

VIA ELECTRONIC DELIVERY

February 7, 2014

European Securities and Market Authority

103 Rue de Grenelle

75345 Paris

France

Email: sarah.raisin@esma.europa.eu

European Banking Authority

Tower 42 (level 18)

25 Old Broad Street

EC2N 1HQ London

United Kingdom

Email: joint-committee@eba.europa.eu

**Re: Consultation on Draft Guidelines for Complaints-Handling for the Securities
(ESMA) and Banking (EBA) Sectors**

Ladies and Gentlemen:

You will find attached our comments to the draft Guidelines for complaints-handling for the securities (ESMA) and banking (EBA) sectors.

We routinely assist a number of investment firms, active in various European jurisdictions, and we would like to thank ESMA and EBA for this opportunity to submit our answers and other comments. We hope that you will find them helpful in your efforts to craft detailed rules on complaints-handling applicable to both securities and banking sectors.

Please do not hesitate to contact us - at +39 335 848 9986 or dleone@cp-dl.com - should you have any questions or wish to discuss any matters in connection with our submission.

Very truly yours,

DANTE LEONE

to: European Securities and Market Authority; European Banking Authority

from: Nicola Rapaccini, Emanuele Inguaggiato

date: February 7, 2014

**Our Comments to Draft Guidelines for Complaints-Handling for the Securities (ESMA)
and Banking (EBA) Sectors**

I. OVERVIEW

- **Q1: Do you agree that complaints-handling is an opportunity for further supervisory convergence? Please also state the reasons for your answer.**

We strongly believe that the harmonization of the approaches to complaints management by participants in the financial and banking market would be a useful instrument both to provide adequate protection to customers and to improve the efficiency of such markets. In fact, it is critical that firms establish efficient and transparent management systems and procedures that may be easily activated by customers and, as a result, we agree that the Guidelines should be addressed to competent national authorities which are able to verify the compliance by national firms with the rules set forth the Guidelines.

Notwithstanding the foregoing, we would like to underline that the way in which investment and banking firms handle complaints is also a legitimate field of competition among those firms, conducive to the good of the final customers. Conversely, trying to uniform the best practice of the market by burdening firms with very granular rules may hinder such competition.

To such extent, we believe that the Guidelines should ideally include general principles around which firms ought to be free to shape their internal procedures regarding the handling of complaints and that national supervisory authorities should be expressly instructed to apply the Guidelines (*i.e.*, verify the compliance by firms with the principles set forth therein) in a manner which is proportionate to the nature, size and complexity of each firm.

In the end, we would ask ESMA/EBA to clarify whether the Guidelines should be deemed binding for national supervisory authorities (and, consequently, for firms) or if, instead, the Guidelines should be applied on a “comply or explain” basis.

II. GUIDELINES ON COMPLAINTS-HANDLING

Q2: Please comment on each of the guidelines, clearly indicating the number of the guideline (there are 7 guidelines) to which your comment relate.

Guideline 1 – Complaints management policy

1. *Competent authorities should ensure that:*

- a) *A ‘complaints management policy’ is put in place by firms. This policy should be defined and endorsed by the firm’s senior management, who should also be responsible for its implementation and for monitoring compliance with it.*
- b) *This ‘complaints management policy’ is set out in a (written) document e.g. as part of a ‘general (fair) treatment policy’.*
- c) *The ‘complaints management policy’ is made available to all relevant staff of the firm through an adequate internal channel.*

First of all, we would suggest spelling out the meaning of “*complaints management policy*”, possibly by including a specific definition in paragraph 15, in order to clarify that such policy – as we believe would be useful to explain – is supposed to be part of a firm’s internal procedures for the management (*i.e.* prevention, identification and cure) of the complaints, while it has nothing to do with the information on the compliance-handling process which should be made available to the customers/complainants (as specifically provided by Guideline 6).

Furthermore, although we agree that firms should entrust an internal body with the definition of the complaints management policy, we do not believe that Guideline 1 should expressly identify such responsible body and, in any case, we do not agree that such body should be part of the firm’s senior management. In fact, it would be more in line with the best everyday practice of financial and banking firms if an *ad hoc* body or a member of the managing body of the firm were assigned the task of drafting internal policies and to supervise the implementation and monitoring thereof (as is the case for conflicts of interest or risk management policies).

Therefore, we would suggest amending Guideline 1 so as to provide that (i) the senior management is responsible for the selection of the person or body in charge of the complaints-handling procedure of the firm, (ii) the selected person or body should define a “complaints management policy”, subject to validation or approval by the senior management of the firm and (iii) the person or body in charge of the complaints-handling process should report to the senior management of the firm on a periodic basis.

Finally, we would suggest considering the possibility of allowing small firms to outsource their complaints-handling procedures by entrusting third-party professionals with the management of complaints, subject to the appointment by the outsourcing firm of an internal reference person and to the satisfaction of independence requirements by the outsourcers.

Guideline 2 – Complaints management function

2. *Competent authorities should ensure that firms have a complaints management function which enables complaints to be investigated fairly and possible conflicts of interest to be identified and mitigated.*

We would suggest clarifying which kinds of conflicts of interest would specifically impact the handling of complaints within a firm, given that a conflict of interest between the firm and the customers appears to be *in re ipsa* upon any presentation of a complaint. In fact, the complaints-handling function is meant to verify whether the customer has been treated fairly, in light of all applicable laws, regulations and policies (including rules on conflicts of interest).

We apologize for stating the obvious by recalling that, pursuant to existing European regulations, all firms should already have adopted internal rules and procedures aiming at minimizing the risk of customers' interests being adversely affected by a conflict of interest between the firm and any person contributing to its business activity and that, therefore, the prevention and cure of conflicts of interest ought not to be a task handled by the complaints management function.

Guideline 3 – Registration

3. *Competent authorities should ensure that firms register, internally, complaints in accordance with national timing requirements in an appropriate manner (for example, through a secure electronic register).*

We agree with the general approach of Guideline 3. Anyway, we would suggest modifying the language as follows:

“3 Competent authorities should ensure that firms register, ~~internally,~~ complaints internally in accordance with national timing requirements in ~~an appropriate manner (for example, through a secure electronic register)~~ appropriate in order to comply with the principles of the Guidelines”.

Guideline 4 – Reporting

4. *Competent authorities should ensure that firms provide information on complaints and complaints-handling to the competent authorities or ombudsman. This data should cover the number of complaints received, differentiated according to their national criteria or own criteria, where relevant.*

We generally agree with the purpose of Guideline 4, however we believe that reporting and processing of information regarding the complaints ought to be structured in such a way as to be effective and useful for firms and national supervisory authorities. Therefore, we would suggest modifying the language as follows:

“4. Competent authorities should ensure that firms ~~provide~~ are able to provide, within a reasonable time and upon request by national competent authorities, information on complaints and complaints-handling to the competent authorities or ombudsman. [...]”.

Guideline 5 – Internal follow-up of complaints-handling

5. Competent authorities should ensure that firms analyse, on an on-going basis, complaints-handling data, to ensure that they identify and address any recurring or systemic problems, and potential legal and operational risks, for example, by:
 - a) Analysing the causes of individual complaints so as to identify root causes common to types of complaint;
 - b) Considering whether such root causes may also affect other processes or products, including those not directly complained of; and
 - c) Correcting, where reasonable to do so, such root causes.

We certainly agree with the guidance of Guideline 5 and, namely, that firms should use complaints-handling and the processing of related data in order to prevent the recurring of new complaints. However, we do not understand how supervisory competent authorities might “ensure” that firms concretely do so. We believe that the Guidelines should highlight the importance that firms internally process the data arising out of received complaints, without entrusting competent authorities with a specific power of supervision in this respect.

We would also stress that data-processing procedures may be particularly onerous for small and medium-size firms and, therefore, imposing this additional task indistinctively on all firms may have an impact on the efficiency and competitive dynamic of the market.

Guideline 6 – Provision of information

6. Competent authorities should ensure that firms:
 - a) On request or when acknowledging receipt of a complaint, provide written information regarding their complaints-handling process.
 - b) Publish details of their complaints-handling process in an easily accessible manner, for example, in brochures, pamphlets, contractual documents or via the firm’s website.
 - c) Provide clear, accurate and up-to-date information about the complaints-handling process, which includes:
 - (i) details of how to complain (e.g. the type of information to be provided by the complainant, the identity and contact details of the person or department to whom the complaint should be directed);

- (ii) *the process that will be followed when handling a complaint (e.g. when the complaint will be acknowledged, indicative handling timelines, the availability of a competent authority, an ombudsman or alternative dispute resolution (ADR) mechanism, etc.).*

d) *Keep the complainant informed about further handling of the complaint.*

We certainly agree that it is important that complaints-handling processes adopted by firms are transparent and easily accessible by costumers. However, we would clarify that firms should provide customers with full access to information concerning the complaints-handling procedure (*i.e.*, the information set forth under item (c) of this Guideline 6) but should not be required to disclose the internal complaints management policy (*i.e.*, how the firm internally processes the complaint) which should, on the contrary, remain confidential.

In addition, we would suggest clarifying that firms should provide costumers with the contact details of the responsible body to which a complaint should be addressed but not necessarily the identity and contact details of the individual entrusted with the processing of such complaint.

In the end, we would suggest modifying the language of Guideline 6 as follows:

“6. *Competent authorities should ensure that firms:*

- a) *On request or when acknowledging receipt of a complaint, provide written information regarding their complaints-handling process.*
- b) *Publish details of their complaints-handling process in an easily accessible manner, for example, in brochures, pamphlets, contractual documents or via the firm’s website, (including the type of information to be provided by the complainant, the identity and contact details of the ~~person or~~ department to whom the complaint should be directed).*
- c) *Allow customers to present a complaint in an easy manner, through multiple channels and instruments, including through online filing via the firm’s website (where available).*
- e d) *Provide to complainants that so request clear, accurate and up-to-date information about the ~~complaints handling process~~ progress of a complaint, which includes:*
 - (i) ~~details of how to complain~~ *(e.g. ~~the type of information to be provided by the complainant, the identity and contact details of the person or department to whom the complaint should be directed~~);*
 - (ii) *the process that will be followed ~~when~~ after the presentation of handling a complaint (e.g. when the complaint will be acknowledged, indicative handling timelines, the availability of a competent authority, an ombudsman or alternative dispute resolution (ADR) mechanism, etc.).”*

Guideline 7 – Procedures for responding to complaints

7. *Competent authorities should ensure that firms:*
- a) *Seek to gather and investigate all relevant evidence and information regarding the complaint.*
 - b) *Communicate in plain language, which is clearly understood.*
 - c) *Provide a response without any unnecessary delay or at least within the time limits set at national level. When an answer cannot be provided within the expected time limits, the firm should inform the complainant about the causes of the delay and indicate when the firm's investigation is likely to be completed.*
 - d) *When providing a final decision that does not fully satisfy the complainant's demand (or any final decision, where national rules require it), include a thorough explanation of the firm's position on the complaint and set out the complainant's option to maintain the complaint e.g. the availability of an ombudsman, ADR mechanism, national competent authorities, etc. Such decision should be provided in writing where national rules require it.*

We generally agree with the approach of Guideline 7 and with the description of the minimum requirements of the procedure which should be adopted by firms in responding to complaints; however, in order to avoid that such procedure may result unduly burdensome for firms, we would suggest modifying the language of Guideline 7 as follows:

“7. *Competent authorities should ensure that firms:*

[...]

- c) Provide the complainant with a response without any unnecessary delay ~~or at least~~ and in any case within the time limits set at national level. When an answer cannot be provided within the expected time limits, the firm should ~~inform the complainant about the causes of the delay and~~ indicate to the complainant when the firm's investigation is likely to be completed.
- d) When providing a final decision that does not fully satisfy the complainant's demand (or any final decision, where national rules require it), include a thorough explanation of the firm's position on the complaint and set out the complainant's option to maintain the complaint e.g. the availability of an ombudsman, ADR mechanism, national competent authorities, etc. ~~Such decision should be provided in writing where national rules require it,~~ provided that the response and decision described under items c) and d) above should be provided in writing if the complaint was made in writing or when it is otherwise appropriate based on the specific circumstances of the case at hand”.

III. COST-BENEFIT ANALYSIS

Q3: Do you agree with the analysis of the cost and benefit impact of the proposals?

Please, see our general remarks under Q2, specifically with respect to comments to Guideline 4 and Guideline 5.

Q4: Please provide any evidence or data that would further inform the analysis of the likely cost and benefit impacts of the proposals?

We strongly believe that the impact of the costs of harmonization of the complaints-handling management at a national level should not be underestimated. In fact, although it is true that most of the Member States have already adopted regulations providing for principles similar to those included in the Guidelines, most of these rules are currently mainly binding for, and applied by, large investment firms and credit institutions (see for example: for the Italian financial and banking sectors, article 59 of *Commissione Nazionale per le Società e la Borsa* regulation no. 11522 of July 1, 1998 and section XI of the Bank of Italy regulation of September 10, 2011, respectively; for the English financial sector, the Complaints Handling Arrangements adopted by the Financial Services Authority; for the French market, the procedure published on the website of the *Autorité des marchés financiers*). For such institutions, the requirements contained in the Guidelines would either be already met or relatively easy to meet. The same cannot be said with respect to firms in respect of which the existing regulations are not applicable and, even more, with respect to firms established in countries where national legislators or competent supervisory authorities have not yet adopted similar regulations. For such other firms, adapting their existing internal procedures to the requirements of the Guidelines is likely to prove significantly expensive, in particular if they are small and/or provide basic financial services.

Therefore, we would stress again the importance of (i) including into the Guidelines a general reference to a principle of proportionality and, thus, to the need that national authorities supervise the compliance by national firms in a manner which is proportionate to the nature, scale and complexity of the firm and the services provided to costumers and (ii) providing for a term within which all Member States are required to adopt regulations reflecting the principles set forth in the Guidelines.

* * *

Once again, we hope that you will find our comments helpful in your continued efforts to craft detailed rules on complaints-handling applicable to both securities and banking sectors.

We are of course available to discuss any of the foregoing matters in further detail.