Nederlandse Vereniging van Banken

The Dutch Banking Association (Nederlandse Vereniging van Banken, hereinafter 'NVB') welcomes the opportunity to respond to ESMA's Consultation Paper ('CP') on guidelines on certain aspects of the MiFID II appropriateness and execution-only requirements.

On a general note, we believe any interpretation in the proposed guidelines that seems to go beyond what is mandated from MiFID II and the MiFID delegated regulation could be seen as a further burden for customers and investment firms that serves no specific cause. In many recitals the guidelines seem to go further than the objective (supervisory convergency) strictly justifies. In our response to ESMA's CP we will highlight examples where ESMA goes beyond simply ensuring uniform and consistent application of 'open standards' (the goal) by means of introducing new requirements or 'expansion' of the level 1 text.

As we have no insight in to what extent the proposed guidelines are absolutely necessary to protect investors and enhance supervisory convergency, we advise ESMA to publish detailed outcomes of the CSA on Appropriateness, as evidence that these outcomes justify imposing these rather strict guidelines. As we don't know the outcomes of the CSA, we are not convinced that these very strict guidelines are proportional.

Lastly, we would like to remark that some guidelines, although they look marginally impactful on the surface, could have rather big IT impact. For example, changing questionnaires, re-assessing all appropriateness tests, storing all previous warnings all might seem rather minor changes, but impose enormous IT impact on banks that have to use all (already stretched) available IT capacity for i.e. SFDR and other MiFID II changes. We suggest ESMA takes note of this.

Q1 Do you agree with the suggested approach on providing information about the purpose of the appropriateness assessment? Please also state the reasons for your answer.

Q2: Do you agree with the suggested approach on the arrangements necessary to understand or warn clients? Please also state the reasons for your answer.

Necessary information

ESMA writes in recital 20 that firms need to 'provide all necessary information and that a firm should always aim to collect all necessary information to assess whether his knowledge and experience is appropriate to the specific type of services or product offered or demanded.' First of all it is not clearly defined by ESMA what information is [absolutely] necessary. There is a risk that 'necessary information' is being interpreted too broadly and therefore leading to long and disproportionate questionnaires. In practice, it is common that certain ex-only services only provide the client access to a limited range of investment products. In such cases it should be made clear that there is no need for collecting information regarding other services and/or other products that are not being offered to the client. Thus, the scope of necessary information should be limited to only services and products that are actual being offered. Furthermore, it is important to recognize that necessary information can diverge over different distribution/client groups (i.e. experience of customers might be more necessary to acquire for younger customers than relatively older customers).

By stating in recital 19/20 that firms should "always aim" and "always ask", it is not taken into consideration by ESMA that under MIFID II it is allowed to provide ex-only services regarding non-complex financial instruments without the need to obtain clients' knowledge and experience. If the investment firm chooses to invoke the exception of Article 25 (4) MIFID II, there will be no questionnaire about knowledge and experience and these considerations should therefore be ignored. The customer cannot be called upon to provide information if this is deliberately not intended. These considerations can therefore only be relevant if there is no appeal to an 'ex-only' exception. If the firm however obtains clients' knowledge and experience but the client does not provide the necessary information, a warning that the firm is not in a position to determine the appropriateness should be sufficient. Recital 20 seems to prescribe that in such case the firm should go back to clients first and ask the questions again. If this is intended by EMSA, we can not agree with this approach. After the questionnaire is presented to clients – and assuming that clients are made fully aware of the importance of providing the necessary information - the firm should be able to proceed with a warning in case clients do not provide the necessary information.

Given the wide variety of firms and subsequent services, we see no benefit in ESMA defining methods to counter circumvention especially when there seems to be no evidence that underpins these assumptions.

Possibility of answer ‘do not know’

Recital 22, p. 27: With regard to the "don't know reply" option, it can be noted that its introduction at this stage comes highly unanticipated and unwelcome. Most questionnaires are set up digitally and the technical implementation of such additional matters quickly has a considerable (IT) impact and can lead to disproportionate costs and efforts. More importantly, such an option does not contribute in any way to the purpose of the appropriateness test. In this case, it will only cause confusion and doubt when answering questions. This option also implies that all questions must always be answered with 100% certainty. This does, however, not have to be the case, especially with multiple-choice questions, customers must be able to give their best answer, given the available knowledge. If there is too much ‘guessing’, then this automatically results in higher error rates in well-composed questionnaires. What matters is that the outcome of the appropriateness test gives a true and fair view and for that a "don't know reply" option is completely unnecessary.

Also, adding the ‘do not know’ possibility will change probably little to the outcome of the appropriateness test. Most customers, obviously, take a test to pass, not to fail (or to say they ‘do not know’). Customers will thus be incentivized to not choose for ‘do not know’ when they actually do not know, as they have a 50% chance of guessing the right answer and therefore have a bigger chance of passing the test.

Furthermore, we see no legal basis in requiring to add the possibility of “don’t know”.

Proportionality

Recital 24/25, p. 28: the proportionality principle that must apply when developing the appropriateness test seems to be completely overlooked in these considerations. For non-complex instruments for which the appropriateness test is not necessarily mandatory, it may go too far to work with substantive multiple-choice questions. This will usually also apply to questionnaires that only pertain to the appropriateness of the ex-only service. In these considerations of ESMA, it is therefore recommended to clarify that in certain cases, given the proportionality principle, it may be sufficient to suffice with binary questions.

Q3: Do you agree with the suggested approach on the extent of information to be collected from clients? Please also state the reasons for your answer.

Complex products: from a legal perspective and as a ‘relative concept’

In recital 26 (guideline 3) on page 10 ESMA writes “Considering the type and characteristics of investment products, firms should ask for more in-depth information on a client’s knowledge and experience when non-advised services are provided in relation to more complex or risky products as compared to less complex or risky products. After all, assessing a client’s capacity to understand the risks associated with more complex or risky products will require more in-depth information from the client. It is important to clarify that in this context, ESMA is referring to complexity as a relative term.”

Paragraph 32 seems to indicate that the appropriateness test requires differentiation according to the type of complex financial instruments involved. So no one size fits all, but a tailor-made approach given the unique nature of *every* financial instrument. We strongly oppose the introduction of complexity as a relative term by ESMA in these guidelines. According to MiFID II art. 25 (4) (a) a UCITS – for example - would not qualify as a complex product (from a legal perspective), implying that non-UCITS would be a complex product. In art. 57 of the delegated regulation, a summary is given of criteria that a product must meet if it is not specifically mentioned in Article 25 (4) (a) (vi) MiFID II, UCITS are mentioned under (iv) and are therefore (again, from a legal perspective) seen as non-complex, non-UCITS can then be classified as complex. What we believe is incorrect in this CP is that ESMA introduces a new definition of complex products - as a relative concept - in addition to the existing legal consideration of whether a product can be regarded as complex or not.

Consider, for example, the degree of risk of a product. An AIF should be categorized as a complex product from a legal perspective, but – in relative terms – could very well be of a less complex nature

given its underlying investments than a UCITS, even when this UCITS qualifies from a legal perspective as a non-complex product.[1] The above example illustrates the current imperfect situation, but introducing 'relative complexity' in the case of appropriateness would not solve this imperfection. Quite the contrary, it would overcomplicate the current situation, without giving firms that provide non-advised services and end investors any legal certainty as the definition of 'relative complexity' is not defined in MiFID II nor the delegated regulation. This in turn, could lead to divergency between market practices. We believe ESMA should pay careful attention to this.

From a more operational standpoint, asking for knowledge and experience giving the 'relative complexity' of a wide array of securities is simply impossible to implement as every security has a unique set of risks and opportunities.

Using product governance information for the appropriateness test

Recital 28 states that "lastly, it is emphasized that, for the purpose of the appropriateness assessment, firms should only take into account a client's information on his knowledge and experience. It should be clear for clients that any other information collected (financial situation, investment objectives, …) in the context of for example product governance arrangements or other investment services, will not be taken into account in conducting the appropriateness assessment."

This does not seem very relevant as banks hardly collect information on financial situation and investment objectives for execution only customers, for Product Governance purposes. The ESMA guidelines on product governance requirements have in general failed to make a clear distinction between target market identification requirements that apply under the execution only regime and under the provision of investment advisory or asset management services regime, since in the latter case, it is possible to conduct a relative more thorough assessment of the target market and obtain information about aspects such as the clients' financial situation and clients' objectives.

Q4: Do you agree with the suggested approach regarding the appropriateness assessment relating to a service with specific features (paragraph 34 of the Guidelines)? In particular, do you agree with the examples provided (bundled services and short selling), or would you suggest including other examples? Please also state the reasons for your answer.

We do not agree with the suggested approach regarding the appropriateness assessment in paragraph 34.

Granting loans

Although the concept of appropriateness is applicable to both services and products, we believe testing the relevant knowledge and experience regarding services for retail investors is complex, burdensome and will not protect retail investors to a bigger extent. With respect to 'bundled services' like granting loans, sectoral legislation already aims and succeeds to inform and protect investors. We have not discovered any motivation from ESMA that indicates that the current sectoral legislation is not sufficient in the case of granting loans in an Execution Only regime.

Short selling

If the service of short selling is provided firms should carefully assess whether that service is appropriate for the customer. We do not specifically believe that this should be part of the knowledge and experience test. Given the nature of Execution Only, we believe firms could set up agreements and information documents on short selling (these do already exist) and it is up to the customer to decide whether the service is deemed appropriate.

Q5: Do you agree with the suggested approach on the reliability of client information? Please also state the reasons for your answer.

ESMA writes in paragraph 37 that '..while clients are expected to provide correct, up-to-date and complete information, firms should take necessary steps to check the reliability, accuracy and

[1] Other example might be the very different levels of risk and complexity regarding stocks. The Special Purpose Acquisition Vehicle (SPAC) might be a share traded on regulated markets and might therefore be deemed non-complex while the holding company in fact they might consist of numerous rather complex underlying investments.

consistency of the information.' We wonder what those necessary steps would be and where the accountability of both the investment firm and client begins and ends. Especially in an online environment it is almost impossible to verify the reliability of client information. We believe clients are not only expected to provide correct, up-to-date and complete information but are also ultimately responsible for handing over this information to the investment firm that provides non-advised services.

We suggest paragraph 37 is replaced by the following:

> "It is the duty of clients to provide correct, up-to-date and complete information as is necessary for the appropriateness assessments. Firms should take reasonable steps to check the reliability, accuracy and consistency of the information collected about their clients. However, firms can not be held ultimately responsible for incorrect, not-up-to-date and incomplete information as, certainly given the online character of many non-advised services, it is impossible to rule out any outliers. However, firms remain responsible for ensuring they have the necessary procedures (systems and controls) to conduct an appropriateness assessment, or they should issue a warning to the client".

Further strengthening our view that not the firm, but the investor is in ultimo responsible for providing correct, up-to-date and complete information is the fact that investors might hold multiple investment accounts with multiple (international) firms. Individual investment firms – for example - have no oversight on securities transactions conducted through third parties, so in this case the information per se is incomplete in the case of multiple accounts.

Regarding paragraph 38 ESMA writes that 'in order to ensure the consistency of client information, firms should view the information collected as a whole'. We believe this is in contrast with beforementioned quotes where all information regarding appropriateness, only accounts for knowledge and experience (i.e. excluding the financial position of the clients, transaction history). We suggest ESMA further clarifies this paragraph.

6: Do you agree with the suggested approach on relying on up-to-date client information? Please also state the reasons for your answer.

We do not agree with the suggested approach. We especially question paragraph 41, 42, 44 and 45.

Although we agree with the general acknowledgement of ESMA in paragraph 41 that 'the issue of updating in the context of the appropriateness assessment has a different nature than for the suitability assessment', we do not see how the knowledge and experience of 'vulnerable clients' should be given particular attention. From a Product Governance perspective the distribution strategy already aims to distribute products to certain target markets. There should be no target market that identifies as 'vulnerable' as they should – in general – probably refrain from investing in complex products any way.

Under 42 ESMA asks firms to implement procedures to ask clients to inform them regularly of any change or update regarding the information originally provided. Furthermore, ESMA states that firms should also have adequate procedures to deal with those situations where the client does not answer to their questions regarding changes or updates of the information provided initially. Only in cases when information is clearly outdated, inaccurate or incomplete information, it will legally be required to take action towards the customer (art. 55 (3) MIFID II DR).

Setting up a mandatory regular update while there is no reason to do so will only lead to misunderstanding and irritation among customers. In practice, ex-only services are offered with a limited or defined range of non-complex instruments (as mentioned before, the Product Governance distribution strategy already clearly defines distribution principles). In these cases, it will not often happen that previously provided information from customers needs an update. The starting point must be that it is up to the investment firm to determine if and what the frequency should be for having to update client information.

ESMA should also take into consideration the risk that a mandatory regular update could operate as an incentive to investors to disqualify itself with the benefit of hindsight for transactions that earlier met the appropriateness test. This could create in civil law a legal ground to claim compensation for investment

losses suffered by the investor with regard to transactions executed on the basis of the outcome of the earlier appropriateness test.

In general, we believe paragraph 42 is rather vague and should be deleted. As clients are responsible for up-to-date, correct and complete information, it is rather unduly to ask clients 'regularly' to update information.[2] Of course, when there is a valid reason to update, a client should be given the possibility to update his/her client information. But this is something completely different than imposing stricter rules on investment firms by means of guidelines.

In paragraph 44 ESMA mentions the possibility for firms to have arrangement to 're-check' knowledge and experience 'becoming aware of a relevant that chat could affect his level of knowledge and experience'. As an example, 'unusual transactions' are given. We do not believe this paragraph is necessary, furthermore the example is rather impractical. For example, if a client was onboarded to a non-advised investment service platform, has not done any transactions but has completed his knowledge and experience test two years ago. Does this mean that large transactions in derivatives are 'unusual'? As firms do not know the goals of individual investors, it is rather impossible to qualify transactions as unusual for the purpose of 'relying on up-to-date client information'. The baseline requirement should be that the product is appropriate if the client's knowledge and experience is of sufficient level.

Paragraph 45 ESMA states that it must be avoided that investors are encouraged to increase the level of their knowledge and experience in order to gain access to complex financial instruments that would otherwise not be appropriate. Educating clients on both complex- and noncomplex products is one of the core elements of non-advised services. We therefore do not agree with this sentence in paragraph 45. Furthermore, if there has not been a real modification in the client's level of knowledge and experience, other guidelines (like guideline 3 and 4) already appropriately address these issues. The comment that in cases of heightened knowledge and experience in a short period of time, firms could also require the modified knowledge and experience to be reviewed by two staff members is overly prescriptive and is not based on assumptions that the possible issue would be overcome (or reduced) if two staff members would review this situation instead of one whilst the burden for firms is heightened.

Furthermore, we see no clear (legal) mandate that could empower ESMA to further fill in these MiFID II requirements. Guideline 5 is a very clear example of 'filling in open norms' by ESMA, without any legal basis, as we mentioned in our introduction. We will highlight these issues as well in the NVB response on the European Commission consultation on the "targeted consultation on the supervisory convergence and the single rulebook", as a clear violation of certain aspects of supervisory convergency and the single rulebook.

Most elements in guideline 5 are a good example of the situation where ESMA has no sound legal basis to impose stricter rules by means of these guidelines. Given that we have many objections towards guideline 5, and that because the content of guideline 5 is already covered by other guidelines we believe it is more adequate to completely delete this guideline as a whole.

Q7: Do you agree with the suggested approach on client information for legal entities or groups? Please also state the reasons for your answer.

In practice, we do not see any investor protection issues relating to testing the knowledge and experience of 'legal entities' as described in this guideline. We therefore see not much use in guideline 6.

When the investment account concerns a legal entity, according to paragraph 48, that is represented by a natural person, the knowledge experience of the person(s) acting on behalf of the legal entity should be tested. In paragraph 49 ESMA subsequently writes that 'if the group of two or more natural persons involved have difficulties in deciding the person(s) from whom the information on knowledge and experience should be collected, the firm should adopt the most prudent approach by taking into account the information on the person with the least knowledge and experience'. We believe that if the group of two or more natural persons involved, like 'Investment Study Clubs', always one person should be

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[2] It should be sufficient to inform customers on the possibility to re-take an appropriateness test once the customer thinks there are (changes) circumstances that justify the re-taking of the test.

appointed by the group that should act as the person who is responsible for conducting the knowledge and experience assessment. In execution-only relationships, only the knowledge and experience of the person requesting the account and entitled to the account is requested. Certainly due to full online services, banks are not aware of any different levels of knowledge and experience within the group: it is up to for example the investment study clubs themselves to decide whether that should be the one with the most knowledge and experience or (of course less preferable) the one with lesser knowledge and experience. We do not foresee a role for investment firms here.

Investment firms that do test the knowledge and experience individually for each "group member" (which is strictly seen, not legally required), do not want to be obliged to assume that the person in the 'group' with the least knowledge and experience should lie at the heart of testing knowledge and experience of the complete 'group'. Preferably, firms should be left free in their options, for example to check what is the best fit for this specific person / group. Regarding paragraph 50 we generally agree that *when* a firm decides to ask information to assess the appropriateness for each individual client part of the group, a firm's policy could specify how it will deal with those situations where there are significant differences between the level of knowledge and/or experience of those individual clients.

Also: the use of "group" can be confusing, especially as it is undefined, i.e. whether it is always a legal entity or group of natural persons. This should be clearly defined, e.g. speaking of "group of individuals".

Q8: Do you agree with the suggested approach on the arrangements necessary to understand investment products? Please also state the reasons for your answer.

Regarding recital 55 (p.34) we believe it is unclear how the conflict-of-interest risks (in particular self-placement practices) have relevance within the framework of these guidelines. After all, these risks are already controlled by other rules from MiFID II that the investment firm must comply with and on the basis of which, among other things, strict segregation of duties apply within banks. If the investment firm chooses not to distribute certain financial instruments in a particular ex-only services, this will have to do with the characteristics and risks of the product that do not match the established target group and not with the fact that the bank could also be involved in the development and/or issuance of financial instruments.

Regarding 52-53: we believe current MiFID II regulation and delegated acts already sufficiently covers the arrangements necessary to understand investment products. For example, ESMA does not need to outline that firms could also define, at the level of product governance arrangements, ex-ante limits to the range of investment products that can be offered under the appropriateness regime as the Product Governance arrangements already take stock of this. This consultation is about Appropriateness, not about Product Governance.

Regarding paragraph 54, for more complex investment products, ESMA writes that firms should not only rely on the information from external data providers but check and challenge such data where possible or compare data provided by multiple sources. We do not see any legal basis for ESMA nor any direct substantiation by ESMA that justifies paragraph 54. Product Governance requirements are already in place and sufficiently set up specific requirements.

Regarding paragraph 55 we believe the descriptions and examples given by ESMA are beyond doubt too detailed. For example, when categorizing investment products for the purpose of the appropriateness assessment, firms should be left free in what level of granularity they assess. Regarding paragraph 55 we would also like to highlight our previous answer to Q3 'complex products' and the introduction of complex products as a relative concept by ESMA.

Q9: Do you agree with the suggested approach on the arrangements necessary to assess the appropriateness of an investment or else issue a meaningful warning? Please also state the reasons for your answer.

It is with reason that MiFID II already provides for warnings in the context of the appropriateness test to be provided in a standardized form (art. 25 (3) MIFID II). The effectiveness of warning is thus by definition already framed. In practice, when submitting orders, customers may be presented with the same standardized warning over and over and "warning inflation" will occur anyway. This is inherent to the

standardized warning system and the bank simply cannot change this, as warnings are standardized in the first place.

Regarding the warning system ESMA and these guidelines should not and cannot expect to much from investment firms, because the starting point is to warn the customers and not to block orders.

Recital 70 indicates that ultimate effectiveness is only certain if the order is blocked. However, both under the MIFID II Product Governance rules and on the basis of the appropriateness test, in fact, there is no obligation to refuse orders, but only to standardize warnings. It should be clarified that ensuring effectiveness does not mean that a standardized warning is no longer sufficient, nor that obligations to refuse orders may apply. The MIFID II Product Governance regime neither does lead to refusal obligations. Even distribution within a potential negative target group indicated by the manufacturer it is not impossible to distribute financial instruments, as long as a warnings are given. Only in very specific situations an obligation to refuse could apply in practice, which, according to ESMA, is only the case if it is abundantly clear in advance that the product can never meet the needs of the identified target group (see ESMA guidelines PG, consideration 32, p. 10).

Q10: Do you agree with the suggested approach on the effectiveness of warnings? Please also state the reasons for your answer.

We partly agree with the suggested approach, however we do not agree with the statement in paragraph 65 that “firms should also take reasonable steps to ensure that the warnings they issue are correctly received and understood”. If firms have to take steps to ensure whether the client had understood the warning, that leads to additional questions to the customer. We believe warning the customer and ensuring that the client has received them, is sufficient to protect investors. We therefore propose to delete the wording ‘and understood’.

Under paragraph 66 we agree with the statement that ambiguous messages should be avoided, however we see a contradiction in avoiding overly long warnings that obscure messages and the possibility for firms to state ‘that no information was provided by the client or that the information collected is insufficient and that the firm therefore is not in a position to determine the appropriateness of the envisaged transaction, or that the assessment of the information provided by the client shows that the envisaged transaction is inappropriate for the client.’ Furthermore, can investment firms use both options (no information and/or not appropriate) or must they choose one option in their warning?

We do not agree with paragraph 71 where ESMA states that “firms should have policies and procedures identifying ex-ante whether there are any conditions and criteria under which a client would not be allowed to proceed with a transaction after having received a warning”. If either knowledge and experience points out that the product is inappropriate, insufficient information from the client was obtained and subsequently a warning was sent out, we believe a firm does not necessarily need to have a general policy to determine ‘which clients’ would not be allowed to proceed. We believe such a policy might have unintended consequences for customers that have chosen to use non-advised services. Furthermore we believe Product Governance requirements, in addition to appropriateness, already sufficiently provides the desired level of investor protection. The example given for such a policy to refrain customers to trade after a warning is ‘a high level of complexity or risk of products offered or demanded’. Given our answers in previous parts of this CP, the relative concept of complexity is a too vague and ambiguous description of a possibly wide range of investment products. We believe it is better to delete this example.

Under 71 ESMA states that firms should evaluate the overall effectiveness of the warnings issued on an ex-post basis, for instance, by assessing the ratio of warnings that were followed by a transaction to the total of all warnings issued, and should make adjustments to their relevant policies and procedures where necessary. We do not agree with this very detailed and specific interpretation of ESMA because it is overly perspective. It is in our view not up to ESMA to prescribe how or when those policies need updating as firms need to have an adequate policy in the first place.

Q11: Do you agree with the suggested approach on the qualifications of firm staff? Please also state the reasons for your answer.

We see no reason to add specific guidelines on the qualifications of staff. In MiFID II, qualification of staff is already firmly based, there is no need to add beyond what is already required. We believe it is best if this guideline is deleted as it adds no value.

Q12: Do you agree with the suggested approach on record-keeping? Please also state the reasons for your answer.

We disagree with the content of paragraph 77. Firms do, indeed, need to keep records to track ex post appropriateness results. It should be done on a high level basis, and should not be overly prescribed by ESMA. Furthermore we see no legal basis to ex-post track 'any warning issued by the firm', we also foresee practical problems to track warnings given to clients executed trades by means of telephone communication.

Furthermore, warnings are prescribed by given requirements. There is no room to maneuver for firms in this sense. If per transaction the prescribed warning is given, one can ask how effective this warning could be (i.e. eroding/inflating the effect of the warning). What is the use for both investment firm and customers of logging the fact that a customer, in execution only (!) has ignored multiple warnings, for example on a daily basis.

Regarding the do not know option we responded in previously questions: Recital 22, p. 27: With regard to the "don't know reply" option, it can be noted that its introduction at this stage comes highly unanticipated and unwelcome. Most questionnaires are set up digitally and the technical implementation of such additional matters quickly has a considerable (IT) impact and can lead to disproportionate costs and efforts. More importantly, such an option does not contribute in any way to the purpose of the appropriateness test. In this case, it will only cause confusion and doubt when answering questions. This option also implies that all questions must always be answered with 100% certainty. This does, however, not have to be the case, especially with multiple-choice questions, and customers must be able to give their best answer, given the available knowledge. If there is too much 'guessing', then this automatically results in higher error rates in well-composed questionnaires. What matters is that the outcome of the appropriateness test gives a true and fair view and for that a "don't know reply" option is completely unnecessary.

Also, adding the do not know possibility will change probably little to the outcome of the appropriateness test. Most customers take a test to pass, not to fail (or 'do not know'). Customers will thus be incentivized to not choose for 'do not know' when they actually do not know the right answer.

Q13: Do you see any specific difficulties attached to the requirement to keep records of any warnings issued and any corresponding transactions made by clients?

Please see our answer to question 12.

Q14: Do you agree with the suggested approach on determining situations where the appropriateness assessment is needed? Please also state the reasons for your answer.

Q15: Do you agree with the suggested approach on controls? Please also state the reasons for your answer.

Please see our answer to question 10.

Q16: When providing non-advised services, should a firm also assess the client's knowledge and experience with respect to the envisaged investment product's sustainability factors and risks? If so, how should such sustainability factors and risks be taken into account in the appropriateness assessment? Please also state the reasons for your answer.

Although we see merit in adding sustainability factors to the appropriateness assessment in the future, we believe it is highly premature at this point in time to require firms to assess the client's knowledge and experience with respect to investment products' sustainability factors and risks when execution only services are rendered. The main argument to refrain assessing clients' knowledge and experience on sustainability factors is that sustainability definitions are still evolving in the regulatory ESG-landscape. We suggest that after evaluating SFDR (that at this moment clearly is not applicable on execution only services) pre-contractual and periodic disclosures and MiFID II ESG amendments (i.e. to Product

Nederlandse Vereniging van Banken

Governance and Suitability) ESMA could look into amending the appropriateness guidelines. Firms should not confuse clients in the present with testing appropriateness when the relevant knowledge and experience that needs to be assessed is evolving significantly.

One of the first consumer tests on periodic- and pre-contractual information in SFDR points out that even well informed, highly (financially) educated clients have problems understanding ESG factors. Many found the SFDR templates for example complicated and hard to read. Another, quite large, portion of the respondents to the consumer test were not interested or simply did not know. As stated above, the ESAs should research how ESG-information is processed by retail investors by means of evaluating SFDR pre-contractual and periodic information with regard to ESG information in advised investment services before turning her attention to non-advised services.

Furthermore, as knowledge and experience in non-advised services are only tested with regards to complex financial instruments, most relevant sustainable products (for example UCITS) will fall out of scope of the appropriateness process. Therefore, testing knowledge and experience will proof to be burdensome but not very helpful to steer consumers towards more sustainable investments.