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## **ESMA's Consultation paper "Guidelines on certain aspects of the MiFID compliance function requirements" (ESMA/2011/446)**

Dear Sir or Madam,

BVI<sup>1</sup> welcomes the opportunity to present its views on ESMA's guidelines on certain aspects of the MiFID compliance function requirement.

### **General remarks**

First of all, we will focus particularly on the point that UCITS management companies are subject to different compliance requirements. According to Article 10 of the UCITS Implementing Directive 2010/43/EU, on the one hand, UCITS management companies have to establish a permanent compliance function which should be designed to ensure that it may detect any risk of failure by the management company to comply with its obligations under the UCITS Directive 2009/65/EC. In addition, if they provide MiFID-relevant services such as portfolio management, investment advice and safekeeping and administration in relation to units of collective investment undertakings, UCITS management companies fall within the scope of the organizations requirements of Article 13 of the MiFID and Article 6 of the MiFID Implementing Directive. Therefore, the UCITS requirements regarding the compliance function compete with the MiFID requirements at this point.

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<sup>1</sup> BVI Bundesverband Investment und Asset Management represents the interests of the German investment fund and asset management industry. Its 82 members manage currently assets close to EUR 1.8 trillion both in mutual funds and mandates. BVI's ID number in the EU register of interest representatives is 96816064173-47. For more information, please visit [www.bvi.de](http://www.bvi.de).

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In order to facilitate the effective and consistent application of the compliance requirements and to avoid contradictions, we propose allowing exceptions to ESMA's compliance guidelines in cases where the investment firms are UCITS management companies which provide MiFID-relevant services in addition to the management of UCITS. This is in line with the German practice which is stipulated in the BaFin Circular 4/2010 (WA) - Minimum Requirements for the Compliance Function and Additional Requirements Governing Rules of Conduct, Organisation and Transparency pursuant to Sections 31 et seq. of the Securities Trading Act for Investment Services Enterprises (MaComp). The compliance function requirements in this Circular shall not apply to investment management companies which provide MiFID services and ancillary services within the meaning of Art. 6 (3) of the UCITS Directive. At the same time, German investment management companies are required to establish adequate policies, keep available resources and put in place procedures designed to detect every risk of non-compliance with the obligations set out in the Investment Act (implementing the UCITS Directive) or Securities Trading Act (implementing MiFID) and the associated risks, and to adhere to these on an ongoing basis. This is stated in the German Circular 5/2010 (WA) of 30 June 2010 on Minimum Requirements for Risk Management in Asset Management Companies (InvMaRisk). In view of the fact, that the German Circular MaComp is the basis for the proposed ESMA's guidelines, we suggest to implement a similar scope.

In case it would be politically unfeasible to implement the German position, we kindly ask to take the following proposals into account.

### **Section III.I – Compliance Risk Assessment**

**Q1:** Do you agree that investment firms should ensure that, where the compliance function takes a risk-based approach, any comprehensive risk assessment is performed to determine the focus and the scope of the monitoring, reporting and advisory activities of the compliance function? Please also state the reasons for your answers.

We agree with this proposal. It is reasonable to support and acknowledge the investment firm and its compliance officer in finding the necessary balance between resources and risks and towards other functions.



### **Section III.II – Monitoring Obligations of the Compliance Function**

**Q2:** Please provide your comments (with reasons) on any or all aspects of this guideline on the monitoring obligations of the compliance function.

In general, we agree with the guidelines on monitoring and the group approach in **paragraph 13** that each investment firm of the group remains responsible for monitoring its own compliance risk. However, in the area of asset management, there are established organizational structures which require maintenance of a centralized compliance function at the group level. In these cases, the compliance function is separated from the investment firm which is part of the group by creating new structures, outsourcing arrangements or implementing virtual structures. Therefore, we suggest clarification that such centralized compliance function should also be responsible for monitoring the compliance risk of the investment firms in the group.

Moreover, the on-site inspections requirement contained in **paragraph 14** potentially has serious implications in terms of additional costs to the compliance function in both headcount and travel and that this should be considered as part of the cost-benefit analysis.

### **Section III.III – Reporting Obligations of the Compliance Function**

**Q3:** Please provide your comments (with reasons) on any and all aspects of this guideline on reporting obligations of the compliance function.

In our view, there is an overlap between the content of the written compliance reports to the senior management in Article 10 (2a) of the UCITS Implementing Directive and ESMA's proposal in **paragraph 20**. In this respect, the requirements for asset managers should be duly calibrated.

**Paragraph 24** states that some competent authorities require investment firms to provide them with compliance function reports. In our view, these reports should not be provided to regulators as a matter of standard practice and instead should be provided only upon request.



#### Section IV.IV – Exemptions

**Q9:** Please provide your comments (with reasons) on any or all aspects of this guideline on Article 6(3) exemptions.

We do not agree with **paragraph 50** that the compliance function should generally not be combined with the legal unit. In the asset management area, combination of legal unit and compliance function is a generally accepted model because the tasks often go hand in hand. Such a combination with legal would not ipso facto impact compliance's independence and in fact such combinations often create various synergies in terms of expertise and cost savings.

We trust that ESMA will take our suggestions into account when refining its views on the compliance's guidelines, and remain at your disposal for any questions that may arise.

Yours sincerely

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