



## Guide for application for a MiFID II licence

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## The Dutch Authority for the Financial Markets (AFM)

The AFM is committed to promoting fair and transparent financial markets.

As an independent market conduct authority, we contribute to a sustainable financial system and prosperity in the Netherlands.

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## **1. Introduction**

MiFID II comes into effect on **3 January 2018**<sup>1</sup>. From then on, certain companies that do not currently need a licence will have to obtain a licence to operate an investment firm. You should apply for this licence to the AFM well before this date. For a smooth assessment procedure for all licence applications and for licences to be issued in good time, it is essential that your licence application includes all the required information and accompanying documentation and is submitted in good time. The following explains what you need to do to apply for a licence and particular points you should take note of. We also explain some of the issues we will be looking at when processing your application.

The aim of this guide is to give an impression of the items of attention in a licence application. It is intended as a guide and is not exhaustive. For a complete picture, the AFM advises you to read the regulations, such as MiFID II, the parliamentary bill for the Act Amending the Wft MiFID II<sup>2</sup> and the RTS<sup>3</sup> on licence applications<sup>4</sup>. Links to these documents are provided at the end of this document. Since not all the requirements at European and/or national level have yet been officially announced, the situation may be subject to change. Please therefore check the latest status on the website of the EU and the website of the AFM. The AFM will adjust this guideline if needed.

## **2. Who has to apply for a licence as a result of MiFID II?**

Companies that currently are not obliged to obtain a licence and will be subject to this obligation with effect from **3 January 2018** in order to conduct their business are companies which:

1. Trade for their own account in non-commodity derivatives, such as
  - market makers;
  - Members and participants in a Regulated Market or an MTF and legal and natural persons having direct electronic access (DEA) to a trading platform (Regulated Market, MTF or OTF), with the exception of non-financial entities executing transactions on a trading platform for which it can be objectively demonstrated that they thereby reduce risks directly related to their commercial activities or to activities associated with management of cash held by these non-financial entities or groups to which they belong.
  - Trade in financial instruments with the use of high-frequency algorithm trading (HFT). In the case of HFT, it is important that investment firms and trading platforms have measures in place to prevent a disorderly market and/or the possibility of market abuse. They must for instance ensure that their trading systems can handle large order flows.
  - Proprietary traders, if they also execute orders for clients.

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<sup>1</sup> Directive 2014/65/EU<sup>1</sup> of the European Parliament and the Council of 15 May 2014 on markets for financial instruments and amending Directives 2002/92/EC and 2011/61/EU

<sup>2</sup> Parliamentary Bill to amend the Financial Supervision Act and certain other Acts for the implementation of the Markets in Financial Instruments Directive 2014 and Regulation no. 600/2014 of the European Parliament and the Council of 15 May 2014 concerning markets in financial instruments and to amend Regulation (EU) no. 648/2012 (Act on the Implementation of the Markets in Financial Instruments Directive 2014) (34583)

<sup>3</sup> RTS stands for regulatory technical standards. After publication, these will become delegated regulations. We refer to RTS in this document since this term is more familiar.

<sup>4</sup> Delegated Regulation of the Commission of 14.7.2016 in addition to Directive 2014/65/EU of the European Parliament and the Council relating to regulatory technical standards with respect to information and requirements for the granting of a licence to investment firms C(2016) 4417. (not yet published)

2. Provide investment services or perform investment activities relating to emission rights, including those relating to greenhouse gases. Under MiFID II, emission rights are financial instruments. All parties providing investment services or performing investment activities in this area must therefore obtain a licence.
3. Trade for their own account in commodity derivatives, emission rights or related derivatives in certain cases, such as:
  - Trading for own account in addition to execution of client orders;
  - Trading for own account whereby the company uses a high-frequency algorithmic trading system;
  - Trading for own account in emission rights;
  - Trading exclusively in commodity derivatives, emission rights or related derivatives.
4. Operate an Organised Trading Facility (OTF), a new type of platform: an OTF is a multilateral trading platform on which only bonds, structured financial products, emission rights and derivatives may be traded.
5. Provide data reporting services<sup>5</sup>.

### **3. *When do you have to apply for a MiFID II licence?***

You can apply to the AFM for a licence from 1 April 2017. If you submit your application after 1 June 2017, it will be less certain that your licence can be issued by 3 January 2018.

Traders for their own account in commodity derivatives for whom the determination of their principal activity and their additional activity is important will have to apply for a licence on a date to be determined. In these cases, the trader will be obliged to hold a licence if they also provide investment services or act as a market maker. Traders in commodity derivatives traded on a trading platform will also be obliged to hold a licence, unless settlement is made by means of physical delivery.

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<sup>5</sup> These fall into a separate category and are not investment firms. A separate form is available for licence applications.

#### **4. How can you apply for a licence?**

To apply for a licence, you should use the form that has been designed at European level. The AFM has attached an annex to this form. Completing this annex will help you to provide the information the AFM needs to assess your application. The form must be submitted with additional information and documentation, including your curriculum vitae, test forms, suitability matrix, articles of association, a business plan and a description of your business operation. All the forms include check lists to ensure that you do not forget anything. The licence application form and other relevant forms can be found on our website at the Digital Portal, under 'MIFID II' and 'Licence application investment firm Mifid II'. You should request the form via the Digital Portal. A link to the Digital Portal is included at the end of this document.

#### **5. What are the criteria?**

In all cases, we will review:

1. the company's business operation
2. the properness of persons in charge of day-to-day policy, co-policymakers and any persons supervising policy
3. the suitability of persons in charge of day-to-day policy and any persons supervising policy
4. the governance structure
5. the financial soundness of the company (this aspect will be assessed by De Nederlandsche Bank (DNB))

Further information on the above aspects is provided below:

##### **1. Business operation**

The AFM requires accurate information on the design of the processes at the investment firm. An overview of the information you should provide is given below.

##### *Description of the business operation (administrative organisation and internal controls)*

Descriptions must be provided showing how the company conducts its operations and how it ensures that it meets the established requirements in this regard. The description of the business operation must show how the company ensures that its business operation is controlled and ethical.

The description of the business operation should include aspects such as:

- A description of the activities of the company.
- A description of the processes relating to administrative organisation and internal controls.
- How it is ensured that the business operation is controlled and ethical in the interests of the integrity of the markets and protection of investors.
- The internal governance. This should include information on compliance, risk management and auditing.
- Measures to identify and prevent conflicts of interest.
- Measures to manage risks relating to the financial soundness of the company.

- The company structure (including the criteria for selection and training of personnel). Who are the persons responsible for management and thereby bearing responsibility for all or some of the activities?
- A description of the personal and technical resources allocated to the various activities of the company.
- The policy with respect to providing services and performing activities (for instance (if applicable) the remuneration policy for sales personnel and the approval of new products).
- Which activities are delegated, and how this delegation is monitored.
- Information on the systems for assessing the risk of money laundering and the financing of terrorism.
- Business continuity plans, including the systems and key personnel.
- Document management, policy for retention and archiving of data.
- If DEA is offered to third parties, a description of how the monitoring mechanisms operate to ensure that this occurs in an orderly manner.
- If algorithm trading is used, there need to be control mechanisms in place that ensure this occurs in an orderly manner (the system has adequate capacity and incorrect orders are prevented).

#### *Business plan*

The description of the business operation should be accompanied by a business plan stating the planned activities and growth projections for the next three years. This should include financial forecasts for this period. In cases other than those involving exclusively proprietary trading, you should provide a description of your target group, where this target group is located and how you intend to reach it. If applicable, you should also provide a description of how your marketing is designed and which persons are the direct marketers, the financial investment advisers and distributors. You should also state the audit firm engaged by your company, provide information on the company's affiliation to the investor compensation scheme and provide a list of delegated activities and a list of contracts with external service providers.

#### *Organisation chart*

You should include an organisation chart for your company. This should show the structure of the organisation, including that of the company to which your licence application relates. This should therefore be an overview of the company and any parent company, affiliated company and other group elements. The organisation chart should show who has control of the company to which the licence application relates. It is important that the organisation chart shows exactly who are the directors of legal entities and the percentages held by both direct and indirect shareholders in the company.

## 2. *Properness*

Those in charge of day-to-day policy, co-policymakers and those responsible for supervision of the policy of a company applying for a licence must be fit and proper persons<sup>6</sup>. The 'Integrity Screening Form' must be completed to enable assessment of properness. In this form, the persons to be assessed provide information on any criminal record, but also for instance regarding cooperation with a voluntary disclosure scheme of the Tax & Customs Administration or traffic offences such as driving while under the influence of alcohol. Failure to complete this form correctly and completely may have consequences for the properness assessment. It is better to provide too much information than too little, even if you are not sure whether the information is relevant. The reporting of a record does not necessarily mean that the person in question will fail to meet the test requirements. Most records will be considered in context, whereby the seriousness of the facts, the person's role and the passage of time are factors in the assessment of a record. Failure to report or to fully report a record will always increase the seriousness of the record.

In order to establish whether the properness of a person to be assessed is beyond question, the AFM will consult internal and external sources such as the Public Prosecution Service and the Tax & Customs Administration. The AFM will form its assessment in combination with the information provided by the applicant.

## 3. *Suitability*

Persons in charge of day-to-day policy and supervisory directors (officially "supervisors", meaning members of the supervisory board or board of supervision) at a company must be suitable as well as proper. Suitability means knowledge, competences and professional conduct. The suitability of a person in charge of day-to-day policy or a supervisory director is shown in any case by the person's work experience and competences and the continued application thereof. Among other things, at least one of the persons in charge of day-to-day policy must have sufficient experience in relation to administrative organisation and internal controls (in other words, the company's back office) and at least one of the persons in charge of day-to-day policy must have sufficient experience in relation to the professional side of the company (in most cases, investment).

The company itself has to decide what is needed internally and must establish whether any candidates meet the requirements. The AFM then assesses the directors by among other things determining whether the grounds submitted by the company are sufficient.

To enable this assessment, you should submit CVs providing as much detail as possible regarding the education and training, knowledge and work experience of the persons to be assessed. The CVs must also list all employers and positions held, including other roles (such as supervisory directorships and management positions at non-profit institutions), and the periods during which these roles were performed. The periods stated should include the first and last months as well as the years in question. A suitability matrix should also be completed showing the allocation of responsibilities and expertise within the daily management. If the company has a supervisory board, a separate suitability matrix should be completed for the persons concerned.

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<sup>6</sup> The requirements relating to properness are stated in Sections 12 to 16 and Annex C of the [Market Conduct Supervision \(Financial Institutions\) Decree 'BGfo Wft'](#). Further information is provided on the AFM website regarding [the assessment of executive and supervisory directors](#).



The requirements for suitability are listed in the Suitability Policy Rule<sup>7</sup>. To apply for a licence to operate an investment firm, see in particular items 2.1 to 2.6 of this policy rule.

Persons in charge of day-to-day policy and supervisory directors must have sufficient time available to fulfil their responsibilities at the investment firm. Combining too many responsibilities may lead to a person not having sufficient time to fulfil their management or supervisory role. It is therefore necessary that the number of positions held by one person is limited.

Persons in charge of day-to-day policy and supervisory directors of a financial enterprise must in addition make a financial sector oath or a solemn affirmation<sup>8</sup>. The oath includes statements regarding matters such as giving central priority to the customer's interests, not abusing knowledge, observing confidentiality with respect to information entrusted and making a careful consideration of all interests involved. With the application, there is an annex to the 'Notification Form of Appointment' for persons in charge of day-to-day policy and supervisors (members of the supervisory board or board of supervision) in which the AFM asks the persons in charge of day-to-day policy and supervisors to declare that they will take the oath either now or within three months of their appointment and that they will continue to comply with the oath.

The minimum time that the person will spend on the fulfilment of their duties at the company should also be stated (on an annual and a monthly basis) and a list of the directorships and supervisory directorships held by the person in question should be attached.

Finally, special issues with respect to the result of assessments of the suitability of the executive board or the supervisory board or board of supervision carried out by the licence applicant should be submitted.

For its test of suitability, the AFM will assess the information submitted by the applicant. The AFM will also contact parties providing references. The referees must be stated with the application and must be in a position to give a substantive impression of the recent knowledge, experience and professional conduct of the person being assessed. In this way, the AFM must be able to form an impression of the way in which the person in charge of day-to-day policy or supervisory director carries out their work. In any case, the most recent former supervisor of the person in question should in principle provide a reference. If a person to be assessed has not had a supervisor, then a former or current fellow director or supervisory director who has assessed the work of the person being tested should be stated as a referee. This person must be able to give a full picture of the person being tested in this position.

#### *4. Financial soundness*

##### *Capital applicant*

To determine whether an applicant meets the prudential capital requirements (minimum equity and solvency), the applicant should submit a statement by an external auditor with the underlying figures observed on the basis of which this is provided, or annual financial statements with an audit opinion from an external auditor. Financial statements shall include the statement of financial position and the income statement and the attached notes. The figures should not date from a time earlier than six months prior to the date of submission of the licence application. The figures will be assessed by DNB.

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<sup>7</sup> [The requirements for suitability are listed in the Suitability Policy Rule 2012](#) (Dutch)

<sup>8</sup> Further information on the [Regulation for the Oath or Solemn Affirmation for the Financial Sector 2015](#) (Dutch)

In addition to the calculation of whether the investment firm meets the prudential requirements at the time of the licence application, you should make an estimate of the company's ability to meet the capital adequacy requirements in the future. This should be provided in the form of future capital projections set against the equity and solvency requirements. This means you should prepare a business plan with a realistic quarterly upside and downside scenario. The horizon to use is 3 years. This will inform DNB regarding your longer term ability to meet the prudential requirements, which is relevant for the assessment of the business model and the general financial soundness.

The information should also include agreements and contracts in relation to the assembled capital and information on the use of borrowed funds, including the names of major lenders, maturities and the origin of borrowed funds.

#### *Certificate of no objection*

Shareholders wishing to acquire or increase a direct or indirect shareholding or controlling interest of 10% or more in the licence applicant<sup>9</sup> must apply for a certificate of no objection (verklaring van geen bezwaar, or 'vvgb')<sup>10</sup> from DNB. Requirements apply with respect to an applicant for a vvgb with respect to the capital position and also the properness (and, in some cases, suitability as well) of the persons in charge of day-to-day policy of the vvgb applicant. The shareholders in question should apply to DNB directly for a vvgb at the same time as the licence application is submitted to the AFM. A link to the application form for a vvgb is provided at the end of this document. The information to be submitted depends on the degree of influence that can or will be exercised over the financial enterprise as a result of the intended shareholding. Figures relating to a certificate of no objection should not date from more than one year prior to the submission of the application.

In the case of shareholders belonging to a group, the organisation diagram of the group in question should be enclosed. This should also show the activities of the companies within the shareholder's group and the names of the relevant supervisory authorities, as well as the relationships between the financial entities in the group and the non-financial entities in the group.

#### **6. What do you need to take account of when applying for a licence?**

For your licence application to be processed, it is important that you answer all the questions in the forms as fully as possible and include all the necessary enclosures. The enclosures should be copies of the most recent official documents and provide an accurate picture of what you do. Your application will be delayed if it is not complete or if the necessary forms are not completed in full or enclosures are missing or inadequate.

The AFM must be able to form a good impression of the operations of the company, how these are conducted (the process and how it is ensured that regulations are complied with) and of the persons with certain authorities, such as the persons in charge of day-to-day policy, co-policymakers and supervisors of company policy.

Incompleteness or lack of clarity will in the first instance lead to further questions. The time needed to process the application will thus increase. If no timely response is received to a request for

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<sup>9</sup> See Section 1:1 Wft, definition of 'qualified shareholding'

<sup>10</sup> Section 3:95 Wft

additional information with respect to the application, or the application continues to be incomplete, the AFM may decide not to process the application or to reject it. Common examples of incompleteness or lack of clarity in applications include:

- The description of the business operation is too focused on stating that the statutory requirements are met, and there is not enough overview of the activities and processes at the company.
- The description of the business operation is inadequate. In the case of small companies, this often happens because the document is seen only as something the supervisor requires instead of something that helps them in their business. The description should not be a compliance document, it should be a document that is written by or on behalf of the applicant. The AFM regularly sees standard descriptions that are not sufficiently adjusted to reflect the activities of the company. This may relate to the way in which the control functions are designed at the applicant, but also the leaving of a name that is different to that of the applicant, or an empty space in some parts of the document. Another example is that the description does not include an account of the order routing, so that it is not clear whether the risks in that process are adequately managed.
- There is insufficient account of the structure of the organisation. The possibility of applying some of the requirements proportionally is in some cases taken by applicants to mean that only cursory compliance with the requirements is required. In all cases, you should determine when applying proportionality how the aims of the requirements with respect to the structure of the organisation will be otherwise achieved. If the invoking of proportionality is not properly substantiated, the proposed structure (or existing organisation) will not meet the requirements for a licence.
- Any person tested for properness must report all records in the Integrity Screening Form. Records include for example vandalism, driving under the influence and tax default surcharges. Further information is provided in the instructions for completing the Integrity Screening Form.
- The persons in charge of day-to-day policy must be suitable both individually and collectively. The AFM regularly encounters a situation, especially at smaller applicants, in which this collective consists of two persons that know a lot about investment and have worked themselves in front office positions. This can lead to an issue as regards suitability, since there is not enough knowledge and experience in the collective with respect to business operation: for instance regarding administration, compliance, risk management and auditing. There will be fewer issues raised with respect to suitability for applicants for which a CEO and a CFO have been appointed with relevant backgrounds.
- The suitability matrix must be completed properly, and its elements must be adequately substantiated. The suitability matrix is a representation of the opinion of the applicant regarding the suitability of the individual persons in charge of day-to-day policy and any supervisory directors. Reference only to the length of work experience is not sufficient information for the AFM.

In some cases, a licence cannot be granted because one of the qualifying shareholders or the applicant itself cannot demonstrate adequately that they meet the prudential requirements. We

then have to wait for statements from auditors or other financial documentation. It is advisable to ensure when making an application that these documents are available and that the (audited) figures are recent. The figures accompanying an application for a certificate of no objection must date from not more than one year prior to the date of the application. The figures accompanying a licence application must not predate the application by more than six months.

#### **7. *What will happen if you are obliged to obtain a licence but do not apply for one?***

If under MiFID II you are obliged to obtain a licence and have a business currently in operation and you fail to obtain a licence in good time, you must cease the activities in question from the date on which MiFID II is implemented. If you fail to do so, you will be carrying out these activities illegally and the AFM can demand that you cease the activities. The AFM may also impose other measures such as a penalty or a fine.

#### **8. *Where can you put your questions?***

Application for a licence to operate an investment firm requires a lot of work and knowledge. It may be useful to take advice from a consultant specialising in this area.

If you have a specific question regarding your licence application, you may contact the AFM's Business Desk, which can be reached by telephone on 0800- 6800 680 or by email to [ondernemersloket@afm.nl](mailto:ondernemersloket@afm.nl)

#### **9. *Where can you find more information on MiFID II and applying for a licence?***

The following websites provide further information on the introduction of MiFID II and the status of regulation:

- [AFM website MiFID II topics;](#)
- [AFM website MiFID publications;](#)
- [MiFID II Directive](#)
- [Internet consultation on the implementation of MiFID II](#)
- [RTS Licensing \(not yet published\)](#)
- [Overview of status of European MiFID II regulation](#)

The various AFM forms can be accessed here:

- [AFM Digital Portal for investment firms](#)
- [Notes on completing some of the forms](#)
- [The application form to DNB for a certificate of no objection](#)

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