:*

- *act honestly, fairly and professionally in accordance with the best interests of the Client; and*
- *provide information to the Client that is fair, clear and not misleading.*

G.4.4.15 *Where the Client does not have capacity to sustain the potential loss of a higher-risk strategy, the Regulated Person should explain that the Client's need for a higher return cannot realistically be met.*

G.4.4.16 *If the Client is able to sustain greater capital losses and is willing, following discussion, to tolerate a higher level of risk to potentially generate the desired level of return, the Regulated Person should document that this is the risk that the Client is willing and able to take, along with the reasons for this.*

G.4.4.17 *Poor outcomes in assessing the risk a Client is willing and able to take can occur if Regulated Persons, in particular:*

- (a) *fails to collect and account for all the information relevant to assessing the risk a Client is willing and able to take as part of suitability considerations, for example because they:*
- *fail to assess a Client's capacity for loss;*

- *do not have a robust process to identify Clients that are best suited to placing their money in cash deposits because they are unwilling or unable to accept the risk of loss of capital;*
- *use poor questions and answers to establish the risk a Client is willing and able to take;*
- *inappropriately interpret the Client's responses to questions (particularly where Regulated Persons rely on tools with sensitive scoring or attribute inappropriate weighting to answers); or*

*(b) use vague, unclear or misleading descriptions or illustrations to check the risk that a Client is willing and able to take.*

R.4.4.14 The information regarding the financial situation of the Client shall include, where relevant, information on:

- (a) The source and extent of his regular income,
- (b) His assets, including liquid assets investments and real property, and
- (c) His regular financial commitments.

R.4.4.15 The information regarding the investment objectives of the Client shall include, where relevant, information on:

- (a) The length of time for which the Client wishes to hold the Product,
- (b) His preferences regarding risk taking,
- (c) His risk profile and
- (d) The purposes for buying the Product.

R.4.4.16 Where a Client is a legal person or a group of two or more natural persons or where one or more natural persons are represented by another natural person, the Regulated Person shall establish and implement a policy as to who should be subject to the suitability assessment and how this assessment will be done in practice, including from whom information about knowledge and experience, financial situation and investment objectives should be collected. The Regulated Person shall record this policy.

Where a natural person is represented by another natural person or where a legal person having requested treatment as a Professional Client is to be considered for the suitability assessment, the financial situation and investment objectives shall be those of the legal person, or in relation to the natural person, the underlying client rather than of the representative. The knowledge and experience shall be that of the representative of the natural person or the person authorised to carry out transactions on behalf of the underlying client.

*G.4.4.18 Regulated Persons should set a policy on who should be subject to the suitability assessment when dealing with a legal person or a group of two or more natural persons or where one or more natural persons are represented by another natural person. The Regulated Person's policy should provide that the best interests of all the persons concerned and their need for protection are taken into consideration.*

*Where there is no agreement and where the financial situations of the persons belonging to the group differ, the Regulated Person should consider the most relevant person in this respect (i.e. the person with the weakest financial situation). The same should be done when considering their investment objectives (i.e. the person with the most conservative investment objectives), or their experience and knowledge (i.e. the person authorised to carry out transactions with the least experience and knowledge).*

*G.4.4.19 In situations where two or more persons are authorised to carry out transactions on behalf of the group jointly (as may be the case for joint accounts), the client profile as defined by the Regulated Person should reflect the ability of the different relevant persons to take investment decisions, as well as the potential impact of such decisions on their individual financial situation and investment objectives*

R.4.4.17 Regulated Persons shall take reasonable steps to ensure that the information collected about their Clients is reliable. This shall include, but shall not be limited to the following:

- a) Ensuring that Clients are aware of the importance of providing accurate and up-to-date information;
- b) Ensuring questions used in the process are likely to be understood by Clients, capture an accurate reflection of the Client's objectives and needs, and the information necessary to undertake the suitability assessment; and

- c) Taking steps, as appropriate, to ensure the consistency of Client information. This includes, considering whether there are obvious inaccuracies in the information provided by Clients.
  - d) Ensuring that no undue reliance is made on any Clients' self assessment in relation to knowledge, experience and financial situation.
- R.4.4.18 Regulated persons shall have, and be able to demonstrate, adequate policies and procedures in place to ensure that they understand the nature, features, including costs and risks of Services and Products selected for their Clients and that they assess, while taking into account cost and complexity, whether equivalent Services or Products could meet their Client's profile.
- G.4.4.20 The Regulated Person shall implement policies and procedures designed to ensure it only recommends Products, or makes investments on behalf of its clients, if the Regulated Person understands the characteristics of the Product involved.*
- R.4.4.19 Where a Regulated Person offers or has access to a limited range of Products, or investment choices associated with Products, it should take reasonable care to establish and maintain appropriate systems and controls to ensure that if there is no Product in the Regulated Person's range of Products which meets the needs and objectives of the Client, no personal recommendation is made and no decision to trade on behalf of the Client is taken.
- R.4.4.20 When providing Advice or Portfolio Management services that involve switching investments, either by selling a Product and buying another, or by exercising a right to make a change in regard to an existing instrument), a Regulated Person shall collect the necessary information on the Client's existing investments and the recommended new investments to undertake an analysis of the costs and benefits of the switch, such that the Regulated Person is reasonably able to demonstrate that the benefits of switching are greater than the costs.
- R.4.4.21 Where the Regulated Person has an ongoing relationship with the Client, such as by providing an ongoing Advice or Portfolio Management service, the Regulated Person shall have, and be able to demonstrate appropriate procedures to maintain adequate and up-to date information about the Client to the extent necessary to fulfil the requirements of R.4.4.10 above.
- G.4.4.21 When providing Advice on an ongoing basis or the ongoing service of Portfolio Management, Regulated Persons need to maintain adequate and updated information about the Client in order to be able to perform the suitability assessment required. Regulated Persons will therefore have to adopt procedures defining:*

*(a) what part of the information collected should be subject to updating and at which frequency;*

*(b) how the updating should be done and what action should be undertaken by the Regulated Person when additional or updated information is received or when the Client fails to provide the information requested.*

*G.4.4.22 Frequency of updating might vary depending on, for example, Clients' risk profiles: based on the information collected about a Client under the suitability requirements, a firm will often determine the Client's risk profile, i.e. what type of Services or Products can in general be suitable for him taking into account his knowledge and experience, his financial situation and his investment objectives. A higher risk profile is likely to require more frequent updating than a lower risk profile. Certain events might also trigger an updating process; this could be so, for example, for clients reaching the age of retirement.*

*G.4.4.23 Updating may, be carried out during periodic meetings with Clients or by sending an updating questionnaire to Clients. Relevant actions might include changing the Client's profile based on the updated information collected.*

R.4.4.21 Regulated persons shall determine the extent of the information to be collected from Clients in the light of all the features of the Advice or portfolio management Services to be provided to those Clients. Regulated Persons shall obtain from Clients or potential Clients such information as is necessary for the Regulated Person to understand the essential facts about the Client and to have a reasonable basis for determining, giving due consideration to the nature and extent of the service provide, that the specific transaction to be recommended, or entered into in the course of providing a portfolio management service, satisfies the following criteria:

- a) it meets the investment objectives of the Client in question, including Client's risk tolerance;
- b) It is such that the Client is able financially to bear any related investment risks consistent with his investment objectives;
- c) Is such that the client has the necessary experience and knowledge in order to understand the risks involved in the transaction or in the management of his portfolio

R.4.4.22 Where a Regulated Person provides a Service to a Professional Client, it shall be entitled to assume that, in relation to the Products, transactions and Services for which it is so classified, the Client has the necessary level of experience and knowledge for the purposes of R. 4.4.21(c) above.

Where that Service consists in the provision of Advice to a Professional Client, the Regulated Person shall be entitled to assume for the purposes of point (b) of the above Rule that the Client is able financially to bear any related investment risks consistent with the investment objectives of that Client.

- G.4.4.24 Although Clients are expected to provide correct, up-to-date and complete information necessary for the suitability assessment, Regulated Persons need to take reasonable steps to check the reliability of information collected about Clients. Regulated Persons remain responsible for ensuring they have adequate information to conduct a suitability assessment. For example, Regulated Persons should consider whether there are any obvious inaccuracies in the information provided by their Clients. They will need to ensure that the questions they address to their Clients are likely to be understood correctly and that any other method used to collect information is designed in way to get the information required for a suitability assessment.*
- G.4.4.25 Where Regulated Persons rely on tools to be used by Clients as part of the suitability process (such as on-line questionnaires, or risk-profiling software), they should ensure that they have appropriate systems and controls to ensure that the tools are fit for purpose and produce satisfactory results. Risk-profiling software could include some controls of coherence of the replies provided by Clients in order to highlight contradictions between different pieces of information collected.*
- G.4.4.26 Regulated Persons should also take reasonable steps to mitigate potential risks associated with the use of such tools. For example, potential risks may arise where Clients (on their own initiative or where encouraged by customer-facing staff) change their answers in order to get access to Products that may not be suitable for them.*
- G.4.4.27 In order to ensure the consistency of Client information, Regulated Persons should view the information collected as a whole. Regulated Persons should be alert to any relevant contradictions between different pieces of information collected, and contact the Client in order to resolve any material potential inconsistencies or inaccuracies. Examples of such contradictions are Clients who have little knowledge or experience and an aggressive attitude to risk, or who have a prudent risk profile and ambitious investment objectives.*
- R.4.4.23 When providing Advice or Portfolio Management, a Regulated Person does not obtain the information required under R.4.4.12, the Regulated Person shall not recommend Services or Products to the Client.

- R.4.4.24 When providing the Services of Advice or Portfolio Management, a Regulated Person shall not recommend or decide to trade where none of the services or instruments are suitable for the Client.
- G.4.4.28 *In order to match Clients with suitable investments, Regulated Persons shall establish policies and procedures to ensure that they consistently take into account:*
- (a) all available information about the Client that is likely to be relevant in assessing whether an investment is suitable, including the Client's current portfolio of investments (and asset allocation within that portfolio);*
  - b) all material characteristics of the investments considered in the suitability assessment, including all relevant risks and any direct or indirect costs to the Client.*
- G.4.4.29 *Regulated Persons that rely on tools in the suitability assessment process (such as model portfolios, asset allocation software or a risk-profiling tool for potential investments), should have appropriate systems and controls to ensure that the tools are fit for purpose and produce satisfactory results*
- G.4.4.30 *Such tools should be designed so that they take account of all the relevant specificities of each Client or Product. For example, tools that classify clients or Products broadly would not be fit for purpose.*
- G.4.4.31 *A Regulated Person should establish policies and procedures which enable it to ensure inter alia that:*
- (a) the Advice and Portfolio Management services provided to the Client take account of an appropriate degree of risk diversification;*
  - (b) the Client has an adequate understanding of the relationship between risk and return, i.e. of the necessarily low remuneration of risk free assets, of the incidence of time horizon on this relationship and of the impact of costs on his investments;*
  - (c) the financial situation of the Client can finance the investments and the Client can bear any possible losses resulting from the investments;*
  - (d) any personal recommendation or transaction entered into in the course of providing an Advisory or portfolio management service, where an illiquid*

*product is involved, takes into account the length of time for which the Client is prepared to hold the investment; and*

*(e) any conflicts of interest are prevented from adversely affecting the quality of the suitability assessment.*

### Suitability Statement

R.4.4.25 A Regulated Person when providing Advice or Portfolio Management Services to a Client shall, before the transaction is made, provide the Client with a suitability statement.

Provided that in the case of in the case of Regulated Persons falling under point (i) and (ii) of the definition of Regulated Person in the Glossary to these Rules, such Regulated Persons shall draw Clients' attention to and shall include in the suitability report information on whether the recommended Services or Products are likely to require the retail Client to seek a periodic review of their arrangements..

### Contents of the Suitability Statement

R.4.4.26 The suitability statement shall, as a minimum:

- a. specify the Client's financial demands and needs;
- b. provide an outline of the Advice given; and
- c. explain why the Regulated Person has concluded that the recommended transaction is suitable for the Client, including how it meets the Client's objectives and personal circumstances with reference to the investment term required, Client's knowledge and experience and client's attitude to risk and capacity for loss ;.

R.4.4.27 In the case of suitability statements relating to Financial Instruments, the Regulated Person should establish appropriate safeguards in order to ensure that the Client does not incur a loss as a result of an inaccurate or unfair presentation of the Personal Recommendation in the report presenting such Personal

Recommendation. Such unfair or inaccurate presentation may relate, inter alia, to the manner in which the Personal Recommendation is indicated as suitable for the Client or to the disadvantages of the recommended course of action.

R.4.4.28 Where a Regulated Person provides a Service that involves periodic suitability assessments and reports, the subsequent reports after the initial Service is established may only cover changes in the Services or Financial Instruments involved and/or the circumstances of the Client and may not need to repeat all the details of the first report.

R.4.4.29 A Regulated Person providing a periodic assessment of the suitability of the recommendations provided pursuant to R.4.4.26 shall disclose all of the following:

- (a) The frequency and extent of the periodic suitability assessment and where relevant, the conditions that trigger that assessment;
- (b) The extent to which the information previously collected will be subject to reassessment;
- (c) The way in which an updated recommendation will be communicated to the Client.

R. 4.4.30 Regulated Persons providing a periodic suitability assessment shall review, in order to enhance the Service, the suitability of the recommendations given at least annually.

The frequency of this assessment shall be increased depending on the risk profile of the Client and the type of Product recommended.

#### Record Keeping Obligations for Suitability Assessments

R.4.4.31 A Regulated Person is required to record all relevant information about the suitability assessment, such as information about the Client (including how that information is used and interpreted to define the Client's risk profile), and information about the Products recommended to the Client or purchased on the client's behalf. Those records should include:

- a) Any changes made by the Regulated Person regarding the suitability assessment, in particular any change to the Client's investment risk profile;
- b) The types of Products that fit that profile and the rationale for such an assessment, as well as any changes and the reasons for them.

R.4.4.32 The Regulated Person shall at least:

- a) Ensure that record-keeping arrangements are designed to enable the detection of failures regarding the suitability assessment;
- b) Ensure that records kept are accessible for the relevant persons in the Regulated Person, and for the Authority ;
- c) Have adequate processes to mitigate any shortcomings or limitations of the record-keeping arrangements.

R.4.4.33 A Regulated Person shall retain any records relating to suitability for a minimum period of, five years, unless requested by the Authority to retain such records for longer periods.

R.4.4.34 The Regulated Person should retain copies of:

- a) All fact finds and any other documentation which has been used to arrive At the personal recommendation made to the Client;
- b) All suitability statements provided to Clients in terms of these Rules.
- c) Any written Advice given to Clients; and
- d) Clients' Agreements

*G.4.4.32 Record-keeping arrangements adopted by Regulated Persons should be designed to enable them to track ex-post why an investment was made or why a Financial Instrument was purchased. This could be important in the event of a dispute between a client and the Regulated Person. It is also important for control purposes - for example, any failures in record-keeping may hamper the Authority's assessment of the quality of a Regulated Person's suitability process, and may weaken the ability of management information to identify risks of mis-selling.*

#### Appropriateness

R.4.4.35 When providing the service other than Advice or Portfolio Management, a Regulated Person shall ask the Client to provide information regarding his knowledge and experience in the field relevant to the specific type of product or service offered or demanded so as to enable the Regulated Person to assess whether the Service or Product envisaged is appropriate for the Client.

R.4.4.36 The Regulated Person shall ensure that where a bundle of Services or Products is envisaged for the Client, the assessment shall consider whether the overall bundled package is appropriate.

#### Assessment of Appropriateness

R.4.4.37 Regulated Persons, shall determine whether that Client has the necessary experience and knowledge in order to understand the risks involved in relation to the Product or Service offered or demanded when assessing whether a Service, other than Advice or Portfolio Management, is appropriate for a Client.

R.4.4.38 In case the Regulated Person considers, on the basis of the information received under R.4.4.35, that the Product or Service is not appropriate to the Client, the Regulated Person shall warn the Client. This warning may be provided in a standardised format .

R.4.4.39 In cases where the Client elects not to provide the information referred to under R.4.4.35, or where he provides insufficient information, the Regulated Person shall warn the Client that such a decision will not allow the Regulated Person to determine whether the Service or Product envisaged is appropriate for him. This warning may be provided in a standardised format.

G.4.4.33 *Although the warnings may be given in standardised format, they should not form an integral part of the document which the Regulated Person uses to test the Product's appropriateness vis a vis the client. They should be in separate documents which should only be provided to the Client in the circumstances envisaged by the above Rules.*

R.4.4.40 A Regulated Person shall be entitled to assume that a Professional Client has the necessary experience and knowledge in order to understand the risks involved in relation to those particular Services or transactions, or types of transaction or product, for which the client is classified as a Professional Client.

#### Exemption from the Appropriateness Assessment

R.4.4.41 Regulated Persons, providing services consisting of execution or reception and transmission of Client orders with or without Ancillary Services, excluding the granting of credits or loans that do not comprise of existing credit limits of loans, current accounts and overdraft facilities of Clients; may provide those services to

their Clients without the need to obtain the information or make the determination provided for in R.4.4.26 above where all the following conditions are met:

- (a) The Services or activities provided relate to any of the following:
  - i. shares admitted to trading on a regulated market or on an equivalent third-country market or on a Multilateral Trading Facility , where those are shares in companies, and excluding shares in non-UCITS collective investment undertakings and shares that embed a derivative;
  - ii. bonds or other forms of securitised debt admitted to trading on a regulated market or on an equivalent third country market or on a Multilateral Trading Facility, excluding those that embed a derivative or incorporate a structure which makes it difficult for the client to understand the risk involved;
  - iii. money-market instruments, excluding those that embed a derivative or incorporate a structure which makes it difficult for the Client to understand the risk involved;
  - iv. shares or units in UCITS, excluding structured UCITS as referred to in the second subparagraph of Article 36(1) or Regulation (EU) No 583/2010 (UCITS Implementing Regulation);
  - v. structured deposits, excluding those that incorporate a structure which makes it difficult for the Client to understand the risk of return or the cost of exiting the Product before term
  - vi. other non-complex Financial Instruments for the purposes of this Rule.
- (b) The service is provided at the initiative of the Client;
- (c) The Client has been clearly informed that in the provision of that service, the Regulated Person is not required to assess the appropriateness of the Financial Instrument or service provided or offered and that therefore he does not benefit from the corresponding protection of the relevant conduct of business rules. Such a warning may be provided in a standardised format;

- (d) The Regulated Person complies with its obligations concerning conflicts of interest.

### Complex Products

- R.4.4.42 Products not referred to in R.4.4.41 above and which do not meet the specific requirements of any of the criteria in R.4.4.45 should be considered to be complex.
- R.4.4.43 Financial Instruments referred to in R.4.41(a) points (i) to (v) which do not satisfy the criteria indicated therein shall be considered complex and therefore cannot be assessed against the criteria for the assessment of other non-complex Financial Instruments in accordance with R.4.4.45.
- R.4.4.44 Before providing a service to a client with respect to a complex financial instrument, the Regulated Person shall consider whether that complex financial instrument is to be provided to such client on an advisory or on a non-advisory basis (subject to an appropriateness test), and shall only provide services to clients on the basis of this consideration.

In effecting the above consideration, the Regulated Person shall, *inter alia*:

- (a) Ensure that its categorisation of these clients is robust and regularly monitored and that it correctly reflects the status of each client such that retail clients are not incorrectly categorised as professional clients;
- (b) Consider the possibility of conflicts of interest especially where the Regulated Person is the issuer of the Financial Instrument or acts as a counterparty in the transaction, or is otherwise involved in the issue of the Financial Instrument. In this context the Regulated person shall specifically assess whether incentives (i.e. inducements/remuneration) are more lucrative for complex Financial Instruments than for those of more standard Financial Instruments.

*G.4.4.34 For the purposes of the above rule, in considering whether a complex Financial Instrument should be provided to a client on an advisory or on a non-advisory basis, the Regulated Person is also expected to take the following factors into account:*

- (a) The level of complexity of the Financial Instrument in question;*
- (b) The categorisation of the client as retail or professional;*

*(c) The level of sophistication of retail investors and any aspects of vulnerability which they may have.*

#### Non-Complex Instruments

R.4.4.45 A Financial Instrument which is not specified in points (i) to (v) of R.4.4.41 (a), shall be considered as non-complex if it satisfies the following criteria:

- (a) It is not a derivative or other security giving the right to acquire or sell a transferable security or giving rise to a cash settlement determined by reference to transferable securities currencies, interest rates or yields, commodities or other indices or measures;
- (b) There are frequent opportunities to dispose of, redeem, or otherwise realize that instrument at prices that are publicly available to market participants and that are either market prices or prices made available, or validated , by valuation systems independent of the issuer;
- (c) It does not involve any actual or potential liability for the Client that exceeds the cost of acquiring the instrument;
- (d) It does not incorporate a clause, condition or trigger that could fundamentally alter the nature or risk of the investment or pay out profile. This would include, investments that incorporate a right to convert the instrument into a different investment;
- (e) It does not include any explicit charges that have the effect of making the investment illiquid even though technically frequent opportunities to dispose or redeem it would be possible.
- (f) Adequately comprehensive information on its characteristics is publicly available and is likely to be readily understood so as to enable the average Retail Client to make an informed judgment as to whether to enter into a transaction in that instrument.

#### Provision of Services 'At the initiative of the Client'

G.4.4.35 *A Service should be considered to be provided at the initiative of a Client unless the Client demands it in response to a personalised communication from or on behalf of the Regulated Person to that particular client, which contains an invitation or is*

*intended to influence the client in respect of a specific Product or transaction. A Service can be considered to be provided at the initiative of the Client notwithstanding that the Client demands it on the basis of any communication containing a promotion or offer of Products made by any means that by its very nature is general and addressed to the public or a larger group or category of Clients.*

G.4.4.36 *There are two tests as to when a transaction may be considered to be at the initiative of the Client. At least one of these tests needs to be satisfied for the Regulated Person to consider a Client to be requesting a Service on his/her own initiative.*

**The two Tests:**

**Test A:** *A Service may be considered to be provided at the initiative of the Client if it is demanded by the Client on the basis of any communication containing a promotion or offer of insurance-based investment Products, financial instruments made by any means that by its very nature is general and addressed to the public or larger group or category of Clients.*

**Thus, this test depends on an evaluation of the MEDIUM of communication.**

*What is a means of communication that by **ITS VERY NATURE** is general and addressed to the public or larger group or category of Clients?*

*The test, here, is whether the medium of communication allows a wide audience. The following are examples of such means of communications which allow a wide audience:*

- (a) Billboards*
- (b) Newspaper Adverts*
- (c) General Website (i.e. websites not requiring a Client password for access).*

*The following means of communications are excluded: letters, emails, text messages and telephone calls. These means of communications should only be subject to **Test B** below since **OF THEIR VERY NATURE**, they are not general and addressed to the public or larger group or category of Clients.*

**Test B:** *A Service is **NOT** provided at the initiative of the client (and therefore an appropriateness test is required) if the Client demands it in response to a communication **WHICH IS** a personalized communication **AND WHICH** contains an invitation or is intended to influence the Client in respect of a specific insurance-based investment Product, financial instrument or specific transaction.*

**NB:** This test has two limbs which shall **BOTH** be satisfied for a transaction **NOT** to be considered to be requested at the initiative of the Client.

Thus, in order to consider a Service to be provided “at the initiative of the Client”, the Regulated Person shall show **EITHER** that:

- (a) the communication was **NOT** personalized **OR THAT**;
- (b) such communication neither did contain an invitation, nor was it intended to influence the Client in respect of a specific insurance-based investment Product or financial Instrument.

G.4.4.37 The key determinant as to what constitutes a “personalized communication ” should be the **likely perception of the Client upon receiving the communication** rather than the process that the Regulated Person has followed in deciding to make the communication to the Client. This means that:

- (a) The evaluation should depend on the **CONTENT** of the communication. (a mass communication could still give the impression that it is a personalized communication).
- (b) The fact alone that the communication has been addressed to the recipient for the purposes of transmission does not make it a personalized communication
- (c) If the **CONTENT** of the communication **GIVES THE IMPRESSION THAT IT IS NOT PERSONALIZED**, it should not matter that the firm has only sent it to a particular group of Clients (rather than to all its Clients base).

G.4.4.38 The following guiding questions may be considered in this context:

- (a) Does the communication refer to the Client’s personal circumstances (e.g. the Product is indicated as suitable for the Client to whom it is being addressed given his/ her capital growth objective)? This would personalize the communication.
- (b) Does the communication include details of the Client’s existing holdings? This would personalize the communication.
- (c) Does the communication refer to characteristics of a target market/Client base in general (e.g, a letter with the heading “are you approaching the age of retirement”?) This is less likely to make the communication personalized.

- (d) *Is the content of the communication changed for each potential Client? If so, this is likely to make the communication personalized.*
- (e) *If it is a personalized communication, does it contain an invitation or is it intended to influence a Client with reference to a specific insurance-based investment Product, financial instrument or transaction? A communication which is personalized but does not contain an invitation or is not intended to try and influence a Client about a specific Product, transaction or instrument, could still render any subsequent requests from the Client to be deemed to have been made 'at the initiative of the Client'.*

**G.4.4.39** *When does a communication deemed to contain an "invitation" or to be intended to "influence the Client with reference to a specific insurance-based investment Product, financial instrument or transaction"?*

*An invitation may be defined as a "spoken or written request for someone's presence or participation".*

**(a) Application Forms**

*An application form for the purchase of an instrument may be considered by the person receiving it as an invitation to actually purchase such instrument.*

**(b) Buy/Sell Recommendations.**

*The inclusion of buy/sell recommendations with mailshots / emails, irrespective of whether such recommendations are of a general nature or not should be considered as intended to influence the Client with respect to a particular Product, instrument or transaction.*

**G.4.4.40** *Regulated Persons should be guided by the following:*

- (a)** *Mailshots, emails, text messages and telephone calls should only be subject to Test B since they fall out of the scope of Test A.*
- (b)** *The nature of a communication could be affected by how its contents are phrased.*
- (c)** *"Generic" marketing material (e.g. a flyer) may still be deemed to be part of a personalized communication if accompanied by a covering letter which clearly refers to the recipient's circumstances.*

- (d) *The filtering of a mailing list (such that a communication is only sent to a portion of the Regulated Person's Clients), does not automatically make the communication personalized if this is not apparent to the recipient from the content of the communication.*
- (e) *The inclusion of an application form and/or a general buy/sell recommendation with a mailshot or a flyer may be considered as an invitation to the Client to carry out a particular transaction with respect to a particular Product or instrument. Moreover, the sending of such an application form with a mailshot may also be considered as influencing the Client's decision with respect to a particular transaction. However, whether a transaction on the basis of such communication would be considered to be at the initiative of the Client would depend on whether it is obvious from the content of the mailshot that this has been personalized.*
- (f) *A Client's use of an e-brokerage facility to conclude a transaction would normally fulfil the condition that there should be no personal communication.*
- (g) *Where there is a clear personal contact between the Client and a representative of the Regulated Person, it would be difficult to argue that the Service is provided at the initiative of the Client, especially when there is a previous approach (albeit for other Products) by the representative. However, this does not mean that in every case the representative will be providing a non-execution only Service. There may well be cases where there is a continuous Regulated Person-Client relationship, but the Service would still be at the initiative of the Client. If the representative can prove that although the Client was personally approached for another Product, the Client finally bought another Product without any intervention on the part of the representative, the Service could be considered as provided 'at the initiative of the Client'.*
- (h) *The matrix in Appendix 1 to this Chapter aims to apply the above two tests to certain practices resorted to by Regulated Persons when communicating with Clients, with a view to providing guidance as to when such communications result in the provision of Services "at the initiative of the Client."*

#### Record Keeping Obligations for Appropriateness Assessments

- R.4.4.46 A Regulated Person shall maintain records of appropriateness assessments undertaken which shall include:
- a) The result of the appropriateness assessment;

- b) Any warning given to the Client where the Services or Product purchased was assessment as potentially inappropriate for the Client, whether the Client asked to proceed with the transaction despite the warning and, if applicable, whether the Regulated Person accepted the Client's request to proceed with the transaction
- c) Any warning given to the Client where the latter did not provide sufficient information to enable the Regulated Person to undertake an appropriateness assessment, whether the Client asked to proceed with the transaction despite this warning and where applicable, whether the Regulated Person accepted the Client's decision to proceed with the transaction..

Provisions Common to the Assessment of Suitability and Appropriateness

- R.4.4.47 Regulated Persons shall ensure that the information regarding the Client's knowledge and experience in the investment field includes, the following, to the extent appropriate to the nature of the Client, the nature and extent of the Service to be provided and to the type of product or transaction envisaged, including their complexity and risks involved:
- (a) the type of Service, or Product with which the Client is familiar;
  - (b) the nature, volume, frequency of the Client's transactions in the relevant Product and the period over which they have been carried out; and
  - (c) the level of education, profession or relevant former profession of the Client.
- R.4.4.48 A Regulated Person shall not discourage a Client from providing information required for the purposes of 4.4.12 or R.4.4.35.
- R.4.4.49 A Regulated Person shall be entitled to rely on the information provided by its Clients unless it is aware or ought to be aware that the information is manifestly out of date, inaccurate or incomplete.
- R.4.4.50 In cases where a Regulated Person is offering a Service as part of a financial instrument which is already subject to other provisions of Community legislation or common European standards related to credit institutions and consumer credits with respect to risk assessment of Clients and/or information

requirements, this Service shall not be additionally subject to the obligations set out in this Chapter.

*Suitability and Appropriateness Assessment Tools/Questionnaires*

R.4.4.51 A Regulated Person assessing a Client's knowledge and experience with respect to a Product, shall ensure that:

- a) The Client understands the particular features of the product, especially in the case of complex products. This should entail clear answers from specific questions presented to the Client about the Product features in order to confirm that the Client is effectively aware of the features and risks of the Product in question;
- b) The paperwork used for the testing of knowledge and experience should clearly indicate the Service being provided to the Client and in the context of which the test is being carried out. Where an assessment of a Client's knowledge and experience is carried out in the context of a service other than Advice and/or portfolio management, the Regulated Person shall undertake and declare that in providing these Services it has not provided personal recommendations to the client vis-à-vis the Product under consideration. This document should be signed by both the client and the Licence Holder.
- c) In the case of Retail Clients, Regulated Persons shall provide the documentation used to assess the appropriateness or suitability of a product or instrument also in the language agreed between the Client and the Regulated Person.

*G.4.4.41 A 'tick-box' approach should not be used either to collect Client information or to assess suitability or appropriateness. Suitability and Appropriateness is not about collecting irrelevant information but such information as is necessary to achieve the intended outcome, which, in the case of the provision of Advice, is a suitable recommendation.*

*G.4.4.42 An appropriateness test should be particularly rigorous if a Regulated Person is offering more complex Products to less experienced Clients who may be less likely to understand the risks.*

*G.4.4.43 When using questionnaires to obtain information from Clients, the Regulated Person should not use questions that are not clearly worded, or where the content*

*is unlikely to be understood, since these can result in a Client not giving answers that accurately reflect the risk they are willing and able to take.*

*G.4.4.44 The possibility of Clients misunderstanding the questions they are being asked could be exacerbated if the questions:*

- (a) are vague, use double negatives or complex language that the Client may not understand;*
- (b) are not suitable for use with the Regulated Person's Client base, for example because they assume the Client has particular knowledge or experience such as a good level of financial knowledge or mathematical ability, and that the Client is comfortable in applying it; or*
- (c) are structured in a way that could invite different answers - for example, because they ask two questions in one and the Client might want to record a different answer to each sub-question.*

*G.4.4.45 The number of questions Regulated Persons ask their Clients can vary significantly. The fewer the questions – coupled with a possibility of misinterpreting an answer – the greater the probability is of making an inaccurate assessment.*

*G.4.4.46 The resulting risk category may be effectively determined by the answer to one question. Where such sensitivity is built into a Regulated Person's approach, the Regulated Person needs to be aware of the reliance being placed on each answer and the risks associated with doing so. The Regulated Person should take particular care to ensure that a Client understands each question and that the answers they give are an accurate reflection of their views.*

*G.4.4.47 Some questionnaires may invite a Client to select the option with which they most agree with. Options that are vague could be interpreted by Clients and Regulated Persons in different ways leading to poor outcomes.*

*G.4.4.48 A Regulated Person should not use a set of questions where a number of the questions asked have the option to answer 'neither yes or no' because a middle weighting may be attributed to these answers, and a Client that chooses this answer for all or some of these questions, could be assessed as having a risk profile in the middle of the scale of risk categories. This could result in an inaccurate assessment of the risk the Client is willing to take where the Client's answer reflects a 'non-answer' rather than a willingness to take the level of risk attributed.*

G.4.4.49 *Part of the skill of an adviser or discretionary manager is considering and evaluating different pieces of information to form a recommendation for the Client. It involves weighing up the advantages and disadvantages of alternative solutions by making trade-off decisions that best meet a Client's investment objectives and reflect their financial situation.*

G.4.4.50 *By bundling information on different factors together, the value of each distinct piece of information is potentially lost because arbitrary weightings are applied to different factors which may negate a preference or need. This can result in output that does not accurately reflect the trade-off decisions that a Client is willing or able to take. If such an approach is used, the tool, or wider suitability assessment process, needs to be capable of accounting adequately for each of the different pieces of information.*

G.4.4.51 *In other words, a Regulated Person needs to be able to demonstrate how any recommendation or transaction is suitable for a particular Client given each of the constituent parts of the suitability assessment.*

G.4.4.52 *Establishing risk categories with relatively broad definitions supported by brief subsections within each definition that in combination aided understanding. This may include:*

*(a) a short summary description that is fair and balanced;*

*(b) bullet points that provide more detail of the risk of capital loss and the nature of typical investments in each category; and*

*(c) a simple chart showing the 'shape' and variability of annual returns over a period that helps the Client to understand that they need to be comfortable to accept the gains and losses associated with a particular level of risk.*

*(The above is considered as a good practice because it attempts to explain the risk in a number of different ways. It may include text and a visual representation, different elements of which might engage different Clients. The chart may include hypothetical returns illustrative of the level of risk described.*

*Provision of investment Services through the medium of another Regulated Person falling under point (i) of the definition of Regulated Person in the Glossary to these Rules or of another European Investment firm*

R.4.4.52 An Regulated Person receiving an instruction to perform Services on behalf of a Client through the medium of another Regulated Person or European investment

firm to rely on Client information transmitted by the latter Regulated Person or European Investment Firm. The Regulated Person or the European Investment Firm which mediates the instructions will remain responsible for the completeness and accuracy of the information transmitted.

*G.4.4.53 Conditions which apply for the reliance on others provisions to apply:*

*(a) the third party shall provide the Regulated Person with an instruction to perform investment or Ancillary Services;*

*(b) the third party shall be a Regulated Person or a European Investment Firm ;*

*(c) the third party who provides the instructions shall be some-body other than the Regulated Person's Client.*

R.4.4.53 A Regulated Person which receives an instruction to undertake Services on behalf of a Client through the medium of another Regulated Person or European Investment firm, shall also be able to rely on any recommendations in respect of the Service or transaction that have been provided to the Client by such other Regulated Person or European Investment Firms. Where the Regulated Person mediates the instructions, it will remain responsible for the appropriateness for the Client of the recommendations or Advice provided.

R.4.4.54 A Regulated Person which receives Client instructions or orders through the medium of another Regulated Person or European investment firm shall remain responsible for concluding the Service or transaction, based on any such information or recommendations.

**Part C: Rules applicable Regulated Persons falling under point (iii) and (iv) of the definition of Regulated Person in the Glossary to these Rules.**

R.4.4.55 For the purposes of this Part, the term 'Regulated Person' shall mean a person falling under points (iii) and part (iv) of the definition of Regulated Person in the Glossary to these Rules.

*Assessment of Demands and Needs*

R. 4.4.56 Prior to the conclusion of an insurance contract, the Regulated Person shall specify, on the basis of information obtained from the Client, the demands and the needs of that Client and shall provide the Client with objective information about the Product in a comprehensible form to allow that customer to make an

informed decision. Any contract proposed shall be consistent with the Client's insurance demands and needs.

- R. 4.4.57 Where Advice is provided prior to the conclusion of any specific contract, the Regulated Person shall provide the Client with a Personalised Recommendation explaining why a particular Product would best meet the Client's demands and needs.
- R.4.4.58 The details referred to in R.4.4.56 and R.4.4.57 shall be modulated according to the complexity of the insurance Product being proposed and the type of Client.

Assessment of Suitability

- R.4.4.59 Without prejudice to R. 4.4.68 when providing Advice on an Insurance Based Investment Product, the Regulated Person shall also obtain the necessary information regarding:
- (a) The Client's knowledge and experience in the investment field relevant to the specific type of Product or Service;
  - (b) That Client's financial situation including that Client's ability to bear losses and
  - (c) That Client's investment objectives, including that Client's risk tolerance
- so as to enable the Regulated Person to recommend to the Client the insurance Based Investment Products that are suitable for that Client and that, in particular, are in accordance with that Client's risk tolerance and ability to bear losses.
- R.4.4.60 Where a Regulated Person provides investment advice recommending a package of bundled Services or Products, the overall bundled package suitable.
- R.4.4.61 For the purposes of providing Advice on an Insurance Based Investment Product in accordance with R.4.4.60, Regulated Persons shall determine the extent of the information to be collected from the Client in the light of all the features of the Advice to be provided to the Client.
- R.4.4.62 Without prejudice to the fact, that, in accordance with R. 4.4.56 any contract proposed shall be consistent with the Client's demands and needs, Regulated Persons shall obtain from Clients such information as is necessary for them to understand the essential facts about the client and to have a reasonable basis for determining that their personal recommendation to the Client satisfies all of the following criteria:

- a) It meets the Client's investment objectives, including that Client's risk tolerance;
- b) It meets the Client's financial situation, including that person's ability to bear losses;
- c) It is such that the Client has the necessary knowledge and experience in the investment field relevant to the specific type of Product or Service.

R.4.4.63 The information regarding the Client's financial situation, including that Client's ability to bear losses, shall include, where relevant, information on the source and extent of the Client's regular income, assets, including liquid assets, investments and real property and the regular financial commitments. The level of information gathered shall be appropriate to the specific type of Product or Service being considered.

R.4.4.64 The information regarding the Client's investment objectives, including that person's risk tolerance, shall include, where relevant, information on the length of time of which the Client wishes to hold the investment, that Client's preferences regarding risk taking, the risk profile, and the purposes of the investment. The level of information gathered shall be appropriate to the specific type of Product or Service being considered.

R. 4.4.65 Where the Regulated Person does not obtain the information required under R.4.4.59 the Regulated Person shall not provide Advice on Insurance Based Investment Products to the Client.

R.4.4.66 When providing Advice on an Insurance Based Investment Product in accordance with R.4.4.59, a Regulated Person shall not make a recommendation where none of the Products are suitable for the Client.

R.4.4.67 When providing Advice that involves switching between underlying investment assets, Regulated Persons shall also collect the necessary information on the Client's existing underlying investment assets and the recommended new investment assets and shall undertake an analysis of the expected costs and benefits of the switch, such that they are reasonably able to demonstrate that the benefits of switching are expected to be greater than the costs.

#### *Reliability of Information*

R.4.4.68 Regulated Persons shall take reasonable steps to ensure that the information collected about Clients for the purposes of the assessment of suitability is reliable. Such steps shall include, but shall not be limited to, the following:

- a) Ensuring that Clients are aware of the importance of providing accurate and up to date information;
- b) Ensuring that all tools, such as risk assessment profiling tools or tools to assess a Client's knowledge and experience, employed in the suitability assessment process are fit for purpose and are appropriately designed for use with their Clients, with any limitations identified and actively mitigated through the suitability assessment process;
- c) Ensuring that questions used in the process are likely to be understood by the Clients and to capture an accurate reflection of the Client's objectives and needs and the information necessary to undertake the suitability assessment;
- d) Taking steps, as appropriate, to ensure the consistency of customer information, such as considering whether there are obvious inaccuracies in the information provided by the Client.

#### *Communication with Clients regarding Assessment of Suitability*

R.4.4.69 Regulated Persons shall not create any ambiguity or confusion about their responsibilities in the process of assessing the suitability of Insurance Based Investment Products in accordance with R.4.4.59. Regulated Persons shall inform Clients, clearly and simply, that the reason for assessing suitability is to enable them to act in the Client's best interest.

#### *Group Insurance*

R.4.4.70 With regard to group insurance the Regulated Person shall establish and implement a policy as to who shall be subject to the suitability assessment in case an insurance contract is concluded on behalf of a group of members and each individual member cannot take an individual decision to join. Such a policy shall also contain rules on how that assessment will be done in practice, including from whom information about knowledge and experience, financial situation and investment objectives shall be collected.

#### *Suitability Statement*

R.4.4.71 When providing Advice on an Insurance Based Investment Product, the Regulated Person shall, prior to the conclusion of the contract, provide the Client with a suitability statement on a Durable Medium specifying the Advice given and how

that advice meets the preferences, objectives and other characteristics of the Client. The Conditions set out in R.1.1.2 to R.1.1.6.

R.4.4.72 Where the contract is concluded using a means of distance communication which prevents the prior delivery of the suitability statement, the Regulate person may provide the suitability statement on a durable medium immediately after the Client is bound by any contract, provided that both of the following conditions are met:

- a) The Client has consented to receiving the suitability statement without undue delay after the conclusion of the contract; and
- b) The Regulated Person has given the client the option of delaying the conclusion of the contract in order to receive the suitability statement in advance of such conclusion.

R.4.4.73 When providing Advice on the suitability of an Insurance Based Investment Product in accordance with R.4.4.59, Regulated Persons shall provide a statement to the Client (suitability statement) that includes the following:

- a) An outline of the advice given;
- b) Information on how the recommendation provided is suitable for the Client, in particular how it meets:
  - i. the Client's investment objectives, including that Client's risk tolerance;
  - ii. the Client's financial situation, including that Client's ability to bear losses;
  - iii. the Client's knowledge and experience.

R.4.4.74 Regulated persons shall draw Clients' attention to, and shall include in the suitability statement, information on whether the recommended Insurance Based Investment Products are likely to require the Client to seek a periodic review of their arrangements.

R.4.4.75 Where the Regulated person has informed the Client that it will carry out a periodic assessment of suitability, the periodic report shall contain an updated statement of how the Insurance Based Investment product meets the Client's preferences, objectives and other characteristics of the Client.

- R.4.4.76 Where a Regulated Person has informed the Client that it will carry out a periodic assessment of suitability the subsequent statements after the initial Service is established may be limited to changes in the services or underlying investment assets, and/or the circumstances of the Client without repeating all the details contained in the first statement.
- R.4.4.77 Regulated Persons providing a periodic assessment of suitability shall review, in accordance with the best interest of their customers, the suitability of the recommended Insurance Based Investment Products at least annually. The frequency of this assessment shall be increased depending on the characteristics of the Client, such as the risk tolerance, and the nature of the recommended Insurance Based Investment Product.

#### *Assessment of Appropriateness*

- R.4.4.78 Without prejudice to R.4.4.56 a Regulated Person, when providing Services other than those referred to in R.4.4.59, in relation to sales where no Advice is given, asks the Client to provide information regarding that client's knowledge and experience in the investment field relevant to the specific type of Product or Service offered or demanded so as to enable the Regulated Person to assess whether the Insurance Based Investment Product envisaged is appropriate for the Client. Where a bundle of Services or Products is envisaged, the assessment shall consider whether the overall bundled package is appropriate.
- R.4.4.79 Without prejudice to the fact that in accordance with R.4.4.56 any contract proposed shall be consistent with the Client's demands and needs, Regulated Persons shall determine whether the Client has the necessary knowledge and experience in order to understand the risks involved in relation to the Service or product proposed or demanded when assessing whether a Service or Product distributed in accordance with R.4.4.78 is appropriate for the Client.
- R.4.4.80 Where the Regulated Person considers, on the basis of the information received under R.4.4.78, that the Product is not appropriate for the Client, the Regulated person shall warn the Client to that effect. That warning may be provided in a standardised format.
- R.4.4.81 Where Clients do not provide the information referred to in R.4.4.78, or where they provide insufficient information regarding their knowledge and experience, the Regulated person shall warn them that it is not in a position to determine whether the product envisaged is appropriate for them. This warning may be provided in a standardised format.

R.4.4.82 Without prejudice to R.4.4.56, a Regulated Person may provide Services in relation to an Insurance Based Investment Product without the need to obtain the information or make the determination provided for in R.4.4.4.78 where all the following conditions are met:

- a) The Services of the Regulated Person relate to either of the following Insurance Based Investment Products;
  - i. Contracts which only provide investment exposure to the Financial Instruments deemed non-complex under R.4.4.45 and do not incorporate a structure which makes it difficult for the Client to understand;
  - ii. Other non-complex Insurance Based Investments for the Purpose of this paragraph;
- b) The Service is carried out at the initiative of the Client;
- c) The Client has been clearly informed that, in the provision the Services, the Regulate Person is not required to assess the appropriateness of the Insurance Based Investment Product or the Service provided or offered and that the Client does not benefit from the corresponding protection of the relevant conduct of business rules. Such a warning may be provided in a standardised format.
- d) The Regulated Person complies with its obligations under R.3.4 and R.3.16.

All Regulated Persons operating under the freedom to provide services or the freedom of establishment, when concluding insurance contracts with Clients having their habitual residence or establishment in a Member State or EEA State which does not allow a derogation from the assessment of appropriateness in terms of this Rule, shall comply with all the applicable provisions in that Member State or EEA State.

#### *Non-Complex Insurance Based Investment Products*

R.4.4.83 An Insurance Based Investment Product shall be considered as non-complex for the purposes of R.4.4.87 where it satisfies all of the following criteria:

- a) It includes a contractually guaranteed minimum maturity value which is at least the amount paid by the Client after deduction of legitimate costs;
- b) It does not incorporate a clause, condition or trigger that allows the Regulated Person to materially alter the nature, risk, or pay-out profile of the Insurance Based Investment Product;

- c) It provides options to surrender or otherwise realise the insurance Based investment Product at a value that is available to the customer;
- d) It does not include any explicit or implicit charges which have the effect that, even though there are technically options to surrender or otherwise realise the Insurance Based Investment Product, doing so may cause unreasonable detriment to the Client because the charges are disproportionate to the cost to the Regulated person;
- e) It does not in any other way incorporate a structure which makes it difficult for the Client to understand the risks involved.

Rules Common to the Assessment of Suitability and Appropriateness

R.4.4.84 For the purposes R.4.4.56 and R.4.4.78, the necessary information to be obtained by Regulated Persons with regard to the Client's knowledge and experience in the relevant investment field shall include, where relevant, the following, to the extent appropriate to the nature of the Client, and the nature and type of Product or Service offered or demanded, including their complexity and the risks involved:

- a) The types of Service, transaction, Insurance Based Investment Product or Financial Instrument with which the Client is familiar;
- b) The nature, number, value and frequency of the Client's transactions in Insurance Based Investment Products or Financial Instruments and the period over which they have been carried out;
- c) The level of education, and profession or relevant former profession of the Client.

R.4.4.85 The Regulated Person shall not discourage a Client from providing information required for the purposes of R.4.4.78.

R.4.4.86 Where the information required for the purposes of R.4.4.56 and R.4.4.78 has already been obtained pursuant to R.4.4.56, the Regulated Person shall not request it anew from the Client.

R.4.4.87 The Regulated Person shall be entitled to rely on the information provided by its Clients unless it is aware or ought to be aware that the information is manifestly out of date, inaccurate or incomplete.

### *Reporting Requirements*

- R.4.4.88 The Regulated person shall provide the Client with adequate reports on the Service provided in a Durable Medium. Those reports shall include periodic communication to Clients, taking into account the type and the complexity of the Insurance Based Investment Products involved and the nature of the Service Provided to the Client and shall include, where applicable, the costs associated with the transactions and Services undertaken on behalf of the Client. This report shall be provided at least annually.
- R.4.4.89 Without prejudice Article 185 of Directive 2009/138/EC of the European Parliament and of the Council (the Solvency II Directive) the Regulated Person shall provide the Client with a periodic report, on a Durable Medium, of the Services provided to and transactions undertaken on behalf of the Client.
- R.4.4.90 The periodic report referred to in R.4.4.89 shall provide a fair and balanced review of the Services provided to and transactions undertaken on behalf of that Client during the reporting period and shall include, where relevant the total costs associated with these Services and transactions and the value of each underlying investment asset.

#### *Retention of Records*

- R.4.4.91 Without prejudice to the application or Regulation (EU) 2016/679 of the European parliament and of the council, Regulated Persons shall maintain records of the assessment of suitability or appropriateness undertaken in accordance with R.4.4.56 and R.4.4.78. The records shall include the information obtained from the client and any documents agreed with the Client, including documents that set out the rights of the parties and the other terms on which the Regulated person will provide services to the Client. Such records shall be retained for at least the uration of the relationship between the Regulated Person and the Client.
- R.4.4.92 In the case of an assessment of suitability undertaken in accordance with R.4.4.xx above, the record shall further include the following:
- a) The result of the suitability assessment;
  - b) The recommendation made to the Client and the statement provided in accordance with R. 4.4.56;
  - c) Any changes made by the Regulated person with regard to the suitability assessment in particular any change to the Client's risk tolerance;
  - d) Any changes to the underlying investment assets.

R.4.4.93 In the case of an assessment of appropriateness undertaken in accordance with R.4.4.78, the record shall further include the following:

- a) The result of the appropriateness test;
- b) Any warning given to the Client where the Insurance Based Investment Product was assessed as potentially inappropriate for the Client, whether the Client asked to proceed with concluding the contract despite the warning and, where applicable, whether the Regulated Person accepted the Client's request to proceed with concluding the contract;
- c) Any warning given to the Client where the Client did not provide sufficient information to enable the Regulated Person to assess the appropriateness of the Insurance Based Investment Product, whether the client asked to proceed with concluding the contract despite the warning and, where applicable, whether the Regulated Person accepted the Client's request to proceed with concluding the contract.

R.4.4.94 The records shall be retained in a medium that allows the storage of information in a way accessible for future reference by the Authority. The authority shall be able to access them readily, to reconstitute each element in a clear and accurate manner and to identify easily any changes, corrections or other amendments, and the contents of the records prior to such modifications.

## **Section 5: Contractual Arrangements with Clients**

### **Application**

- R.4.5.1 The Rules and the relative Guidance set out under Part A are applicable to all Regulated Persons.
- R.4.5.2 The Rules and the relative Guidance set out under Part B are applicable to persons falling under point (i), (ii) and (v) of the definition of Regulated Person in the Glossary to these Rules.
- R.4.5.3 The Rules and the relative Guidance set out under Part C are applicable to persons falling under point (iii) of the definition of “Regulated Person” in the Glossary to these Rules.
- R. 4.5.4 The provisions of this Section are without prejudice to any rights which may be available to professional and retail clients under the Consumer Affairs Act.

### **PART A: General Rules**

- R.4.5.5 For the purposes of this Part the term “Regulated Person” shall refer to all Regulated Persons as defined in the Glossary to these Rules, except as otherwise indicated.
- R.4.5.6 A Regulated Person shall ensure that the terms of any contract or agreement entered into with a Client for the provision of a Service or Product, are fair, clear and not misleading.
- R.4.5.7 A Regulated Person shall establish a record that includes the document or documents agreed between the Regulated Person and the Client that set out the essential rights and obligations of the parties, and the other terms on which the Regulated Person will provide services to the Client. The rights and duties of the parties to the contract may be incorporated by reference to other documents or legal texts.

R.4.5.8 The Regulated Person shall not, in any communication or agreement with a Client (except where permitted by applicable legislation), exclude or restrict, or seek to exclude or restrict:

- a) any legal liability or duty of care to a Client which it has under applicable law or under these Rules;
- b) any other duty to act with skill, care and diligence which is owed to a Client in connection with the provision to that Client of a Product or Service; or
- c) any liability owed to a Client for failure to exercise the degree of skill, care and diligence that may reasonably be expected of it in the provision of a Product or Service.

**Part B: Rules Applicable to persons falling under point (i), (ii) and (v) of the definition of Regulated Person in the Glossary to these Rules**

R.4.5.9 For the purposes of this Part, the term Regulated Person shall mean a person falling under point (i), (ii) and (v) of the definition of Regulated Person in the Glossary to these Rules.

R.4.5.10 Regulated Persons providing any investment Service or the service relating to safekeeping and administration of Financial instruments for the account of clients, including custodianship and related services such as cash/collateral management and excluding maintaining securities accounts at the top tier to a Client after the date of the coming into force of this Rulebook shall enter into a written basic agreement with the Client, in paper or another durable medium setting out the essential rights and obligations of the Regulated Person and the Client. Regulated Persons providing Advice shall comply with this obligation only where a periodic assessment of the suitability of the Financial Instruments or Services recommended is performed.

The written agreement shall set out the essential rights and obligations of the parties, and shall include the following:

- a) a description of the Services, and where relevant the nature and extent of any Advice services to be provided;

- b) in case of portfolio management services, the types of Products that may be purchased and sold and the types of transactions that may be undertaken on behalf of the Client, as well as any Products or transactions prohibited; and
- c) a description of the main features of any of the Services to be provided relating to safekeeping and administration of Financial instruments for the account of clients, including custodianship and related services such as cash/collateral management and excluding maintaining securities accounts at the top tier, including where applicable the role of the Regulated Person with respect to corporate actions relating to Client Financial instruments and the terms on which securities financing transactions involving Client securities will generate a return for the Client.

The provisions of this Rule shall apply to Regulated Persons who offer the services referred to in this Rule to Professional Clients.

**Part C: Rules Applicable to persons falling under point (iii) of the definition of Regulated Person in the Glossary to these Rules**

- R.4.5.11 For the purposes of this Part, the term Regulated Person shall mean a person falling under point (iii) of the definition of Regulated Person in the Glossary to these Rules.
- R.4.5.12 A Regulated Person entering into an Insurance contract shall ensure that such contract is made in a durable medium.
- R.4.5.13 A Regulated Person entering into a Life insurance contract shall ensure that it complies with the requirements set out in Title XI A of the Civil Code (Chapter 16 of the Laws of Malta) in relation to Life Insurance Contracts, in addition to any other applicable legislation and rules and regulations issued thereunder.

## **Section 6: Complaint Handling by Regulated Persons**

### **Application**

R.4.6.1 The Rules and the relative Guidance set out under Part A are applicable to Regulated Persons falling under points (i) and (iii) of the definition of Regulated Person in the Glossary, excluding a European Investment firm or European Insurance Undertaking which has established a branch in Malta in exercise of a European right in terms of the 'European Passport Rights for Investment Firms Regulations and the 'European Passport Rights for Insurance and Reinsurance Undertakings Regulations' respectively.

R.4.6.2 The Rules and the relative Guidance set out in Part B are applicable to Regulated Persons falling under point (iii) of the definition of Regulated Person in the Glossary, excluding European Insurance Undertaking which has established a branch in Malta in exercise of a European right in terms of the 'European Passport Rights for Insurance and Reinsurance Undertakings Regulations.'

**Part A- Rules and the relative Guidance set out under Part A are applicable to Regulated Persons falling under points (i) and (iii) of the definition of Regulated Person in the Glossary, excluding a European Investment firm or European Insurance Undertaking which has established a branch in Malta in exercise of a European right in terms of the 'European Passport Rights for Investment Firms Regulations and the 'European Passport Rights for Insurance and Reinsurance Undertakings Regulations.**

### *Complaints Management Policy*

R.4.6.3 Regulated Persons shall ensure that a complaints management policy is put in place and set out in a written document. This policy shall be defined and endorsed by the Regulated Person's senior management, who shall also be responsible for its implementation and for monitoring compliance with it.

The complaints management policy shall be made available to all relevant staff of the Licence Holder through an adequate internal channel.

*G.4.6.1 A Regulated Person's complaint management policy should include processes for:*

- a) *lodging a complaint with the Regulated Person by any reasonable means (including complaints submitted by an authorised representative such as a family member or a lawyer) and confirmation that this is free of charge;*
- b) *handling complaints received, including deadlines etc;*
- c) *the fair treatment of complainants;*
- d) *the proper treatment of a complainant's information and personal data, according to the applicable legal framework;*
- e) *preventing, identifying and managing possible situations of conflicts of interest in complaints management;*
- f) *the prompt, equal, fair and efficient management of complaints;*
- g) *the adequate training of staff participating in complaints handling within the Regulated Person ;*
- (g) *internal reporting, follow up and monitoring of compliance with the complaints management policy.*

**G.4.6.2** *With respect to the requirement in R. 4.6.3 above that the complaints management policy should be defined and endorsed by the senior management of the Regulated Person falling under point (iv) of the definition of 'Regulated Person' in the Glossary. Where such Regulated Person is a sole trader, such individual may not have the same formal governance processes as larger Regulated Persons and therefore a formal endorsement process may not be necessary. In any case, it is important that the complaints policy forms part of the formal processes followed by a sole trader.*

### Complaints Management Function

R.4.6.4 Regulated Persons shall have in place a complaints management function which enables them to investigate complaints fairly and to identify or mitigate any possible conflicts of interest.

Provided that in the case of Regulated Persons falling under points (iii) or (iv) of the Definition of Regulated Person in the Glossary to these Rules, the complaints management function shall not be entrusted to a person involved in the handling of the claim on which a complaint has been lodged.

R.4.6.5 Regulated Persons shall inform the Authority of the identity and contact details of the individual/s involved in the complaints management function as referred to above and any changes thereto.

*G.4.6.3 Irrespective of the specific model that a Regulated Person may have adopted for complaints handling, it is considered best practice for a Regulated Person to:*

*(a) appoint one or more senior manager(s) with overall regulatory responsibility for the complaints management function or process, as appropriate;*

*(b) ensure the necessary internal flows of information and reporting lines for complaints management, as appropriate;*

*(c) control the effective and efficient treatment of complaints.*

*G.4.6.4 Where the Regulated Person is considered as small, (especially in the case of sole traders) it might not be possible for the Regulated Person to structure its internal organisation in such a way that it has a separate complaints management unit. However, the Regulated Person should still ensure that it operates in a manner that ensures that complaints are handled fairly and impartially and (with the exception of sole traders) they identify and mitigate conflicts of interest*

#### Registration of Complaints

R.4.6.6 Regulated Persons shall register any complaints it receives in an appropriate manner, (for example through a secure electronic register) as soon as these are received together with any action taken with respect to such complaints. The Authority may at any time require the register to be produced for its review

G.4.6.5 *The register referred to in R.4.6.6 above may be maintained in the form of a secure electronic register.*

G.4.6.6 *Regulated Persons are recommended to include in such register, for each complaint, the date on which it was received and the date on which it was resolved.*

G.4.6.7 *Without prejudice to the provisions of the Data Protection Act (Cap. 440) and any applicable provisions of Maltese law relating to record keeping, it is considered best practice for:*

*(a) the register of complaints held by a Regulated Person to contain all the necessary information on the complaints, including;*

*(i) the subject of the complaint;*

*(ii) data on the complainant;*

*(iii) date of receiving and answering the complaint;*

*(iv) result/outcome of the complaints handling procedure;*

*(iv) class of business or financial instrument, as applicable to which the complaint relates;*

*(b) documentation relating to the complaint to be kept and archived in a secure manner for a reasonable period of time based on the nature of the complaint;*

*(c) a Regulated Person to provide information to complainants regarding their complaint, where reasonably requested by complainants.*

#### *Internal Follow-up of Complaints*

R.4.6.7 *Regulated Persons shall analyse on an on-going basis, complaints handling data to ensure that they identify and address any recurring or systemic problems, and potential legal and operational risks.*

G.4.6.8 *Regulated Persons may carry out the above analysis by, inter alia:*

- (a) Analysing the causes of individual complaints so as to identify root causes common to types of complaint;*
- (b) Considering whether such root causes may also affect other processes or products, including those not directly complained of; and*
- (c) Correcting, where reasonable to do so, such root causes.*

*G.4.6.9 A Regulated Person should have in place the following processes in order to comply with the proper internal follow-up of complaints:*

- (a) the collection of management information on the causes of complaints and the products and services complaints relate to;*
- (b) a process to identify the root causes of complaints and to prioritise dealing with the root causes of complaints;*
- (c) a process to consider whether the root causes identified may affect other processes or products;*
- (d) a process for deciding whether root causes discovered should be corrected and how this should be done; and*
- (e) regular reporting or information on recurring problems to senior management.*

#### Provision of Information

**R.4.6.8** Regulated Persons shall:

- (a)** On request or when acknowledging receipt of a complaint, provide written information regarding their complaints handling process;
- (b)** Publish details of their complaints handling process in an easily accessible manner
- (c)** Provide clear, accurate and up-to-date information about the complaints-handling process including:

- i. details of how to make a complaint and
  - ii. the process that will be followed when handling a complaint
- (d) Keep the complainant informed about further handling of the complaint.

*G.4.6.10 For the purposes of paragraph (b) in the above Rule, Regulated Persons should publish details of their complaints handling process in brochures, pamphlets, contractual documents or via the Regulated Person's website.*

*For the purposes of paragraph (c)(i), in the above Rule, Regulated Persons should include the type of information to be provided by the complainant and the identity and contact details of the person or department to whom this complaint should be directed.*

*For the purposes of paragraph (c)(ii), in the above Rule, Regulated Persons should provide information on when the complaint will be acknowledged, an indication of handling timelines, and the availability of the Office of the Arbiter for Financial Services as established by the Arbiter for Financial Services Act and of alternative dispute resolution mechanisms in the case that a dispute remains unresolved.*

#### Procedure for Responding to Complaints

R.4.6.9 Regulated Persons shall:

- (a) In writing, acknowledge receipt of any complaint upon receipt;
- (b) Where a complaint is made orally, the Regulated Person shall make a summary of the complaint and request the complainant to confirm in writing the said summary;
- (c) Seek to gather and investigate all relevant evidence and information regarding the complaint;
- (d) Communicate in plain language, which is clearly understood;

- (e) Provide a response without unnecessary delay, or at least, by not later than fifteen working days from when the complaint was registered. Where the investigation of a complaint is not completed within fifteen days from receipt of the complaint, the Regulated Person shall, :
- i. inform the complainant about the causes of the delay;
  - ii. provide an indication as to when the investigation is likely to be completed; and
- (f) when providing a final decision in terms of (e) above that does not fully satisfy the complainant's demand, shall provide a thorough explanation of the Regulated Person's position on the complaint and that if the complainant is not satisfied with the way the complaint was resolved by the Regulated Person, the complainant may refer the complaint to the Office of the Arbiter for Financial Services established under the Arbiter for Financial Services Act, (Cap.555). Such decision shall be provided in writing.

#### Reporting to the Authority

- R.4.6.10 Regulated Persons shall provide information on complaints and complaints handling to the Authority as and when required in any format as required by the Authority. This data shall, as a minimum, cover the number of complaints received, differentiated as appropriate by Product or Service, as applicable and the cause of the complaint.
- R.4.6.11 Without prejudice to R.4.6.10 above, where a complaint has been lodged with the Office of the Arbiter for Financial Services and the case has been decided, the Regulated Person shall immediately provide the Authority with a copy of the Arbiter's final decision. The Regulated Person shall also notify the Authority immediately, in the event that an appeal from the decision of the Arbiter is lodged by the complainant or by the Regulated Person itself, in terms of the Arbiter for Financial Services Act, and once such appeal has been decided of the final decision of the Court.

**Part B- Rule applicable to Regulated Persons falling under point (iii) of the definition of Regulated Person in the Glossary, excluding European Insurance Undertaking which has established a branch in Malta in exercise of a European right in terms of the 'European Passport Rights for Insurance and Reinsurance Undertakings Regulations.'**

Unrelated Complaints

R.4.6.12 Where a Regulated Person receives a complaint about:

- (a) activities other than those regulated by the MFSA ; or
- (b) the activities of another financial services provider for which the Regulated Person has no legal or regulatory responsibility (and where those activities form the substance of the complaint),

the provisions of this section shall not apply to such Regulated Person

R.4.6.13 Notwithstanding the provisions of R.4.6.12 above, the Regulated person should where possible, explain its position on the complaint and/or, where appropriate, direct the complainant to the Regulated person or other financial services provider responsible for handling the complaint or to any other appropriate body which may deal with the complaint and/or seek independent professional advice.

**Appendix 1**

***It is important to note that in referring to this matrix and seeking to apply it in practice, Regulated Persons should take into account the particular circumstances of the scenario they are faced with in light of contents of this Guidance Note. The matrix should only serve as a rough guide and does not remove the need for Regulated Persons to exercise their own judgment.***

<p><b>Subsequent service/transaction at Initiative of the Client</b></p>	<p>Regulated Person sends envelope/email addressed to Client including covering letter <b>drawing recipients' attention to enclosures/attachments</b> which are a product leaflet and relevant application form and a general buy/sell recommendation.</p>	<p>Regulated Person sends envelope/email to Client containing/attaching a product leaflet and/or relevant application form and/or general recommendation <b>(without covering letter)</b></p>	<p>Regulated Person sends a text message to a small number of selected Clients, referring to their existing investments and inviting them to consider products or instruments offered by the Regulated Person</p>	<p>Regulated Person sends mailshot to all or some of its existing Clients, referring to their particular circumstances, e.g. "Dear Mr. Borg, as you are reaching retirement, we have products which may suit your needs..."</p>	<p>Regulated Person distributes a communication advertising a particular product or its services. (e.g. flyer in newspaper or magazine)</p>	<p>Regulated Person issues advertorial in the newspaper advertising its services and referring to a general buy/sell recommendation with respect to a particular product/instrument</p>	<p>Regulated Person simply forwards primary issues application forms to Clients</p>
<p><b>TEST A:</b></p>							
<p>Is means of communication <b>OF ITS VERY NATURE</b> general (and hence excludes a personal</p>	<p>NO</p>	<p>NO</p>	<p>NO</p>	<p>NO</p>	<p>Yes</p>	<p>Yes</p>	<p>No</p>

communication)?							
<b>TEST B:</b>							
Personalised Communication	No*	No	Yes	Yes	No	No	No
Contains an Invitation or is Intended to influence the Client	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Analysis</b>	Transaction at initiative of Client	Transaction at initiative of Client	Transaction <b>NOT</b> at initiative of Client	Transaction <b>NOT</b> at Initiative of Client	Transaction at Initiative of Client	Transaction at Initiative of Client	Transaction at Initiative of Client

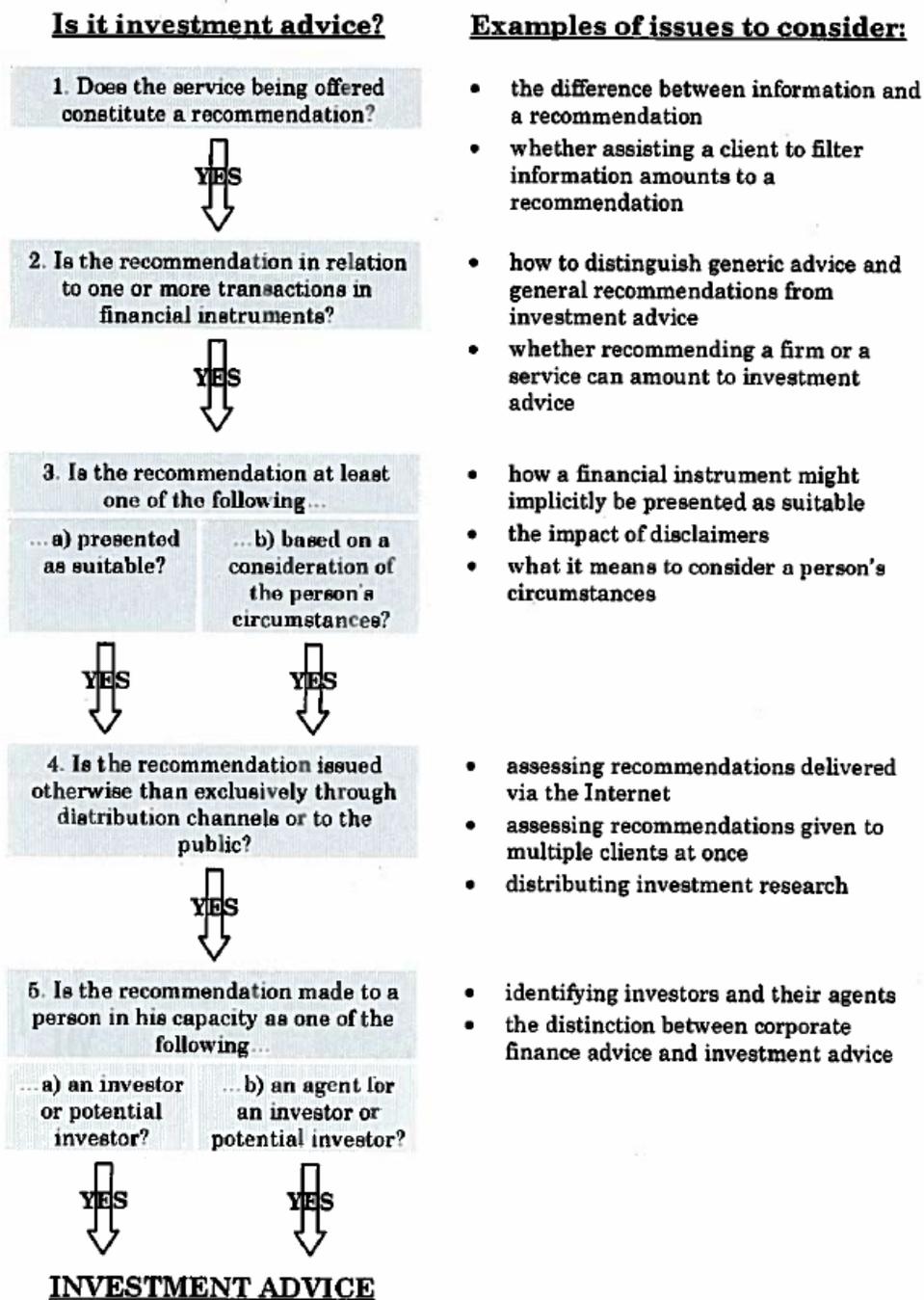
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\* Provided the covering letter includes a **prominent disclaimer** to the effect that it is a standard letter which has been sent to various clients and that it should not be construed by the recipient as a personal communication since it has not been tailored to suit the particular circumstances of the recipient.

Issued on: 20 December 2017

Issued on: 20 December 2017

**Appendix 2: The Five Key Tests For Investment Advice.**



Issued on: 20 December 2017