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The Netherlands

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HEAT MAP

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Conflicts of interest			
Client assets			
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Third Party Payments ban			
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Investment advice			
Product intervention			
Recording communications			
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Dealings with eligible counterparties			

Key:  Significant change  Moderate change  Minor / no change

Level 1 (Final)

Client categorisation

- No change to client categories (retail / professional / eligible counterparty) or opting up procedures
- Minor change to treat municipalities and local public authorities as retail clients by default, with ability to become elective professional clients and some categories of ECPs are no longer ECPs
- National/regional governments and public bodies that manage public debt are not local authorities
- Member States have discretion to design the opt up procedure

Conflicts of interest

- No change to existing regime
- Amalgamation of Levels 1 and 2 of MiFID I
- Express statement that conflicts arise from inducements and remuneration structures

Client order handling

- Requirement to disclose unexecuted client limit orders to the public extended to capture additional trading venues created by MiFID II
- ESMA was not asked to provide technical advice

Complaints handling

- No significant change to MiFID I
- Member States to notify ESMA of their out-of-court complaints and redress procedures - ESMA intends to keep a list on its website
- Note: Interaction with Alternative Disputes Resolution Directive (in force from 9 July 2015) and Online Dispute Resolution Regulations (in force from 9 January 2016)

Clear, fair and not misleading communications

- No direct change to current regime
- Extension of fair, clear and not misleading regime to eligible counterparties

Client assets

- No significant change to MiFID I

Inducements (generally)

- Existing test for receiving third party payments remains: (i) enhance quality of service; (ii) be in clients' best interest; and (iii) be disclosed
- 'Minor non-monetary benefits' excluded from ban for independent advisers and portfolio managers
- Confirmation of disclosure requirements to clients – must be accurate and periodic

Third party payments ban

- New EU wide ban on payments being received and kept (or off-set against fees owed to firms)
- Applies to retail and professional clients
- 'Minor non-monetary benefits' excluded from ban
- Member States can gold-plate

Suitability

- Requirement to assess suitability of product when advising retail/professional clients remains
- If advising on bundled/package product, overall product needs to be suitable
- New requirement for a suitability report for retail clients

Appropriateness/execution-only

- Appropriateness test remains the same
- List of 'non-complex' financial instruments on which appropriateness can be undertaken is narrowed
- Explicit statement of what is a 'complex' product (including structured UCITS)
- Appropriateness test always required where 'credit' provided

Level 1 (Final)

Best execution

- Firms must publish top 5 execution venues actually used each year, and to notify execution venue used for each trade
- Must take “all sufficient” steps for best execution
- Firms that receive/transmit/place to have execution policies
- Policies to be tailored and detailed and material changes notified
- Demonstrate best execution to regulators on request

Investment advice

- No change to definition of investment advice
- New concept of ‘independent’ and ‘non-independent’ advice
- Parameters set that need to meet to give ‘independent’ advice

Record-keeping

- No significant change to MiFID I
- Clarification that records are also required to allow regulators to fulfil their supervisory duties under other EU regulations and to demonstrate firms’ compliance with rules related to ‘market integrity’

Reporting to clients

- Existing reporting requirements remain
- Extended to require ‘periodic’ reporting
- Extends reporting requirement to also apply to eligible counterparties

Information to clients

- Existing requirements remain and enhanced for:
 - investment advice (with new ‘independent’ advice)
 - financial instruments (to implement product governance requirements)
 - costs and charges (aggregated and individual costs, provided ‘in good time’ and annually updated)

Remuneration

- New requirements for investment firms
- Restrictions on incentive schemes, internal rewards and sales targets for staff
- New remuneration policy and procedure approved and overseen by senior management
- Focus on responsible business conduct, fair treatment of clients, avoiding conflicts of interest, clients’ best interests

Recording communications

- Was optional, but now mandatory for certain firms to record calls and electronic communications that (could) result in a transaction
- Records to be kept for 5 / 7 years
- File note of face-to-face meetings with clients to be kept

Dealings with eligible counterparties

- Exclusion from MiFID requirements for “eligible counterparty business” remains
- Recitals extend some investor protection requirements to ECPs as they are ‘clients’
- Obligation to act honestly, fairly and professionally
- Obligation to communicate in a manner which is fair, clear and not misleading
- To receive certain information / reports

Product intervention

- Completely new regime for national regulators to ban products and services
- Complete new regime for ESMA/EBA under MiFIR and EIOPA under PRIIPs to temporarily ban products and services on an EU wide basis or in specific Member States

Product governance and distribution

- New EU wide product governance and distribution regime
- Detailed obligations apply to product manufacturers and, separately, distributors

Level 2 (Final Technical Advice)

Client categorisation

- ESMA was not asked to comment on treatment of municipalities and local public authorities or their opting up procedure
- Firms which are eligible to become elective ECPs narrowed (elective professionals excluded)
- New procedure for opting up to ECP status – warnings need to be given, specific procedure adopted, written confirmation required

Conflicts of interest

- Disclosure can only be used as a 'last resort'
- Over-reliance on disclosure implies a firm's conflict of interest policy is deficient
- Disclosures must be tailored, and contain a warning
- Conflicts policies must be reviewed at least annually
- Operational separation of staff producing 'recommendations'.
- Physical separation of staff preparing investment research (unless this is disproportionate)

Client order handling

- ESMA was not asked to provide technical advice

Complaints handling

- Written complaints handling policy / procedures required and new complaints oversight function (can be provided by compliance)
- Applies to retail / professional / potential clients
- Complaints to be brought free of charge
- No clarity on what amounts to a 'complaint' in the context of professional clients
- Complaints data to be reported to regulators
- Level 3 guidelines may be made

Clear, fair and not misleading communications

- Targeted improvements to communications with retail clients (i.e. consistent language, indication of risks, kept up-to-date, performance scenarios)
- To improve treatment of non-retail clients, extending some 'retail-like' obligations to professional clients
- Confirmed technical advice does not apply to communications to eligible counterparties

Client assets

- New officer responsible for client assets
- Further restrictions on title transfer collateral arrangements and must demonstrate 'appropriateness' and disclose the risks of TTCAs
- New requirements for securities financing transactions; diversify where client funds held; limits on intra-group deposits; ban on custody liens / not segregating if not prescribed by applicable law
- Commission services non-paper (04/02/2015)

Inducements (generally)

- Non-exhaustive list of when 'quality enhancement' test not met - firms must prove quality enhanced
- Exhaustive list of 'minor non-monetary benefit' - narrowly interpreted and strictly applied
- Inducements to be disclosed, individually priced
- Dealing commission paying for research banned
- Level 3 guidelines expected to supplement what does not enhance the quality of a service
- Commission services non-paper (04/02/2015)

Third party payments ban

- Any third party payments received must be paid over '*as soon as reasonably practicable*'
- Can pay over by paying into client money account
- Must have policy for ensuring amounts paid over
- Can inform clients of amounts paid over in regular statements

Suitability

- Prescribed content of suitability reports and periodic reports
- Clients to be alerted where suitability may need to be reviewed periodically – no need to revisit the entire assessment, just what has changed
- Suitability assessment required for simplified advice (e.g. advice given through automated processes)

Appropriateness/execution-only

- Products expressly excluded from the 'non-complex' product definition are automatically complex and cannot then go through the separate test to see if they fall within being a non-complex product
- For the separate 'non-complex' test, a further two criteria have been added
- New record-keeping requirements
- ESMA guidelines expected on the warning for clients where there is a "not appropriate" assessment

Level 2 (Final Technical Advice)

Best execution

- Tailored best execution policies
- Separate policy summaries for retail clients
- No clarity on how to satisfy 'all sufficient steps'
- Execution venues/entities to be notified (but do not necessarily need to be listed in policies)
- Additional disclosure requirements
- Clarity on what constitutes a 'material change' to trigger a review of the policy
- Separately, draft RTS under discussion by ESMA
- ESMA's Peer Review Report into Best Execution (2015/494)

Investment advice

- Change to definition of investment advice - exclusion for where advice given through 'distribution channels' deleted
- Additional requirements in order to meet threshold for giving 'independent' advice
- Level 3 guidelines anticipated on what amounts to investment advice and to clarify how to meet 'independent' standards

Record-keeping

- ESMA codifying Level 3 guidance from 2007
- Non-exhaustive list of type of records to be kept in writing (regardless of technology used)
- Extended to apply to a wider range of firms and situations
- Content of records prescribed
- Does not apply retrospectively
- RTS being developed and Level 3 guidelines expected

Reporting to clients

- Confirms reporting requirements for all clients (but ECPs can agree different standards for content and timing)
- Professional clients to receive same reports as retail clients
- Depreciation thresholds which trigger reporting requirements (multiples of 10%)
- Some reports disapplied if information is available on a website which is a 'durable medium'

Information to clients

Increased information requirements for:

- Investment advice: applies to professional clients
- Costs and charges: significant level of detail
- Client agreements expanded
- ECPs can opt out from receiving information (but not where they on-sell to retail clients)
- Professionals can also opt-out in certain circumstances

Remuneration

- ESMA is codifying its previous Level 3 guidance
- Includes in-kind benefits and career progression
- Compliance function and senior management to set remuneration policy
- Balance between fixed and variable remuneration
- Requirements extended to relevant people who affect a firm's services and its 'corporate behaviour'
- Also, ESMA consultation on Guidelines on sound remuneration policies under CRD IV (4 March 2015)
- Also EBA consultation on guidelines for sound remuneration policies (EBA/CP/2015/03)

Recording communications

- New policy required with senior management oversight and (proportionate) ongoing monitoring
- Record-keeping obligations
- Content of face-to-face file note prescribed
- To be stored in durable medium
- Must inform clients that calls being recorded and kept for a minimum of 5 years

Dealings with eligible counterparties

- ECPs can opt out from receiving some reports/information but not where they are on-selling products to their own clients or where the product embeds a derivative
- Firms can also agree with ECPs different standards for the content and timing of reports

Product intervention

- EBA has separately consulted on its product intervention powers for structured deposits; EIOPA is consulting on the same for PRIIPs
- Criteria for national regulators tweaked
- Criteria is non-exhaustive for national regulators but ESMA advises the Commission to consider if it should be exhaustive for EBA/ESMA (and presumably EIOPA)

Product governance and distribution

- Applies to 'services' as well as 'products', for all client types and to all distributors in the sales chain
- Also consider 'market threat' in developing products
- Only one target market assessment required, for pure manufacturers this is on a 'theoretical basis'
- Non-MiFID entities not exempt from regime
- ESMA proposes to eventually harmonise product governance regimes across MiFID/UCITS/AIFMD

Impact in the Netherlands

Client categorisation

- Impact for firms dealing with ECPs who are elective professionals, and local public authorities, municipalities, market maker, commodities traders and locals (may need to recategorise these clients)
- Implement new elective ECP opting-up pack which complies with requirements

Conflicts of interest

- Reassess the firm's conflicts, update policies and procedures, and implement periodic (at least annual) review
- Create suite of disclosure documents, tailored for different client types/services/strategies, with the new warning
- Consider how to demonstrate that disclosure is being used only as a last resort
- Physical separation of analysts, and additional operational separation required?

Client order handling

- Impact in relation to handling client orders on new trading venues such as OTFs

Complaints handling

- Extend existing regime to potential and professional clients
- Change operational procedures
- May need to increase staff to deal with more complaints

Clear, fair and not misleading communications

- Extension of some obligations to professional clients may mean marketing materials need to be updated
- Dealing with ECPs in fair, clear and not misleading manner is unlikely to be much of a change

Client assets

- Firms will need to appoint a single officer, reassess TTCA arrangements; negotiate new threshold limits for clients; renegotiate sub-custody arrangements so that third parties cannot disapply segregation requirements/require liens where they are not required by applicable law, diversify where client funds are held; introduce limits on intra-group deposits

Inducements (generally)

- End to 'free' research
- Firms will need to prove that an inducement enhances quality of service and fits in the narrowed 'permitted benefits' table

Third party payments ban




- NL regime super equivalent for most firms as commission ban under Act on the Financial Supervision (AFS) goes further than EU ban but currently only applies to retail
- Extension to professional clients significant impact
- Payments excluded from AFS ban may not match the 'minor non-monetary benefits' proposed to be excluded from the EU ban

Suitability

- Provide suitability reports before transactions to non-professional clients,
- Suitability should take into account the whole of the services and/or the combination of financial service and the financial product together
- Will apply to 'structured deposits'

Appropriateness/execution-only

- Firms' 'non-complex' product suite to be reassessed
- Reassessed 'complex' products cannot be sold execution-only
- Operational change for record-keeping requirements
- Uncertainty on 'complex' / 'non-complex' distinction
- ESMA Consultation Paper (2015/610) on complex debt instruments and structured deposits

Key:  Significant change compared to MiFID I  Moderate change compared to MiFID I  Minor / no change compared to MiFID I

"IDD" means the revised Insurance Mediation Directive, proposed to be called the "Insurance Distribution Directive"

Impact in the Netherlands

Best execution

- Reconsider entire best execution process
- Redraft policies / create retail summaries
- Evidence best execution, "all sufficient steps"
- Publish top 5 venues
- Publish required information in standardised form but with sufficient granularity

Record-keeping

- Additional records may need to be kept
- Member States can gold-plate, not sure whether Dutch legislator will do that. The requirement will be laid down in the Decree on conduct of business AFS which has not been published yet

Information to clients

- Firms will need to negotiate the information ECPs / professional clients do not wish to receive
- Significant amount of new information to clients
- New KID for PRIIPs will represent significant operational projects for firms creating packaged products and firms distributing them

Reporting to clients

- Professional clients to receive what retail clients receive
- Negotiate with ECPs what reports they receive and record what is agreed
- May need to update terms and conditions of services
- If reporting online, need to ensure website is a 'durable medium'

Remuneration

- NL already equivalent to MiFID requirements for many firms; amendments not clear yet. The requirement will be laid down in the Decree on conduct of business AFS which has not been published yet
- May need to revisit who is caught by the new rules after there is clarity on who affects a firm's 'corporate behaviour' – delegates? contractors?

Recording communications

- Policies and procedures will need to be updated
- Extent of recording internal communications?
- Storage requirements to be updated so records can be kept for 7 years
- Firms to determine if records kept in 'durable medium' that allows for immediate reproduction

Dealings with eligible counterparties

- Firms which require them to communicate with ECPs in a way that is not misleading
- Information and reporting to ECPs is a more significant change

Product intervention

- Nothing for firms to do in practice
- Ensure compliance monitoring programme monitors for bans

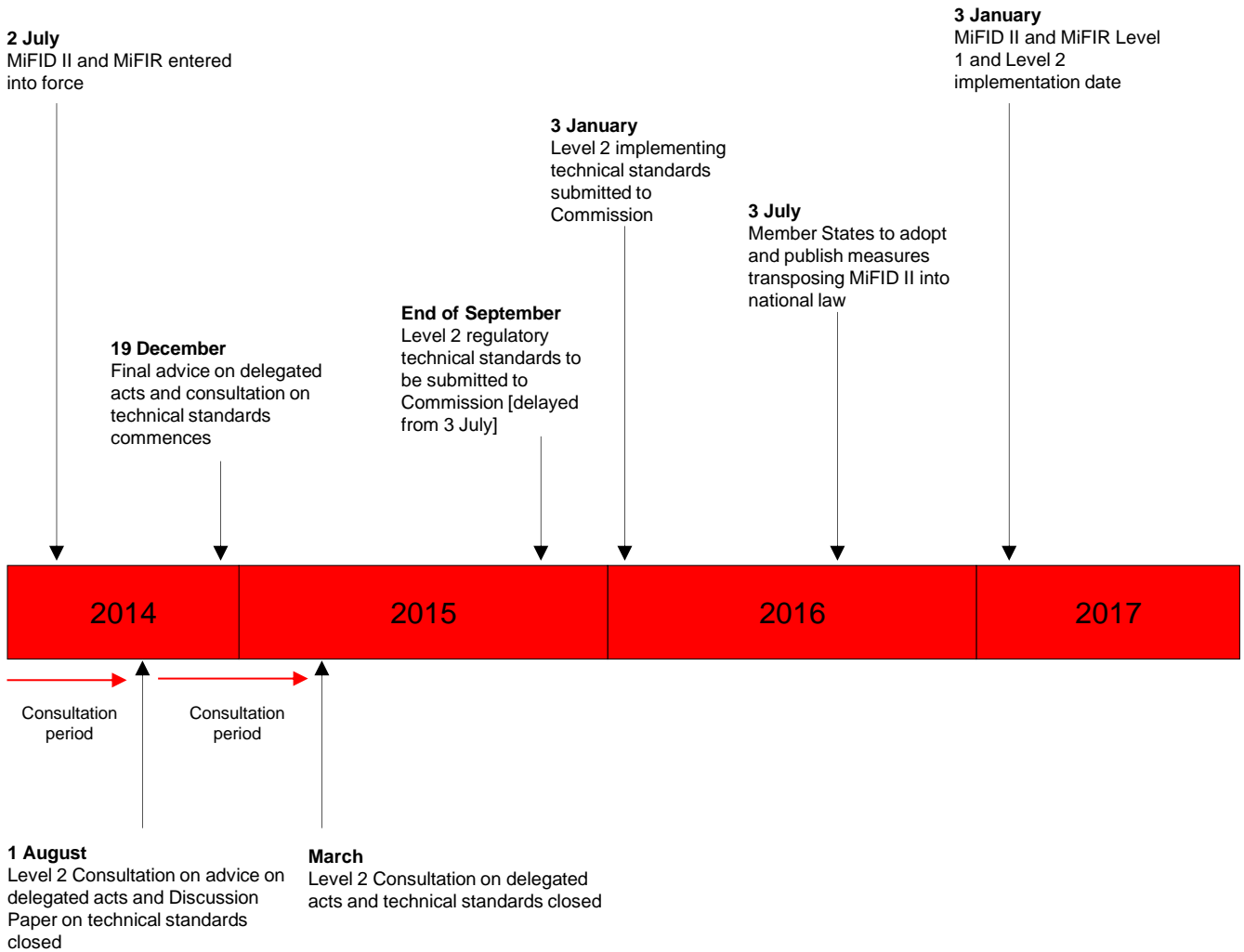
Investment advice

- definition of investment advice – no impact
- 'independent' advice – the information requirement will be laid down in article 58f of the Decree on conduct of business AFS which has not been published yet

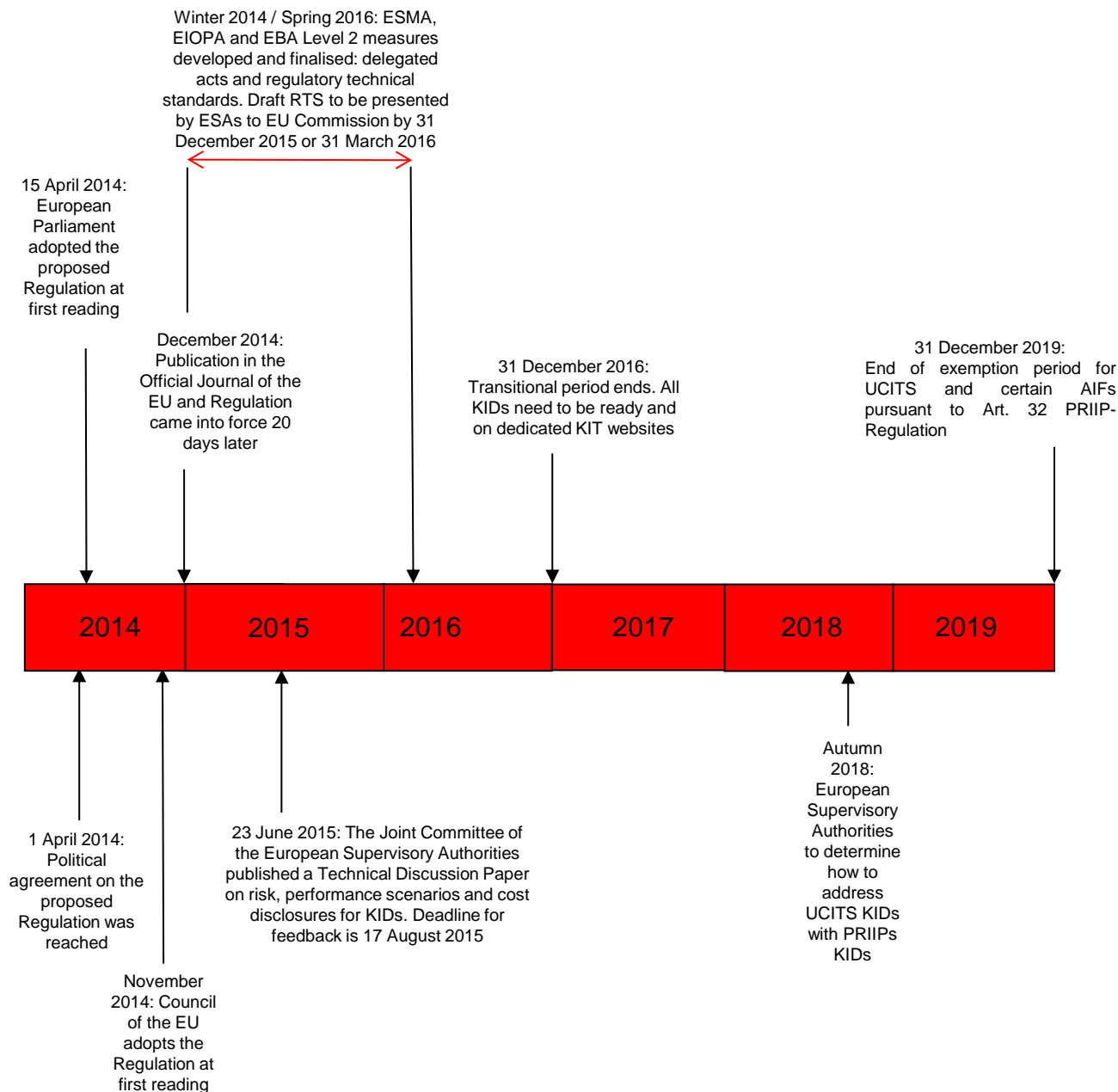
Product governance and distribution

- Current NL rules will be aligned with EU regime; amendments not clear yet. The requirement will be laid down in the Decree on conduct of business AFS which has not been published yet
- This will impact on firm's product governance policies and procedures and committees

Timing: MiFID II and MiFIR



Timing: PRIIPs*



* Regulation on Key Information Document (KID) for packaged retail and insurance based investment products (PRIIPs)

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