

RESPONSE

The list of minimum records in Article 51 (3) of the MiFID implementing Directive

CESR Public Consultation - Ref: CESR/06-552

1. The European Banking Federation (EBF)¹ welcomes the opportunity to comment on CESR's proposed list of minimum records in Article 51 (3) of the MiFID implementing Directive. The EBF also supports CESR's wider efforts at Level 3 of MiFID and generally agrees with the revised priorities and timing of the specific consultations it sets out.
2. Whilst recognising that timing for the MiFID Level 3 priority areas is necessarily very tight, we urge the Committee to continue to consult stakeholders in the most meaningful way possible. The EBF stands ready therefore to provide input to CESR's work at Level 3 at relatively short notice.

I. General remarks

3. The EBF fully endorses CESR's stated objectives of (i) promoting common implementation of MiFID, (ii) fostering supervisory convergence, (iii) facilitating the provision of cross-border investment services and activities, and (iv) ensuring a common minimum basis for investor protection.
4. We call on CESR's members not to diverge significantly from what the minimum list sets out. Of greater concern to industry is the possibility that by establishing a minimum list there is the **opportunity for CESR members to "gold plate" the record keeping requirements** by requiring industry to keep records that go beyond those requested by MiFID. This potential source of inconsistency could lead to uneven levels of consumer protection and be additionally burdensome for banks, especially those with operations in more than one Member State. Therefore, we also call on CESR's members not to add to the minimum list in a way that could be deemed to be super-equivalent to the [spirit of] MiFID.
5. We nonetheless recognise without CESR drawing up such a list of minimum requirements the risk of inconsistency and gold plating becomes even greater so **we support the principle of at least some form of harmonised requirements**. We also recognise that drawing up a minimum list helps the convergence of supervisory practices across a diverse supervisory community.

¹ The European Banking Federation (EBF) is the voice of the European banking and securities sectors (since banks carry out the bulk of European securities business) (representing the vast majority of investment business carried out in Europe. It represents the interests of over 5,000 European banks, large and small, from 29 national banking associations, with assets of more than €20,000 billion and over 2.3 million employees.

II. Specific remarks

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

6. The **principle of drawing up a common list of records is welcome** as it provides the basis for greater harmonisation of regulatory requirements in the Member States. Since the legislative basis for record keeping requirements derives from that of the Member States we also welcome CESR refraining from recommending details of its suggested record keeping obligations.

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

7. The **EBF broadly agrees with the content of the list** elaborated by CESR. However, some members have expressed concerns that the content of the list itself could cause **interpretation difficulties**. For example, the minimum list states that client categorisation and identification will have to take place when the client relationship "begins". When a relationship "begins" can be interpreted differently: directly after signing the client agreement or at the moment actual services are being provided under the agreement. Such practical questions limit the effective use of a minimum list.
8. Furthermore, we are of the opinion that the list should clearly refer to the **retention period of records** of at least five years as stated in Article 51.1 of the implementing Directive.
9. In general, the EBF recommends that CESR:
- clearly states the **specific reference from the European MiFID texts** from which the contents of the record are derived;
 - considers the **interaction between minimum record keeping requirements under MiFID and those that emanate from other areas of European legislation** such as the Market Abuse Directive (e.g. the request to hold client identification). In such cases the record keeping requirement should be common to both Directives so that duplicitous requirements are avoided;
 - reflects on the fact that the list of records to be kept by supervisors will (i) differ if the supervisor is performing the duty of **home or host state competent authority** and (ii) differ between those **records that must be kept for client relations** and **those for the purposes of internal organisation**.
10. In particular, we draw CESR's attention to the following points:
- **client details (Article 19 (4) & (5))**: we agree that these client details should be "obtained" since this is what the Directive requires. Whether or not these details should be "recorded" is less clear since there is no

explicit requirement to do so in Article 19.4 regarding the suitability test or Article 19.5 regarding appropriateness.

In respect of CESR's proposed guidance, concerning the time at which the record must be created, we do not think this should necessarily be the time when the advice / service is being given. Rather, this is the latest possible point in time. We therefore suggest the following wording: "On giving advice at the latest or on being appointed as a portfolio manager" and "[u]pon providing the relevant service at the latest;" and

- **marketing communications:** concerning marketing campaigns, it is our understanding that a sample of such marketing communications provided to a large number of clients will be sufficient to fulfil the recording obligation.

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

11. The **EBF would oppose the introduction of a specific requirement for keeping records of the provisions of investment advice.** Such a requirement would be new within the EU since there is no such requirement in the EU so far (with the exception of one jurisdiction) and would be very costly to implement.
12. Moreover, since Article 13.6 of the framework (Level 1) Directive includes a general obligation for all investment firms to keep records of all services and transactions undertaken the basis to impose specific requirements for investment advice is given. However, Articles 7 and 8 of the implementing Regulation (which detail the requirements of Article 13.6 of the framework Directive), do not include any specific record keeping requirement for the service of investment advice. As Level 2 does not impose specific requirements for investment advice, new obligations should not be created at Level 3.
13. Furthermore, the question of keeping records of investment advice was **highly controversial throughout the political debate.** As a result, MiFID does not make it mandatory to keep records of investment advice provided on the telephone. There is also an exemption for investment advice in Article 39 of the implementing directive. Whether, and, if so, to what extent record-keeping obligations apply to investment advice must be decided at Levels 1 and/or 2 of the Lamfalussy process, in our view, not at Level 3.
14. Notwithstanding the above, EBF members recognise that if CESR were to opt or not for not proposing specific record keeping requirements of the provision of investment advice, firms would in any case have to comply with the Level 1 requirements.