

**Submission Date**

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# ESMA\_QA\_1794

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## **Additional Information**

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### **Level 1 Regulation**

Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU- Investor Protection and Intermediaries

### **Topic**

Inducements (research)

## **Subject Matter**

Inducements

### **Question**

In what circumstances should material received by a firm providing independent investment advice or portfolio management services be considered a minor non-monetary benefit under Article 12(3) of the MiFID II Delegated Directive rather than research?

16-12-2016

Original language

[ESMA 35-43-349 MiFID II Q&As on Investor protection Ch.7, question 6]

In accordance with Q&A 3 (see above) firms should have in place policies and systems to assess the nature and scale of any service, benefit or material provided by any third party to determine whether it can be considered as a minor non-monetary benefit or as research subject to Article 13 requirements.

Whereas an overall definition of minor non-monetary benefits is provided for in Article 24 (8) of MiFID II, and specific items are provided for in Article 12(3) of the MiFID II Delegated Directive, Recital 29 of the MiFID II Delegated Directive provides some further clarity in relation to certain types of information or material. It states that in particular “non-substantive material or services consisting of short term market commentary on the latest economic statistics or company results” that firms providing independent investment advice or portfolio management may treat as minor non-monetary benefits.

The assessment of whether material is substantive or not (and therefore can be viewed as a minor non-monetary benefit) should only be linked to its content and not to the qualification given/alleged by the provider nor its provenance within the third party provider. Article 12(3) of the MiFID II Delegated Directive makes clear that for any third party benefits to be an acceptable minor non-monetary benefits, a firm should assess and ensure they are “reasonable and proportionate and of such a scale that they are that they are unlikely to influence the firm’s behaviour in any way that is detrimental to the interest of the relevant client.”

For example, a detailed research report or conversation with a research analyst, which in content meets the nature of research described in Recital 28, cannot be considered as a minor non-monetary benefit due to it being labelled as such by a provider or because such material is provided through a dealing desk rather than a research department. By contrast, short market updates with limited commentary or opinion may be capable of being

considered as information that is a minor non-monetary benefit consistent with Recital 29 and Article 12(3)(a) of the MiFID II Delegated Directive. The restriction on inducements, including research, should also not prevent communications between a firm's trading desk and a trader in another firm's dealing desk in the context of seeking market information to immediately execute an order, for example on available liquidity or recently traded prices, which should be considered as part of the execution service. Material repeating or summarising public news stories or public statements from corporate issuers (e.g. public quarterly results reports or other market announcements) could also be considered as information that constitutes a minor non-monetary benefit.

Recital 29 also refers to Article 12(3)(b) of the MiFID II Delegated Directive. This provides that a minor non-monetary benefit can include “written material from a third party that is commissioned and paid for by a corporate issuer or potential issuer to promote a new issuance by the company... provided that the relationship is clearly disclosed in the material and that the material is made available at the same time to any investment firms wishing to receive it or to the general public”. This exemption can allow investment firms to receive ‘pre-deal’ material directly relating to a new capital raising event by an issuer, which is produced by a third party such as another investment firm who is placing and / or underwriting the issue (often referred to as ‘connected research’), provided that the nature of the material is made clear and it is available at the same time to any prospective investor.

Article 12(3)(b) also allow investment firms to accept material from a third party where they are “contractually engaged and paid by the issuer to produce such material on an ongoing basis”, again subject to the relationship being clearly disclosed within it and the material being made available at the same time to any investment firms wishing to receive it or to the general public. This permits so-called ‘issuer sponsored’ third party coverage to be distributed and received by an investment firm as a minor non-monetary benefit, provided that it is offered generally either to any investment firm or is made public. In both cases under Article 12(3)(b) of the MiFID II Delegated Directive it is clear that there should be no expectation or actual payment from a recipient investment firm for such material or restriction in access that could in any way infer the provision of this material could act as an inducement and not constitute a ‘minor’ benefit.

Recital 30 of the MiFID II Delegated Directive finally clarifies that “any non-monetary benefit that involves a third party allocating valuable resources to the investment firm shall not be considered as minor and shall be judged to impair compliance with the investment firm's duty to act in their client's best interest.”