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Via e-mail:
<http://www.esma.europa.eu/consultation/55687/response>

Consultation ESMA/ 2011/445 Guidelines on certain aspects of the MiFID suitability requirements

Ladies and Gentlemen

BVI¹ appreciates the opportunity to present its views on ESMA's interpretation of the MiFID suitability test. We are of the opinion that wording details are of major importance when dealing with these draft guidelines. Therefore we took the liberty rather than answering your questionnaire, but to propose some alternative wordings.

Preliminary Remarks

Extent of information to be collected from clients (proportionality)
No. 20 et seqq.

We recommend approaching the issue from a different angle. Usually, investment advisers should first collect information from clients and as a second step, determine the type of financial instruments that shall be

¹BVI Bundesverband Investment and Asset Management represents the interests of the German investment fund and asset management industry. Its 82 members currently handle assets of EUR 1.8 trillion in both investment funds and mandates. BVI's members directly and indirectly manage the capital of 50 million private clients in 21 million households. BVI's ID number in the EU register of interest representatives is 96816064173-47. For more information, please visit www.bvi.de.

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recommended. Recommendations do not form part of the suitability test, but should be provided on the basis of the results provided by the suitability assessment. Therefore, it seems not appropriate to differentiate the extent of information depending on the type of financial instruments as suggested in guideline 22. Preliminary differentiation should be performed in accordance with the investment objectives of the client (long-term/short-term, conservative or more risk-inclined etc.) and the nature/extent of the service.

Consequently, subparagraph (a) of guideline 22 and the corresponding guidelines 23 and 24 should be deleted.

Client's Responsibilities

We do not share ESMA's view of the average client as it is implicitly depicted in the draft guidelines. When reading them, one might get the impression that most clients lack any knowledge about financial issues and therefore should be protected even against their own will.

The draft guidelines seem to be based on the assumption that investment firms are obliged to prevent clients from acquiring unsuitable investment products. However, MiFID does not contain such an obligation. Investment firms have to perform the suitability test and they are not allowed to advise in favour of any investment product which, according to the test result, is not suitable for the client. It is then up to the client to decide whether he follows the test result (and a given advice) and acquires a suitable product, or if he ignores the result and invests in an unsuitable product. ESMA should not try to introduce a comprehensive liability of investment firms for "wrong" client decisions by means of interpretative Level 3 guidelines, as such liability is not provided for in the Level 1 Directive.

Proposed Amendments to the Draft Guidelines

No. 9

The second sentence of No. 9 should read as follows:

"At no stage during the suitability assessment process, or when informing clients, should investment firms create any ambiguity or confusion about **which responsibilities have to be borne by them and which by the client** in the process."



The investment firm is not responsible for every aspect of the process. The client is responsible for the correctness of the information provided by him. The investment firm may spot obvious contradictions, but it is not its duty to verify the information. As stated above, the client is also responsible for the decision whether to follow the test result (and a warning by the investment firm) or to choose an unsuitable product. This may not be part of the suitability assessment process, but is closely linked to it.

No. 11

The guideline should be deleted.

In our view, the investment firm is only obliged to gather information about the financial knowledge and education of the client. It is not responsible for improvement of these skills. The investment firm has to find out to what extent the client understands the relationship between risk and return or the set-up of a risk profile. But there is no duty to educate clients on these points. A client's poor understanding has only to be taken into consideration as part of the suitability test.

No. 16 and No. 44 (b)

The guidelines should be deleted, or they should be integrated into the "supporting guidelines" No. 18 and 19.

An investment firm as such will not be able to understand product characteristics. In our view, its employees dealing with clients should have the skill and knowledge. Therefore, the guidelines should rather require policies and procedures ensuring staff education.

No. 24 (b)

The sentence in brackets should be deleted.

In many cases, clients are not willing to give detailed information about their financial situation. If investment firms would have to insist on questions relating e. g. to the interest rate of a loan, clients may refuse to give any information or they may give wrong information just in order to put an end to the inquiry.



No. 29

The sentence should end “may also impact the **kind** of information to be collected.”

We are of the opinion that a client’s personal circumstances should not influence the “level” of information to be collected. For example, there is no need to investigate more thoroughly on the financial situation of a married person. However, the kind of information that should be gathered may differ according to the family status.

No. 31

In case investment firms do not obtain sufficient information from clients, they should refrain from recommending investment services or financial instruments, but are not generally prevented from performing investment services as such (Article 35 para. 5 of MiFID L2 Directive). This is important in terms of portfolio management where it should be possible to provide management services on a cautious basis even if the client objects to disclosing some aspects of the relevant information. Thus, the wording of guideline 31 should be amended in “it must refrain from **recommending investment services or financial instruments** to that client”.

No. 32 (a) should read as follows:

“In particular, firms should **only rely on clients' self-assessment if it is based on clear and objective criteria;**”

The second sentence in **No. 33** and the first sentence in **No. 34** should be deleted and **No. 34** should start as follows:

“Investment firms should try to lead the client to a self-assessment that is rather based on objective criteria than on opinions or estimations. For example: ...”

No. 32 (a) actually indicates that self-assessment should not be used at all, which is not in line with Nos. 33 and 34. In many cases, investment firms have to rely mainly on clients' self-assessment because there is no other source of information available. As stated in No. 33, it is the client’s responsibility to provide correct and complete information. Investment firms may only support clients with this task, for example by asking for facts rather than for estimations. However, if the client's self-assessment turns out to be wrong, there shall be no liability of the investment firm.



No. 35

We think that if clients shall be informed clearly and simply about the suitability test, it should to be stated (among others) that they are not forced to follow the test result. Clients will see not any reason for giving false information "in order to get access to financial instruments that may not be suitable for them" if it is clear that the test should give some guidance, but is not linked to any investment restriction.

We agree with the draft guidelines that investment firms should try to mitigate the potential risk of clients giving incorrect information to them. However, the client is responsible for any incorrect information given on purpose. In such cases, the investment firm will hardly be able to discover the incorrectness.

No. 40

If a client is a group of two or more persons and no representative has been appointed, the suitability test should not necessarily be based on the person belonging to the group who has the lowest level of knowledge and experience. It should rather be based on the group member with the most conservative investment plans.

No. 43

This guideline should not prevent portfolio managers to provide standardized management solutions to certain groups of clients (e.g. risk-averse, conservative, moderate, chance-oriented).

No. 44 (c) should read:

"the **actual** financial situation of the client allows him to finance his investment ~~at any moment~~ and to bear any possible losses resulting from his investments;"

Investment firms may not always have information about investments and disinvestments made by their clients (e.g. in case of pure investment advisers maintaining no client accounts).

No. 45

The word "centralised" in lit. (a) should be deleted. Investment firms might be able to store the data centrally once they have gathered them, but the record-keeping during the suitability assessment is the task of the individual advising employee.



No 46

The words "how and" in the first sentence should be deleted. To our understanding, the suitability test is only about "why" an investment is made, not about "how". There are already other record-keeping duties in place with regard to the "how".

No. 47

The wording shall be amended in "information about financial instruments **recommended** to the client". Financial instruments are generally "accessible" to clients at their own initiative, regardless of the results of the suitability test.

We hope that our suggestions will help ESMA to develop a practicable, exhaustive and well-balanced interpretation of the MiFID requirements at hand. We would like to assure you of our willingness to engage in further discussions on this subject.

Yours sincerely

Marcus Mecklenburg

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