

3 Clements Inc.
London WC2A 2AZ

T 620-7025-2950
F 620-7025-2951

byca@byca.co.uk
www.byca.co.uk

Dear Mr Comporti

MiFID - CESR's Call for Evidence - Investment Advice

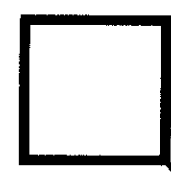
The British Venture Capital Association (BVCA) is responding to the invitation to submit views on the issue of investment advice. We appreciate that this arrives after the closing date for submissions, but hope that you will still find it helpful to have our views. The BVCA represents the vast majority of UK based private equity and venture capital firms. Its 165 members are invested in over 11,000 companies who between them employ nearly 3,000,000 people, equivalent to some 18% of the private sector work force. The industry invests in every sector of the economy across all regions. Private equity funds are non harmonised funds with professional investors.

CESR has been asked to give advice on the criteria for differentiating a personal recommendation from, amongst other things, general recommendations, marketing communications and information given to clients. This distinction will be crucial in the context of raising private equity funds from professional investors. We are particularly concerned to ensure that the approach to the issue of investment advice is flexible enough to reflect the wide range of activities that take place in the professional markets, such as the private equity markets.

The key comments we would like CESR to take into account in this context are as follows.

In determining whether there is a personal recommendation it is essential to have regard to the expectations of the parties and the surrounding factual matrix. Thus in a sale of an investment to a private unsophisticated individual it may well be that the individual will be under the impression that he is being advised that the acquisition is recommended by the selling firm as suitable for him personally. This is to be contrasted with the marketing of a fund to professional investors where the investor will not usually have this impression. Key points in this area are:

- private equity firms make it clear in writing to the investor that they are not acting for the investor on the fund raising, that they are not responsible for advising the investor and that the investor should take its own independent advice. The firms do not operate in a way as to lead the investor to believe that they are assuming an advisory responsibility;
- the minimum subscription is usually several hundred thousand Euros, and is often millions of Euros;
- they are not offered to the mass market;



- the promotion process is lengthy. There will be preliminary contact with the potential investor followed by one or more presentations. Most investors perform due diligence on the manager and may well have lengthy lists of questions for the manager requiring formal reply. Finally there will be a private placing memorandum on the basis of which subscriptions are taken. The placing memorandum will contain material about the manager, its track record, its plans - it is a promotional document subject to both regulatory and legal constraints. The fact that a placing memorandum describes the benefits of private equity investing and promotes the manager's services does not alter this, where the investors are professionals and understand the purpose of the document is to persuade them, not to advise them personally;
- the documentation for the fund is negotiated with the investors and, in partnership and similar funds, by definition, all investors benefit from the terms negotiated by others.

Thus, the entire structure in which the marketing takes place militates against an advisory relationship between the promoter and the potential investor - it is simply not the expectation that the parties have of the relationship.

We would therefore recommend that, when CESR is considering the factors that distinguish investment advice from the other activities listed, the expectations of the parties and their behaviour are relevant factors to take into account, particularly where the investor is a professional investor and where the promotion process involves interaction and negotiation - as opposed to, say, direct offer sales. Therefore when determining whether a particular communication is "a personal recommendation", the communication, the surrounding facts, the expectations of and the nature of the parties has to be considered.

If you would like to discuss this please do not hesitate to contact John Mackie the Chief Executive of the BVCA on 020 7025 2960.

Yours sincerely



MARGARET CHAMBERLAIN
(Chairman of BVCA Regulatory Committee)