

**COMMENTS ON THE PUBLIC CONSULTATION DOCUMENT OF CESR ON
“THE LIST OF MINIMUM RECORDS IN ARTICLE 51 (3) OF THE MIFID
IMPLEMENTING DIRECTIVE”**

**COMMENTS FROM THE SOCIEDAD GESTORA DEL FONDO GENERAL DE
GARANTÍA DE INVERSIONES, S.A., (Spanish compensation scheme for
investment firms) SENT ON ITS BEHALF AND ON BEHALF OF A MIFID
WORKING GROUP FORMED BY 11 SPANISH INVESTMENT FIRMS**

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

Establishing standards for the practical application of MIFID among entities in different jurisdictions is considered positive insofar as it contributes to a more uniform application of same.

Particularly in relation to the list of compulsory records to be submitted by the ESIs and credit entities (hereinafter “entities”), the introduction of new obligations in this respect in MIFID and in the regulations developing it means that a common approach of the CESR regulators in this field is particularly useful.

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?

In general terms the list can be considered adequate, although the following remarks can be made:

- (i) Although this may seem obvious, investment service companies are obliged to keep other records aside from those listed on the CESR document. These records are required by specific regulations, such as those applying to accounting, the prevention of money laundering, the protection of personal data, etc. Because of this, the approval of a list of minimum compulsory records by the regulators should stress that said list is provided merely for the purpose of the provisions in article 51 (3) of Directive 2006/73/EC, and in no way does it affect the obligation of keeping records required by other regulations, which in any case will continue to be applicable.
- (ii) The keeping of compulsory records must always be understood under the terms stated in article 51 (2) of Directive 2006/73/EC, meaning that entities are under the obligation of (i) storing the corresponding information; and (ii) availing of the mechanisms to ensure that it is accessible within a reasonable time. It is therefore not a matter of obliging anyone to create formal records for each one of the cases listed in the Appendix. Understanding it this way, the objectives sought by the Directive are achieved and at the same time costs, to the extent possible, are limited for entities.

- (iii) It is not clear that the entities should be required to provide the following compulsory records:
- a. Record of reports furnished to customers from time to time. Keeping this record may be costly for entities when hard copies of the reports are to be kept, and it would even be more costly if they were required to be kept on electronic files even though they were originally supplied on paper. In addition, it does not seem to follow from the Directive that keeping this kind of record is compulsory for entities.
 - b. Record of commercial communications. Although it may be prudent that entities keep a copy of the text of the commercial communications produced by the entity, obliging them to keep a copy of everything they send, stating who the addressee was, is too costly and the correlative benefits are not clear. Additionally it does not seem to follow from the Directive that keeping this kind of record is compulsory for entities.
 - c. Record of transactions of the firm and its internal organisation. What the contents of this specific record will be is not clear. Article 5(1) of the Directive establishes that entities “must keep adequate records of their activities and of their internal organisation.” It seems like this is a general statement, the concrete demands of which are contained in other obligatory records such as (i) records of orders, executions and transmissions, in respect of the ‘activities’ of the firm; and (ii) records of personal transactions and reports by the independent functions within the firm (compliance, risk control, internal audit), for the records deriving from the firm’s internal organisation structure. Therefore, this record may be considered redundant in relation to other records.

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

It does not seem that establishing this as a compulsory record is clearly useful right now, because of the following reasons:

- (i) Investment advice can be provided to customers by different means (voice, telephone, electronically, on paper ...) and in many different contexts (in the process of executing an order, within the scope of a contract for advisory portfolio management ...), therefore it does not seem possible to arrange a comprehensive record of this activity, and the benefits of keeping incomplete records are not apparent either.
- (ii) At a European level, the novelty of considering investment advisory activities as an investment service raises the question, among other matters, of how the rendering of this kind of services is going to be structured between entities and their customers and how to provide evidence of a service having been rendered, in some cases. In the absence of a definition of these aspects, what the contents of an advisory record could be does not seem to be clear at present.
- (iii) On the other hand, if the advisory relationship is set out on a contract, it would already be comprised in the record of clients contracts and it

would not be necessary to create an additional record for investment advisory services.