

Per web-link http://www.cesr-eu.org/index.php?page=to_respond&id=77 sent to the
Committee of European Security Regulators

CESR/ 06-552

Dear Ladies and Gentlemen,

we are pleased to have the opportunity to give our opinion within the scope of the consultations about the list of minimum records in Article 51 (3) of the MiFID implementing Directive.

The Deutsche Anlegerschutz Bund e. V. (DASB - the German Investor Protection Association) is a licensed non-profit institution who supports claimants of dubious investment consultants and finds specialised lawyers for the claimants. The mainly intended purpose of the association is to clarify aspects of the “grey” capital market to the public, the police, justice and supervisory institutions. Further financial services and asset manager are tested for investors according their reliability. We consult aggrieved investors and fight nuisances. Besides the DASB co-operates with supervisory institutions and justice.

From our point of view a common list of minimum records constitutes a reasonable regulation investors and industry will profit from. Only some aspects are to be added to the list. Further we recommend a specific requirement for keeping records of the provision of investment advice. In the following we take the opportunity to present our proposals in detail:

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

The obligation to document the most important aspects of investment services or ancillary services is an asset for investor protection. A common list of minimum records in all CESR members promotes the aim of the MiFID to ensure a common regime of obligations which enables common conditions for investors and industry.

With this list the investment firms are provided with a document which upon they can fulfil their obligations accurately. The risk is inhibited that investment firms elaborate their own

lists which might leave out essential recording obligations. Operating and financial expenses of the different national investment firms will not vary too much if they all stick to the same standard established by this list. They all have to burden the same efforts to fulfil these obligations. Therefore discussions about these obligations as a cost factor will be inhibited as well as a forum shopping of the financial industry to avoid costs. Investor protection shall not be a cost factor which can be eluded.

Further the investor has the advantage to act on the European market where he can be sure of the fact to deal under the same conditions as on his national market. This is guaranteed by such a list. The investor's confidence to invest in other CESR member countries will grow and thus promote the competition and the choice of financial products.

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?

From our point of view the list of minimum records already covers most of the necessary requirements to record information imposed by the Directives 2004/39/EC, 2006/37/EC and the Regulation (EC) No. 1287/2006.

Although we propose to add the following records to the list:

1) concerning regulations of the MiFID

a) Art. 19 par. 5 MiFID engages the investment firm to warn the client if he refuses to inform the investment firm about his experience and knowledge concerning financial products. Art. 19 par. 6 third passage imposes a warning duty on the investment firm in case of "execution only"-services. The executed warning should be recorded. The documented warning should also be signed by the client. Otherwise investment firms could justify the missing data with the denial of the client to inform the investment firm without proving this fact. In a lot of civil proceedings the parties argue about the extent of duties towards the client. Art. 19 par. 5 and par. 6 MiFID enables to avoid such conflicts which may also occur in relation to the supervisory institutions. A documentation of such a warning clarifies that this has taken place and how it was executed. This creates a basis in how far the client must or must not have been conscious of risks of the transaction or investment.

b) The DASB e. V. considers that it is necessary to insert to the list in addition to the retail client agreements those documents which the agreements refer to (Art. 19 par. 7 MiFID / Art. 39 Dir. 2006/73/EC). Indeed it is already regulated that rights and duties are part of the list of minimum records. But it is useful to clarify that a document which the retail agreement refers to also has to be recorded. The option to refer to a document should not make it possible to bypass the obligation to record rights and duties being part of the retail agreement. They are often the background for legal conflicts and should consequently be completely recorded. As the content of these agreements are regularly changed it is also necessary to determine which version has been background for the agreement in a particular case. This is only possible if the recording includes the document which is referred to.

2) concerning Directive 2006/73/EC

The list already contains the aspect to make a note of data of the client and the number of the utilised financial instruments after Art. 19 (2) last par. The conditions accepted by the client for security financing transactions should be added as obligatory recordable. Clients and investment firms often dispute about the facts what has been the basis for trading of the investment firm in the name of the client in the case of losses. This problem can be at least partly mitigated when the conditions are documented.

3) concerning Regulation (EC) 1287/2006

There are no aspects to be added to the list.

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

Yes. Investment advice becomes more and more important especially towards retail clients. They are not able to overview the growing vast variety of financial instruments and their functions. In a lot of cases the money invested by these clients is dedicated for retirement provisions. As a consequence investment advice is an important factor to give the retail client as well as other clients a correct orientation for their investment decision. As a matter of fact the documentation of investment advice supports the aim of the MiFID to ensure honest, fair

and professional investment advice in accordance with the best interests of its clients. Even though records of the content of investment advice does not guarantee an honest, fair and professional advice it at least supports the intention to act after these principles.

We would welcome to see our proposals incorporated.

Best regards,

Klaus Nieding

Attorney and President of the D.A.S.B. e. V.