

European Securities and Markets Authority, ESMA  
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France

– Submitted online via ESMA's website –

24 February 2012

**Comments of the EAPB on the on the ESMA consultation paper on “Guidelines on certain aspects of the MiFID compliance function requirements”**

Dear Madam or Sir,

The European Association of Public Banks, EAPB, welcomes the opportunity to comment on the ESMA consultation paper on “Guidelines on certain aspects of the MiFID compliance function requirements” (ESMA/2011/446).

To start with, we would like to point out that the explanation to the guidelines do not signify additional requirements for the investment firms or the competent authorities, since nature, scale and complexity of the business of investment firms as well as the nature and the range of the investment services and their supplementary services differ considerably. The guidelines should explicitly mention the primary responsibility of the operative units for MiFID compliance. An indirect reference in the context of the differentiation between the first level controls of the operative units and the second level controls of the compliance function is not sufficient.

As for the references to the internal audit function, any overlaps with regard to any duties that might be allocated to a compliance function or an audit function should in any case be avoided. Within an internal "monitoring" system of any firm, there are two core elements: the internal control system and internal audit. Internal audit is the only function within any firm that is in charge of controls that are to be performed "independent" of any processes. Instead, any other controls belong to the internal control system and are part of the relevant processes. As such this also applies to the compliance function's controls. The compliance function's controls are always to be integrated into the relevant processes. As those controls are to be integrated into the relevant processes, "timeliness" is a crucial element of an efficient performance of the compliance function's controls.

Insofar, and to prevent inefficient processes within any firm we recommend to take the opportunity to clearly describe the specific control-tasks of the compliance function and exactly segregate these controls from the already existing and legally defined internal audit tasks.

## **Selected answers**

**Q3.** The requirement of paragraph 20(c) would be excessive. According to Article 9(2) and Article 6 of the MiFID Implementing Directive, the compliance report merely has to address matters that are relevant to compliance tasks. This involves monitoring and assessing the adequacy and effectiveness of the organisational measures and procedures put in place to ensure compliance with the requirements pertaining to the field of securities supervision as well as advice and assistance in order to help the operational units to meet these requirements. Forecasts concerning prospective future regulatory changes are not warranted by the existing mandate.

As for the second sentence of paragraph 21 we would like to point out that it is not part of the responsibilities of the compliance function to suggest necessary remedial steps. This task is incumbent upon the operational unit in which the shortcoming has been discovered. Otherwise, the compliance function would have to assess the adequacy and effectiveness of its own proposals which would be incompatible with the requested independence of the compliance function.

**Q4.** The focus of the second sentence of paragraph 25 is wrong. The compliance function should offer protection to the investment firm and its staff. The fact that compliance with the provisions equally protects clients is a reflex of the task of the compliance function. It is not the task of the compliance function to improve investor protection.

**Q5.** The proposal in paragraph 35 is slightly ambiguous. Any potential need for an extension of the compliance function will depend on the specific scenario at hand. A requirement to the effect that an extension of the business activities shall automatically trigger the need for a corresponding extension of the compliance function would be inappropriate.

**Q8.** The suggestion made in paragraph 45 would be incompatible with the fact that senior management is ultimately responsible for compliance. This statement fails to reflect that senior management also bears responsibility for the compliance function. Any restriction of senior management's right to direct the compliance function is not feasible, not even in terms of day-to-day business.

Should you have additional questions or comments, please do not hesitate to contact us.



## European Association of Public Banks

– European Association of Public Banks and Funding Agencies AISBL –

Kind regards,

Two handwritten signatures in black ink. The signature on the left is 'Henning Schoppmann' and the signature on the right is 'Boris Bartels'.

Henning Schoppmann  
EAPB

Boris Bartels  
EAPB

*The European Association of Public Banks (EAPB) represents the interests of 40 public banks, funding agencies and associations of public banks throughout Europe, which together represent some 100 public financial institutions. The latter have a combined balance sheet total of about EUR 3,500 billion and represent about 190,000 employees, i.e. covering a European market share of approximately 15%.*