Raad van de
Effectenbranche

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Vereniging van Commissionairs
Association of Proprietary Traders
Vereniging van Vermogensbeheerders

Postadres: Vasco da Gamalaan 4
2803 XW Gouda
tel.: 0182-699 301
fax: 0182-699 774
email: meahiskes@rsnet.nl

The Raad van de Effectenbranche
Responses to Questions Included in
"CESR's Advice on Possible Implementing Measures of the Directive 2004/39/EC on Markets in Financial Instruments"

The Raad van de Effectenbranche is an umbrella organization representing (primarily) non-bank Dutch investment firms. The joined associations – including the membership of the associations – range from proprietary trading firms through full-service broker-dealers to specialized investment management concerns. We are delighted to have this opportunity to comment on pending CESR recommendations. In what follows we have attempted to address the questions contained in CESR's documentation by reference to their question numbers. Furthermore we ask your attention for the different structure of the financial industry in the various EU-countries. Please contact the secretary of our organization if further comment or elucidation is required.

Raad van de Effectenbranche
Ms. Mea Hiskes-Willemse, secretary
telephone: 31-182-699-301
e-mail:meahiskes@rsnet.nl

1.1
The independence requirement as set out is excessive, is likely in fact to impede an effective compliance function and will contribute substantially to fixed costs, which is highly undesirable. An emphasis on the personal accountability of the compliance officer (w hether independent as envisioned here or not), and strict enforcement of the responsibilities the role entails, would be a better solution. Personnel qualified for this function are expensive and difficult to find. Imposing a strict independence requirem ent on such personnel multiplies costs, and could isolate the person responsible in a way that could easily detract from his or her effectiveness.

1.2
We believe that proportionality ought to be based on the *nature* of business transacted, and we are concerned about the idea of reducing compliance requirements based on the *scale* of the business in question. It is not at all clear to us why customers of smaller service providers deserve less protection than customers of large firms. Different investment f irm activities

involve different degrees of risk to customers, and the different risks bear no relation to the size of the firms offering the services. We support any effort to relieve smaller firms of their regulatory burdens, but we are convinced that the best way to do this is to reduce the burden of bureaucracy for *all* firms rather than to make special exceptions for small ones. However, as a touchstone for the appropriate level of this burden, we suggest any regulatory requirement that puts a disproportionate burden on smaller firms is excessive. If the requirements are proportionate to the actual needs of customers, they will not unduly disadvantage smaller firms.

1.3
CESR should be extremely cautious about extending the protections suggested by Standard 127 beyond the scope of investment managers. We believe that the third option mentioned in the discussion is much to be preferred to the other two.

Europeans must have the right to carry out business in non-EU jurisdictions if they wish to. It would be odd to forbid them to use EU agents for such business, in which case, an EU agent should be able to use judgment in selecting a non-EU agent to accomplish its customer's goals. The EU agent has a duty of care in selecting the local agent and monitoring its activities on its customer's behalf: that should be enough to provide adequate customer protection.

Investment management might be regarded as a unique service to which special consideration should be given. However, it is not clear to us that even sub-advisory roles within investment management should attract this degree of regulation: we believe that an advisor's duty of care in selecting and monitoring a sub-advisor should be enough. It is clear to us that other activities within financial services should not be so burdened. We recommend that 9(b) be omitted.

4.1
It is not acceptable to put firms in a position where it is impossible in principle to fulfil a regulator's requirements. Information requirements must be specified rather than left open-ended. This is not to suggest that, when the regulator has suspicions of a firm, it is without power to insist on any information it requires, but as presented here, this provision opens the door to ever-greater demands for information as a matter of routine – a situation which our members believe is already out of control in many jurisdictions. In particular, competent authorities should have the right of access to voice recordings only in cases where criminal activity is reasonably suspected.

4.2
We do not have strong opinions on how long or what records should be kept, but we do believe such requirements should not exceed the regulator's likely information needs. Issuance and merger advisory (categories i and ii) should be matters that regulators concentrated their attention on, so the record-keeping requirements for them should be high. General financial advice to corporations (category iii) is not, by and large, subject to regulation, so record-keeping requirements in this area should be light or nil. This is an area where paperwork should be kept to a minimum, or perhaps not required at all.

5.1
Regulatory opt-outs risk institutionalizing regulatory practice that should not exist in the first place: permitting them is likely to cause these practices t o persist.

5.2
It is enough that the investment firm reports where it delivered the assets: that may be all that is under its control.

5.3
Alternative (a) is unacceptable.

6.1
The legislation is weakly drafted and additional examples will not repair that.

6.2
Alternative (a) is preferable. Further specification (*i.e.*, in reference to (c)) should be left to national regulators.

6.3 and 6.4
The only significant risk arising from contact between research departments and trading desks is the risk that, with foreknowledge of impending research publications, the trading desk might front-run the firm's customers. This must be prevented. Otherwise, analysts should be restricted from direct involvement in investment banking, but that need not be a matter of com plete isolation from that side of the investment firm.

6.4
The first alternative (a) is the best.

10.1
In Box 10, 8)b) is superfluous if the terms of the lending are not disclosed. The purpose of 8)b) is to prevent investment firms from lending customer assets without notification or allowing the customer to share in the proceeds of the loan. 16)c) should indicate that transaction charges are reported separately from other charges. Paragraph 19) would place inordinate burdens on managers of funds: it should apply solely to separate account managers.

p. 73, Q1
The Directive should not specify this. Customers should be able to decide what is important to them, in consultation with if necessary. The investment firm should be permitted a "default" specification, provided that its clients are informed of it.

p. 73, Q2

Again, it is the customer, not the firm, who should decide. In the absence of any indication from the customer, the firm may need to rank the factors, but then it must accept the burden of justifying its decision. The list as given is adequate.

p. 73, Q3

The same client may have different needs on at different times. This should probably not be an area subject to regulation at the European level. The investment firm should be permitted to create a "default" specification, provided that it informs its clients of this policy.

p. 73, Q4

These factors are applied differently in different circumstances. The point of departure is the customer's stated requirements: the transaction facilitator, in accounting for his or her performance, will refer to that statement, and balance the factors accordingly.

p. 75, Q1 - Q7

It is inappropriate for our organization, as a representative of numerous firms with a wide range of security market activities, to respond to these questions.

p. 75, Q8

The criteria seem to be fairly exhaustive.

p. 75, Q9

Very little of the relevant data is generally available, and most of what is available is only obtainable at considerable cost. Hence we recommend that this area be regulated with a "light touch." Market solutions will not be able to fill the gap until RM's improve their data provision.

p. 76, Q1

Those of our membership who are active in these areas report that monitoring is largely on a case-by-case basis: the situation is likely to be different from one security to the next, and it often is found to vary over time. They have expressed concern that an attempt to force a single mode of analysis upon the industry is likely to give poor results: from a customer perspective, "best execution" is always the execution that best fulfils his or her possibly quite changeable requirements at that particular moment.

p. 76, Q2

The answers of our members vary. Investment managers and proprietary trading firms indicate that they pay considerable attention to the quality of every execution, at the time of execution.

p. 76, Q3

As mentioned above (p. 75, Q9) this data is difficult to obtain if it is obtainable at all, and what there is of it tends to be made available rather late. Firms report that they analyze trades shortly after execution because of this, and because, in many marketplaces, that is the only way to access relevant data that is otherwise not saved (by RM's or data services) for later analysis.

p. 76, Q4
Our members do not report any significant differences.

p. 76, Q5
The firms that responded to our query indicated that orderbook depth is overwhelmingly the greatest factor to consider, and that the fact that historical orderbook depth is difficult (if at all possible) to obtain requires that the most important judgements about execution quality must be made in real time, or close to it.

p. 76, Q6
This will depend on what is available, and its cost.

p. 77, Q1 - Q6
For most of our membership, the availability of a realistically alternative venue is so new that it has not yet received a review. Those more experienced with such alternatives report that they use them primarily in pursuit of proprietary gains rather than execution of customer business, and hence their internal reviews relate closely to their costs of accessing the alternatives.

p. 78, Q1
We received almost as many answers to this question as our organization has members.

p. 78, Q2
This would place a significant cost burden on investment firms in order to provide its customers with information of dubious value at best: the firm's "average" experience is irrelevant to the requirements of any particular transaction.

p. 78, Q3
We do not believe customers could derive any benefit from this information .

p. 78, Q4
We see no value to the customer in such reports.

p. 78, Q5
We see no value to the customer in such reports.

p. 78, Q6
We are inclined to think that the entire discussion of these matters errs on the side of "transparency" that has very littl e value to customers.

p. 78 - 9, Q7
As we have indicated, we believe that the requirements suggested for broker -dealers are unworkable and excessive. All the more so, then, for investment managers.

p. 79. Q8

It is not clear that, in most cases, conflict of interest is an issue. Where the broker-dealer does not hold an equity interest in the transaction venue, receives no incentive for routing orders to it, and reports transaction costs transparently to its customers, we see no conflict. Where these conditions do not apply, disclosure should suffice for customer protection.

p. 79, Q9
A single disclosure of policy at the time that the commercial relationship is initiated should suffice, although customers should have the right to demand disclosure if the y desire it.

p. 79, Q10
Our members indicate little agreement on this matter.

p. 84, Q1
The definition is adequate and complete.

p. 84, Q2
No order should be accepted without this information, and the information is sufficient to carry out any order.

p. 84, Q3
Time stamping should be mandatory.

p. 84, Q4
If an investment firm cannot determine the proper sequence of the customer orders it has received then it should be required to refrain from trading for its own account until they have been executed. These circumstances are most likely to arise in periods of market stress, when customers require even more protection than usual.

p. 84, Q5
If this is possible, then aggregation should not be permitted.

p. 84, Q6
If customers run a risk of being disadvan taged, they ought to be informed of the circumstances under which this might occur and given the opportunity to insist that their orders not be treated in this way. The regulator should specify allocation procedures.

p. 84, Q7
Proprietary trading should be segregated from non-professional-clients-business in such a way that these issues do not arise. This need not mean that it is carried out by a separate trading group cloistered behind “Chinese Walls,” but there should never be any potential for confusio n as to the priority of customer trading interest over the investment firm’s.

p. 84, Q8
No, we believe that institutional customers be deserve such protections, too.

12.1
We believe that the dangers from unwise regulation in this area are greater than the p roblem they would purport to solve.

12.2
If there are to be such exemptions, the threshold for them should be set high, and should be based on average size of orders in the relevant instrument. We suspect that such thresholds should be around ten times avera ge order size, and they should be updated regularly.

12.3
The requirements seem appropriate.

12.4
We dislike the thought of any exemptions and certainly do not want them to proliferate.

12.5
We believe crossing systems should be exempt and we do not regard them eit her as damaging to market liquidity or important potential sources of market abuse.

12.6
If we must accept exemptions, then yes. There is even less justification for an exemption from post-trade transparency of large trades than for a pre -trade exemption.

12.7
We do not think there are any other appropriate methods: see our response to 12.2 above.

13.1
No system other than trade-by-trade could be said to foster transparency.

13.2
Paragraph 21 does not mention systematic internalizers: if they are included within its s cope then the market forces alternative mentioned in this question is sufficient.

13.3
This is an acceptable minimum.

13.4
In the interest of transparency, no trades should ever be excluded.

13.5
The method is appropriate and sixty seconds is, if anything, generous .

13.6
We dislike such exemptions in principle and would prefer that there be none: we certainly would not support extending them more widely.

13.7
The cost of harmonization is likely to outweigh any benefits, which would be very minor at best.

13.8
Improving the information on stock lending would be a service to the industry, but providing quality data is likely to be difficult in the current clearing environment. If the data are not of the highest quality then their value is questionable.

13.9
This should be left to commercial providers.

14.1
The requirements are proportionate and complete as written.

14.2
The requirements under paragraph 7 seem is too severe: the RM should have no liability for the accuracy of information it disseminates as a service to others and over which it has little control.

15.1
Regulators should make use such an exemption only in very unusual cases, but they should have the power to grant one.

15.2
We do not believe that transitional arrangements are necessary and suspect that the suggestion that they might be is evidence of resistance to implementation.

15.3
We think this is a low priority, and believe that cost/benefit analysis would argue against it.

15.4
The minimum conditions are acceptable. We believe that if a reporting channel is deemed acceptable by the regulator, and if an investment firm submits its reports properly to that channel, then its regulatory obligations should be regarded as fulfilled. On the other matters discussed, we are inclined to think that they should be postponed until Level III .

15.5
We are concerned that cost/benefit analysis has not featured more centrally in this discussion.

16.1 and 16.2
We would prefer that actual market behaviour be the touchstone for these issues. The proxies suggested in paragraph 8 are unacceptable: neither the domicile of an issuer nor the jurisdiction of the initial offering (other than at the time of the offering) is relevant.

16.3 and 16.4
We believe that this issue varies widely across jurisdictions and that it should be a matter for national rather than European level regulation. Where the issue transcends borders, then the competent authorities should be able to reach agreement among themselves without reference to detailed, European level rules.

16.5
We believe that the Mandate risks a monolith ic, inflexible solution, and are inclined to think that most of these issues should be postponed to Level III.

17.1
We believe the costs of harmonization in this area are disproportionate to the minor benefits likely to be achieved. The list in Annex A is co mplete.

17.2
We believe that the costs of harmonization are likely to outweigh the potential benefits.

17.3
They are acceptable.

17.4
Principal transactions should be regarded as those that create or eliminate an economic risk on the part of the facilitator; agency transactions are those that do not. For the purposes of such reporting "matched principal" transactions should be treated as principal trades: otherwise counterparty disclosure would be required.

17.5
We believe that such a system would be hugely expensive, not only to create but to maintain, and that the benefits of such a system are unlikely to be significant.

17.6
Greater attention to the cost to the industry of providing such information would be welcome.

18.1
The list is acceptable.

18.2
The criteria in 22(d) and under paragraph 23 are unacceptable. We are generally hostile to the concept of “substantial importance” and hope that CESR’s membership will agree among themselves to appeal to it very sparingly if ever.

18.3
Considerations internal to securities markets themselves are the only legitimate grounds for a claim of “substantial importance.” Shareholdership, level of employment, *etc.* should be rigorously excluded from such discussions.

19.1
They are acceptable as written.

19.2
We agree, provided that cost/benefit considerations play a major role in any response.

19.3
Again, cost/benefit considerations.

19.4
We suspect that these matters are over-specified at Level II, and would prefer to see more of the postponed to Level III. We suggest that thought be given to permitting these matters to be handled by bilateral arrangements between CESR members: many CESR members are unlikely to confront these issues.

p. 133, Q1
Before initiating a program of IT investment we would urge CESR to weigh the realistically achievable benefits to be derived from it and budget accordingly. If this results in delayed implementation it is unlikely that the industry will object. Delays are common to all IT projects and the implementation period must be sufficient to allow for them.

p. 133, Q2
Our suspicion is that realistic assessment of actual needs would argue against major infrastructure investment.

p. 133, Q3
Where intractable disagreements among CESR members arise, in most cases that will indicate that the issue in hand relates to substantive differences in national market practices, and should suggest that it is not an area suitable for centralized solutions at a European level. Where disagreements arise for other reasons, attention should first and foremost be paid to the legitimacy of those reasons before any attempt to resolve the dispute.