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**ESMA**

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18/6/2015

## **Comments on ESMA Consultation Paper - ESMA/2015/763**

### **Draft guidelines for the assessment of knowledge and competence**

Dear Sirs,

the Verband für Finanzdienstleistungsinstitute e.V. (Association for Financial Services Institutions) is a German professional association representing small and intermediate sized investment firms, especially advisors, introducing brokers and portfolio managers.

We consider the consultation paper and the draft guidelines as a prudent and reasonable approach and successful effort to strengthen investor protection. There are only two issues in which we would disagree with the draft. These disagreements are as follows:

#### **Question 1:**

##### **Preexisting competence**

The period of pre-guideline activities which indicates the competence of existing staff at the time of the guidelines taking effect should be three not five years. This qualifying period needs not to be spent in the same firm, but rather may be fulfilled in more than one firm.

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**Rationale:**

The usual time for a successful apprenticeship in the financial industry as in many other industries or economic sectors is a three year period of practical activities combined with theoretical training. The same time period should also be sufficient for the staff member responsible for giving information and/or advice, as a rule, to acquire the necessary professional competence. It may be assumed that the firms comply with their already existing obligation to maintain the appropriate level of knowledge on an ongoing basis. Furthermore, we cannot see any valid reason that this experience ought to be acquired in the same firm. The experience may be even of greater value if acquired in different firms with different compliance environments, different clientele and possibly different approaches to issues relevant for the assessment of competence.

**Question 3:****Our view on Draft - Guidelines provisions V.II 20 b) and V.III 22 b)**

In these provisions, the requirements as to knowledge of the staff giving information or giving invest advice include as key characteristic the knowledge of the general tax implications of transactions which are the object of information or advice.

We feel that this requirement is too vague and, depending on its interpretation, goes beyond what can be reasonably expected from the service provider. This requirement should be narrowed by adding the restriction of “where appropriate, the knowledge of general tax implications”.

**Rationale:**

The entitlement of financial services providers of giving tax advice in connection with their activity varies from jurisdiction to jurisdiction. In addition, even where tax advice may be given by financial service providers, one cannot expect the staff members to become tax experts in the field of financial transactions. This area is (at least in the jurisdiction of Germany) highly complicated, in particular regarding the tax treatment of derivatives or instruments embedding such derivatives. Even qualified tax experts have difficulties in properly assessing the tax implications. Therefore, it should be left to the respective investment firm as to whether they include even general tax implications, which might be wrong or misleading in a particular case, in the service menu offered to their clients or rather include a general disclaimer and refer their clients to their respective tax advisor or accountant. In the latter case, the firm and its staff should not be required to show knowledge, even in a general manner, in the tax treatment of the

transactions in question. This approach should be made possible by the suggested restriction (“where appropriate”) of the knowledge requirement.

Kind regards,

A handwritten signature in blue ink, appearing to read 'G. Cloß', with a stylized flourish at the end.

Verband der Finanzdienstleistungsinstitute e.V.  
Gabriele Cloß  
Rechtsanwältin