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Norwegian Securities Dealers Association (NSDA)
London Investment Banking Association (LIBA)
Swedish Securities Dealers Association (SSDA)

Comments on CESR's Public Consultation on the list of minimum records in Article 51(3) of the MIFID implementing Directive

27th November 2006

General comments

CESR's list of minimum records required by MIFID is potentially a helpful compilation of various provisions on MIFID level 1 and 2. We also appreciate that CESR is proposing this list at this early stage in order for the industry to attend to the list when planning implementing measures.

We consider that a minimum list of this kind should reflect only what is required by MIFID. It should retain the flexibility inherent in MIFID to allow regulators and particularly firms to determine the most appropriate means to ensure and evidence compliance with MIFID's provisions. We also strongly recommend that the competent authorities satisfy themselves with this list and refrain from adding other specific record items to it. For example, the UK FSA in its recently published policy statement has adopted this approach, in line with the 'intelligent copy-out' of MIFID. The UK FSA has stated that it does not expect the current proposals to have any impact on firms other than the cost of adhering to the increased record-keeping period in the UK from 3 to 5 years.

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

Yes, if it is sufficiently non-prescriptive, and accompanied by CESR's encouraging Member State authorities not to add other specific record items to this list.

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 what reasons?

We consider that the list proposed by CESR contains all the information that MIFID explicitly requires being recorded. As regards 'non-minimum' records, firms should retain flexibility, either as to how they fulfil the general requirement in Art.13(6) of the Directive, that "An investment firm shall arrange for records to be kept of all services and transactions undertaken by it which shall be sufficient to enable the competent authority to monitor compliance", or as regards any additional records that a firm might choose to keep, such as the complete transaction information reported to regulators.

However, there are some additional CESR requirements e.g. the requirement to record "Aggregated *transaction* that includes a client order", "Aggregation of one or more client *orders* and an own account order". We believe that that the general obligation to record "Order received or arising or decision to deal taken in providing the service of portfolio management" (Art. 7 of the Regulation), "Orders executed on behalf of clients" (Art. 47(1)a of the Directive 2006/73/EC) and, "Order carried out ... and transactions effected for own account" (Art. 8 of the Regulation) will cater for the recording needed in these aspects. Thus, the two records proposed by CESR mentioned in the beginning of this paragraph should be deleted.

Furthermore we do not think that there is an explicit requirement in MIFID to make a record of client details according to the Directive Art.19(4) as regards the suitability test and (5) as regards appropriateness. The Directive only requires that firms "obtain" client details. There are other means of evidencing compliance than maintaining physical records at every step of the process, and it should be for firms to make that determination. Given that MIFID Article 13.6 provides a general obligation to maintain records sufficient to enable Competent Authorities to monitor compliance, it would be wrong for CESR to go beyond this requirement by adding a further layer of prescription in this area.

We would also like further clarity on CESR's proposed definition and application of 'marketing communications' in the minimum record-keeping list. Minimum record-keeping requirements should apply only to a narrowly defined class of marketing communications to retail clients. A broader minimum requirement would be impractical

to implement because of the very large volume of communications, different marketing channels, and the amount of change that communications undergo, especially in the wholesale markets.

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

No, we do not think that provision of investment advice should be required to be recorded. Given that MIFID Article 13.6 provides a general obligation to maintain records sufficient to enable Competent Authorities to monitor compliance, and that there are other means of evidencing compliance than maintaining records of the advice given, it should be for firms to make that determination, and it would be wrong for CESR to go beyond this requirement by adding a further layer of prescription in this area. Having to maintain a minimum record of when advice is given, what information is obtained, and the suitability assessment, where applicable, would be impractical and disproportionate.