



Bundesverband Investment
und Asset Management e.V.

Mr. Fabrice Demarigny
Secretary General
CESR the Committee of European
Securities Regulators
11-13 avenue de Friedland
75008 Paris
FRANCE

Contact:
Dr. Magdalena Kuper
Phone: +49.69.154090.263
Fax: +49.69.154090.163
Magdalena.Kuper@bvi.de

November 27, 2006

Public consultation on the list of minimum records in Article 51 (3) of the MiFID implementing Directive

Dear Mr. Demarigny,

BVI¹ thanks you for the opportunity to issue comments on the proposed list of minimum records to be kept by investment firms. We will provide our views in the answers to specific questions posed by CESR.

Question 1: *Do you agree that a common list of minimum records in all CESR members will benefit investors and industry?*

In principle, we agree with CESR that a harmonised list of minimum records is capable of enhancing supervisory convergence and providing practical benefits to cross-border operating investment firms. However, this can only be achieved by a genuine harmonisation of minimum recording obligations implying an effective commitment on parts of the supervisors to implement and apply the listed requirements in a consistent manner.

Hence, even though Article 51 (3) of the Implementing Directive provides no basis for an extensive convergence of recording requirements, we urge CESR members to agree upon a harmonised list of minimum records and its uniform practical implementation, bearing in mind the responsibility of CESR at Level 3 of the Lamfalussy process for ensuring consistency in the supervisory practice. Otherwise, if the proposed list should only constitute a

¹ BVI Bundesverband Investment und Asset Management e.V. represents the interest of the German investment fund and asset management industry. Its 84 members currently manage nearly 7,500 investment funds with over € 1,200 bn assets under management. The units of these funds are held by some 15 million unit holders. Mandates for portfolio management services provided by our members comprise assets in excess of € 150 bn. For more information, please visit www.bvi.de.

Director General:
Stefan Seip
Managing Director:
Rüdiger H. Päsler
Rudolf Siebel

Eschenheimer Anlage 28
D-60318 Frankfurt am Main
Postfach 10 04 37
D-60004 Frankfurt am Main
Phone: +49.69.154090.0
Fax: +49.69.5971406
info@bvi.de
www.bvi.de



non-binding guidance for national supervisors who were entitled to draw up their own lists and to handle the requirements in divergent ways, the current initiative would provide little additional value for market participants. Even worse, setting up a list of minimum records at EU-level which might conflict or deviate from the requirements imposed by national regulators will only fuel arguments with auditors and supervisory authorities with regard to applicable standards and thus, create legal uncertainty and confusion in the market.

Question 2: *Do you agree with the contents of the list elaborated by CESR? If not, which records should be added or deleted and for which reasons?*

Most of the record-keeping obligations proposed by CESR already amount to market standards being commonly observed by investment firms. The following requirements, however, are expected to pose problems as regards their practical implementation:

- **Line 10:** *Orders received or arising or decisions to deal taken in providing the service of portfolio management*

The wording of this record-keeping task leaves unnecessary room for interpretation. In particular, it is unclear what is meant by the phrase “orders arising” in contrast to “orders received”. Regarding decisions to deal, the requirement to create records “immediately after the decision taken” is very vague, as the point of decision-making might be debatable in certain circumstances. In order to make a reliable indication for the internal record-keeping process, the time of creating records should correspond with a definable action taken by the asset manager. In our view, an adequate point of time would be the creation of an order sheet by the manager before its forwarding to the trading desk.

- **Lines 9-13:** *Time limit for creating records*

The proposed standards relating to receipt, transmission, execution and allocation of orders require investment firms to make records at the time of the relevant event or immediately thereafter. However, the complex environment of order processing does not always allow for an immediate recording of the necessary details. Especially, in case of longer periods between conclusion and settlement of transactions as well as for orders executed in parts, the reconstruction of relevant stages in the process is technically challenging and not feasible to produce immediate results. In addition, allowance should be made for non-standard processing and transmission of orders as well as for technical or other systematic failures requiring implementation of contingency measures.



Therefore, we think it appropriate to extend the time limit for record-making to a reasonable time after the relevant event. Specifically, the right column in lines 9-13 should be complemented by the following term:

“...or within a reasonable time thereafter”

- **Line 16:** *Time frame for records on client financial instruments available for, and subject to, stock lending activities*

CESR’s proposal requires investment firms to make records of client financial instruments subject to stock lending at the actual time of being lent. This obligation is not possible to comply with in case of agency lending activities, where lending agreements are concluded by an agent having access to a pool of assets reported as available for lending by asset managers. In these circumstances, the time of effective lending is known only to the agent involved in the transaction who subsequently passes to the asset manager the information on lent assets and corresponding revenues.

The advantage of agency lending systems is the considerable reduction of administrative burden for asset managers without compromising their ability to generate additional profits for the managed portfolios. Hence, the involvement of an agent must not be effectively banned by imposing impracticable recording requirements.

In this respect, we propose to extend the time limit for creating records in order to cover specificities of agency lending schemes. This could be done by amending the text in line 16, column 3 in the following way:

*“On such assets being made available for lending and on such assets being lent **or immediately after receipt of the respective notification**”*

- **Line 18:** *Recording of marketing communications*

In principle, we have no objections to the proposed rule, provided that it merely requires investment firms to keep records on the general contents of marketing communications and not on the frequency or details of its distribution. If the latter were the case, the burden on investment firms would be blatantly out of proportion to the additional gain on parts of supervisory authorities, if any, and we would strongly advise CESR to abstain from such a requirement.

Moreover, we think it appropriate to reduce the recording obligation to a reproduction in text form. Many investment firms do not have technical means to record marketing communications broadcasted via different media - TV, radio and internet – and might be forced to make substantial investments with regard to their internal storage systems. More important, text records appear entirely sufficient in terms of assessment



if a marketing communication is “fair, clear and not misleading” and thus, allow for a proper conduct of supervisory duties under Article 19 (2) MiFID.

- **Line 20:** *Records on the firm’s business and internal organisation*

In our opinion, recordkeeping in respect of each internal guidance and organisation manual, even those pertaining to minor business matters like housekeeping and office equipment, is not appropriate and should be limited to sets of rules being of material relevance to the functioning of investment firms.

Question 3: *Do you consider that a specific requirement for keeping records of the provision of investment advice should be introduced?*

From our point of view, no specific provisions on recording of investment advice are needed. Details of suitability test are already subject to recording requirements in line 3 of the proposed list. With regard to recommendations given to the client, the duty to arrange for proper records results directly from Article 13 (6) MiFID which requires investment firms to keep sufficient records of all their services and transactions to prove compliance with their obligations under MiFID.

Furthermore, bearing in mind different ways of providing investment advice (depending on the distribution channel, type of client, instruments involved, etc.), any prescriptive record list might prove quite burdensome and ill-suited to the situation in question. The choice of appropriate type of record and the specification of its content should therefore be left to the discretion of investment firm providing investment advice.

We hope that our remarks are helpful for CESR’s ongoing evaluation of minimum record-keeping requirements and remain at your disposal for further in-depth discussion.

Yours sincerely

BVI Bundesverband Investment und Asset Management e.V.

signed:
Stefan Seip

signed:
Dr. Magdalena Kuper