



European Securities and
Markets Authority

Reply form for the Consultation Paper on draft guidelines on complex debt instruments and structured deposits



Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA Consultation Paper on draft guidelines on complex debt instruments and structured deposits, published on the ESMA website.

Instructions

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, ESMA will only be able to consider responses which follow the instructions described below:

- use this form and send your responses in Word format (pdf documents will not be considered except for annexes);
- do not remove the tags of type < ESMA_QUESTION_COMPLEX_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- if you do not have a response to a question, do not delete it and leave the text "TYPE YOUR TEXT HERE" between the tags.

Responses are most helpful:

- if they respond to the question stated;
- contain a clear rationale, including on any related costs and benefits; and
- describe any alternatives that ESMA should consider

Naming protocol

In order to facilitate the handling of stakeholders responses please save your document using the following format:

ESMA_COMPLEXPRODUCTS_NAMEOFCOMPANY_NAMEOFDOCUMENT.

E.g. if the respondent were XXXX, the name of the reply form would be:

ESMA_COMPLEXPRODUCTS_XXXX_REPLYFORM or

ESMA_COMPLEXPRODUCTS_XXXX_ANNEX1

Deadline

Responses must reach us by **15 June 2015**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input/Consultations'.



Publication of responses

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that a confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the headings 'Legal notice' and 'Data protection'.



Introduction

Please make your introductory comments below, if any:

< ESMA_COMMENT_COMPLEX_1 >

The Dutch Investors' Association (VEB) welcomes the opportunity to reply to ESMA's consultation paper on draft guidelines on complex debt instruments and structured deposits.

In general, the VEB agrees with the definitions proposed by ESMA as they are sufficiently encompassing to prevent complex products from being sold to retail investors without an appropriateness test. The VEB also agrees with the products and structures that are listed in each section. It should however be emphasized these lists are meant to be non-exhaustive. Omission from such a list should not be a sufficient reason for a NCA or investment firm to consider a product non-complex. The definition itself should always act as the guiding principle for the consideration of whether a product is complex or not.

The VEB would also like to make a more general comment on the sale of complex products in the framework of execution-only:

On the 28th of May 2015, the Dutch Financial Market Authority (AFM) organised a public hearing to discuss ESMA's consultation paper among market participants. No real discussion took place on the definition of what constitutes a complex product. No objections were raised by those providing investment services, despite the fact that ESMA's draft guidelines would considerably broaden the range of products that are considered complex and therefore create additional obligations for these firms.

Instead, the discussion focused on the appropriateness test. Broadening the range of products that are considered complex only increases consumer protection if the appropriateness test is effective at ensuring that clients possess the knowledge and experience necessary to understand the investment decisions they make and the associated risks.

According to research conducted by the AFM and presented during the public hearing, this is currently not the case. Clients who do not possess the knowledge and experience necessary to understand the risks of a complex product are still able to pass the test and warnings, in case of a negative result, are often ignored. Many clients do not even seem to be aware of the rationale behind the test and do not remember taking it. The VEB therefore believes that ESMA, in cooperation with the NCAs, should review the effectiveness of this test in assessing the knowledge and experience of clients and the impact that warnings have on their behaviour.

The VEB, as an organisation representing retail investors, is very willing to contribute to such an endeavour. The ban on inducements in the Netherlands has led to an increased use of execution-only services, especially among smaller investors. A similar development is expected across the EU as a result of MiFIDII. This should not go at the detriment of adequate levels of consumer protection. A high quality appropriateness test is therefore necessary.

The VEB believes open-ended questions should be added to the test in order to make sure that the result is truly reflective of the experience and knowledge of the client. For each open-ended question, the client should receive a score depending on the quality of his answer. The client should obtain a minimum score for each open-ended question in order to pass the overall test. The costs for investment firms could be kept limited by making use of automated coding.

This would represent a great leap forward compared to the close-ended question that are currently used by firms and whereby the client can easily know, or is even informed explicitly, which box he has to tick in order to pass the test (as an example, see:

<https://www.jameshay.co.uk/DocumentView.aspx?DocumentID=205>).

Furthermore, the VEB believes that the results of the test should be quasi-binding. Only through an explicit opt-out (e.g. by calling the investment firm) should it be possible for clients to buy products for which they do not possess sufficient knowledge and experience.< ESMA_COMMENT_COMPLEX_1 >



Question 1: Do you agree with the examples of debt instruments that embed a derivative? If not, which examples do you not agree with, and why not?

<ESMA_QUESTION_COMPLEX_1>

The VEB agrees with the examples of debt instruments that embed a derivative.

<ESMA_QUESTION_COMPLEX_1>

Question 2: Do you agree with the definition of embedded derivative proposed in the Guidelines in Annex IV? If not, why not?

<ESMA_QUESTION_COMPLEX_2>

The VEB agrees with the definition of embedded derivative proposed by ESMA.

<ESMA_QUESTION_COMPLEX_2>

Question 3: Do you agree with the examples of debt instruments that incorporate a structure making it difficult for the client to understand the risk? If not, which examples and why not?

<ESMA_QUESTION_COMPLEX_3>

The VEB agrees with the examples of debt instruments that incorporate a structure making it difficult for the client to understand the risk.

<ESMA_QUESTION_COMPLEX_3>

Question 4: Do you agree with the definition of a structure making it difficult for the client to understand the risk included in the Guidelines in Annex IV? If not, why not?

<ESMA_QUESTION_COMPLEX_4>

The VEB agrees with the proposed definition of a structure making it difficult for the client to understand the risk <ESMA_QUESTION_COMPLEX_4>

Question 5: Do you agree with the definition of a structure making it difficult for the client to understand the risk of return of structured deposits and with the relevant examples proposed? If not, why not?

<ESMA_QUESTION_COMPLEX_5>

The VEB agrees with the proposed definition of a structure making it difficult for the client to understand the risk of return of structured deposits and with the relevant examples proposed <ESMA_QUESTION_COMPLEX_5>

Question 6: Do you agree with the definition of a structure making it difficult for the client to understand the cost of exiting a structured deposit before term and with the relevant examples proposed? If not, why not?

<ESMA_QUESTION_COMPLEX_6>

When considering the early exit terms of a structured deposit, the VEB believes that ESMA should look at more than just the financial penalty that is applied. In some cases, it is not even possible to exit early or only a couple of weeks or months after notice. In this case, the client faces large opportunity costs by not being able to access his capital.<ESMA_QUESTION_COMPLEX_6>

Question 7: Please provide any specific evidence or data that would further inform the analysis of the likely cost and benefit impacts of the guidelines.

<ESMA_QUESTION_COMPLEX_7>

The VEB represents retail investors and does not act as an investment firm. Therefore, the VEB will not answer this question in any great detail. Nevertheless, the VEB generally believes that enhancing investor



protection cannot be rejected by invoking undesirable greater costs, increased administrative costs or petitioning to maintain extant structures in the financial markets<ESMA_QUESTION_COMPLEX_7>