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The Committee of European Securities Regulators ("CESR")
11-13 Avenue de Friedland
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France

14 December 2009

Dear Sirs

CESR Consultation Paper - Understanding the definition of advice under MiFID

The City of London Law Society ("CLLS") represents approximately 13,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response has been prepared by the CLLS Regulatory Law Committee (the "**Committee**"). Members of the Committee advise a wide range of firms in the financial markets including banks, brokers, investment advisers, investment managers, custodians, private equity and other specialist fund managers as well as market infrastructure providers such as the operators of trading, clearing and settlement systems.

Overview

We support the main analysis set out in the Consultation Paper. In particular:

- the diagram of the five key tests is helpful;
- the distinction between presenting information and making a personal recommendation is helpful, in particular the acknowledgement that advice requires an element of opinion on behalf of the advisor, and is distinct from the provision of information;
- the fact that, to be advice, the recommendation must be based on information about a person's circumstances is helpful, because without knowing a person's circumstances it is difficult for information

to amount to a personal recommendation;

- the distinction between advice relating to a particular financial instrument and generic advice is helpful.

We do have the following detailed comments on some of CESR's questions.

Question 5: Are the circumstances where "it is clear the firm is making a personal recommendation" sufficiently clear. Would further clarification be helpful?

In our view, in many cases there may be scope for drawing a distinction between the use of disclaimers with different types of client. That is because there will be a different level of understanding of the meaning and importance of a disclaimer between different categories. For example, in some cases a disclaimer used with retail clients may not be appropriate whereas it would be with professional clients. That is not to say that a disclaimer will always be inappropriate with a retail client - everything depends on the circumstances. In our view, CESR should make it clear that paragraph 47 as drafted applies to some retail clients and that, in relation to professional clients, and in some circumstances retail clients, it needs to be taken into account when considering the effect of a disclaimer.

Question 6: Are there other criteria you believe should be considered when determining whether messages to multiple clients constitute investment advice?

Paragraphs 60-62 cover the use of the Internet as a distribution channel. Article 52 of the MiFID Implementing Directive states "a recommendation is not a personal recommendation if it is issued exclusively through distribution channels or to the public". In paragraph 60, CESR says in its opinion that this exemption only applies when the recommendation issued through distribution channels or to the public is addressed to the public in general. This ignores the word "or" in the MiFID definition. Where a distribution channel is used, it does not matter whether the personal recommendation is made to the public or not. It can be assumed that the use of proper distribution channels means that a recommendation has been made public. The words "or to the public" are to cover alternatives to distribution channels. CESR should avoid giving guidance that contradicts MiFID.

Question 7: What information would be helpful to assist in determining whether or not what firms provide constitutes investment advice or corporate finance advice?

Paragraphs 71-77 analyse the difference between corporate finance advice and investment advice. In our view, the existence of two separate definitions suggests that the activities are separate, and that the analysis in paragraph 75 is correct. Indeed, under ISD, both investment advice and corporate finance advice were ancillary activities. When MiFID came in, investment advice became a core activity, but the definitions were not changed. In practice, we think that this produces the clearest outcome. In addition, investment firms still need to comply with MiFID's overall principle, being "to act honestly, fairly and professionally in accordance with the best interests of its clients". In our view, this gives sufficient comfort that the interests of the various parties set out in paragraph 76 are properly protected.

We would be delighted to discuss the above observations and suggestions with you. You may contact me on +44 (0)20 7295 3233 or by e-mail at margaret.chamberlain@traverssmith.com.

Yours faithfully,



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Chair CLLS Regulatory Law Committee

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