Svensk Värdepappersmarknad
Swedish Securities Markets Association

Stockholm 28 August 2023

SSMAs comments to the European Commission's Have Your Say consultation on Retail Investment Strategy

The Swedish Securities Markets Association (SSMA)[1] welcomes the opportunity to respond to the European Commissions (EC) "Have Your Say Consultation" on Retail Investment Strategy (RIS).

1. General comments

The SSMA welcomes that the EC has developed a strategy that aims to facilitate retail clients' engagement on the capital markets in the EU. It is positive that a horizontal approach is now taken regarding the investor protection rules in various EU-regulations, with an aim of removing existing inconsistencies and overlaps. We agree that the overall ambition should be that RIS results in a less complex and more proportionate rulebook, whilst ensuring an adequate level of investor protection in the EU. In order to achieve this, it is important that the existing problems with information overload to retail clients are dealt with in an efficient manner.

Furthermore, it is important to take due account of the fact that retail markets in EU today have a different level of maturity and that a harmonized regime must work in 27 Member States. For example, the Swedish capital markets is already characterized by a remarkably high level of participation by retail clients, often through digital means. It is also important to note that "retail client" is a broad term which covers many types of clients who have diverse needs, i.e., not just the average consumer. The SSMA therefore welcomes that action eight (8) in the CMU Action Plan so clearly states that the RIS should also consider the needs of more sophisticated retail clients and note that EC's proposal contains some steps in this direction.

From a CMU perspective, it is furthermore important to avoid that RIS introduces new or amended rules which has the effect of distorting the competition and level playing field between investment firms in the EU. In fact, to enable different business models is important in order to ensure that EU investment firms are able to meet the needs of their clients through different types of services and different types of products. A one size fits all approach will not serve EU capital markets well.

Another key issue which in our view has not received enough attention in EC's proposal, is the fact that in several pieces of EU-regulations, investor protection rules which make sense for products that are developed/used for investments purposes are in fact applicable to a much broader range of instruments and services. This has caused significant problems in the implementation of both MIFID II and PRIIPs and has contributed to the problem of

[1] The SSMA is a trade association representing the interests of investment firms active on the Swedish securities market.

information overload as firms often are required to provide retail clients with information which makes absolutely no sense. In particular, we note that this issue arises when it comes to instruments which serve other purposes than being an investment product such as shares and bonds (issued for the purpose of financing a company's business) and certain types of derivatives (used by clients such as small SME companies or sophisticated retail investors for hedging purposes). It would be very welcome if this issue could be considered e.g., in relation to the MiFID II rules on product governance and PRIIPs scope.

The SSMA notes that the EC's proposal is very extensive and that it contains many mandates for regulation at level 2 and level 3. In our view, the implementation of RIS will require time and resources in the form of e.g., IT development, new internal processes, and staff training. It is therefore of significant importance to have sufficiently long implementation times and that the timetable for level 1 is synchronized with level 2, so that unfortunate "gaps" in the implementation are avoided. Implementation time should be at least 24 months, counting from the date when the level 2 is finalized.

2. Specific comments on MiFID II

2.1. Cost & charges

A stated ambition with RIS is to simplify, clarify and at the same time limit the amount of information provided to retail investors (cf. the Kantar report which concluded that investors do not need more but clearer information). The SSMA considers that the EC's proposal for amended rules on costs & charges does not rhyme particularly well with this ambition. On the contrary we see a clear risk that as a result of RIS there will be even more cost information for investors to deal with, i.e., that the already existing "information overload" will in fact increase. As a first example, the proposed Article 24b includes two separate requirements to calculate and present the cumulative effect of costs on return, the already existing requirement for the total costs and one additional for third party payments. Given that third party payments shall be itemized separately in the cost disclosure provided to clients, the SSMA considers it to be unproportionate and excessive to include an additional cumulative effect of third-party payments on return. The key aspect from a retail client perspective is how the total costs affect the return, not how one specific cost component affect the return.

A second example of the increase of the information overload is the proposed obligation to calculate and disclose the costs for holding periods of 1, 3 and 5 years in the absence of a recommended holding period. Again, clear, and straight forward information is the key to capture the attention of retail clients and this proposal contradicts that principle. The most efficient approach here would be to calculate and disclose ongoing costs based on a 12-month period, so retail clients can see the total costs on a yearly basis in an easy way.

The third example concerns the additional requirements proposed for the ex-post annual costs and charges reports. The EC proposes to include taxes as a separate category when this type of costs is already included in the existing rules under service costs. The market value of each instrument is already captured by the existing rules to provide clients with yearly holding statements.

Lastly, to include the total amount of dividends, interest and other payments received would blur the picture of the costs and charges report and would be better placed in holding statements.

As noted under general comments, the retail market in Sweden is mature and highly digitalized and many retail clients access investment services and products through internet banking and smartphone apps. From our market's perspective, it is therefore of outmost importance that the co-legislators ensure that cost & charges disclosures work in a digital environment and note that this is also in line with the EU Digital Agenda.

For example:

- The proposal introduces requirements to provide information on costs and charges in a standardized format in the same manner as PRIIP. In our experience the PRIIP KID has not been an easily accessible piece of information for our members' retail clients. We believe that retail clients will be best served if information about costs and charges are presented in a format that is adjusted to the rest of the information that is provided to the client. If, for example, the retail client uses a smartphone to access investment services, the investment firm providing the service should be allowed to adjust the format of the information to suit that environment.
- When facilitating the possibility to use digital channels for providing information about cost and charges the requirements should not be stricter than the regular requirements. An example of this is bullet 5 in article 24 b where the requirement on the on-line system is that it contains disclosure per instrument and that it is evidenced that the client has accessed the statements at least once a year. In any case, the SSMA suggests that the words "shall not" in this particular requirement is changed to "is not required to", in order to open up for both alternatives when using online systems.

There are also uncertainties how the proposal relates to the existing rules in MiFID II delegated regulation as well as the amendments that were introduced in the "MiFID Quick Fix". In the forthcoming work, we encourage the co-legislators to consider the whole package of rules on cost & charges (level 1, level 2, and level 3 as well as PRIIPs) in order to ensure legal certainty and consistency. We encourage the co-legislators to add the MiFID Quick Fix exemptions for professional clients and eligible counterparties into the Level 1 text. In addition, we would encourage them to review the provisions enabling agreement with clients on a limited application of the rules which have been lifted up from the delegated regulation into the proposed level 1 text, to make sure that these are aligned with the MiFID Quick Fix provisions (and that it is assessed whether these provisions need to remain at all).

As a final comment, it is important to learn from the MiFID II experience and ensure that the date of application for amended rules on cost & charges disclosures to start applying on the 1 of January, i.e. so that firms are given a year to collect the information before being required to provide reports to clients.

2.2. Warnings for particularly risky products

The SSMA notes that the current requirement for "comprehension alert" regarding particularly complex products is removed in PRIIPs in light of the fact that it did not achieve the desired effect. We are therefore surprised that EC is simultaneously proposing that a similar requirement regarding particularly risky products be introduced in MiFID. Also, it is difficult to provide feedback in substance on the proposal as unfortunately it is not clear from the proposal what the concept of particularly risky products will actually be. Information regarding fundamental criteria is left out, e.g., as regards granularity, computing the measure, data etc.

2.3. Marketing communications and practices

The SSMA agrees that there is a need for supervisors to tackle marketing of financial products by unregulated actors on social media, financial influencers, etc. and we support clarifications regarding the responsibility which investment firms have when entering into arrangements with such third parties. However, for investment firms' own activities on social media, it should be noted that exist rules in MiFID II and other regulations are already applicable and, in our opinion, sufficient to protect investors. Also, investment firms cannot be responsible for actions taken by persons not engaged by the investment firm.

The proposal also needs to be clarified in several respects, including the delineation between what is "information" and "marketing" as well as how the proposal relates to requirements set in other legislations e.g., marketing legislations and prospectus rules. Another area of concern is the difficulty of separating education and marketing communication. In our view, there is a clear risk that unproportionate requirements on all marketing communication could risk harming all creative ideas around information and education and make investors less informed, i.e., have a negative impact on financial literacy.

In this connection, the SSMA wants to underline that that the proposed definition of "marketing communications" in Article 4 is extremely broad ("in any form and by any means") and applies regardless of client type, which is hardly proportionate and can have major effects on the interpretation and application of the substantive requirements in MIFID II. In fact, the SSMA questions if it is even possible to meet the proposed documentation requirements for any type of "marketing communication".

Thus, a clearer connection between the description of the problem (social media, finfluencers, etc.) and the area of application is, in SSMA's view, important in order to achieve effective and proportionate regulation.

2.4. Inducements

2.4.1. General

First of all, the scope regarding the proposed new partial ban in article 24a (2) must be clarified. In fact, in the explanatory text and press-releases, the EC refers to a new ban for "execution only services" which is a well-established term that refers to the provision of services without appropriateness assessment, possible only under the conditions set forth in article 25(4) of MiFID II, i.e., if the products are deemed "non-complex" and execution takes place at the client's initiative. However, the proposed legal text in article 24a (2) has a wider

scope and includes "the investment services reception and transmission of orders and execution of orders to or on behalf of retail clients", i.e., regardless of type of financial instrument and on whose initiative the service is provided. Thus, there appears to be a misalignment between the scope of the new partial ban and the policy objective expressed by the EC. This unclarity makes the proposal difficult to analyze. (In this response we will assume that the proposal includes all execution services to retail clients).

Secondly, the SSMA wants to draw the attention to the fact that the EC presents a proposal for a partial ban on execution services without conducting an impact assessment on what effect such a proposal might have on the structure of EU capital markets, the protection of retail clients and the participation on capital markets by retail clients. In fact, the RIS-impact assessment only covers option 1 (do nothing), option 2 (improve/harmonize inducements disclosure) and option 3 (full ban) but not the proposal (partial ban). In fact, it is most unclear how a partial ban for execution services will address the problems with conflicts of interest identified by the EC or if the NCA or EC have seen signs that retail clients have been negatively affected by the existence of inducements in connection with execution services.

As mentioned in section 1. General Comments, an important starting point for the SSMA is that a well-functioning capital market requires that clients have access to different types of services (advice and execution services, including but not limited to execution-only) and different types of financial instruments (non-complex products and, where suitable or appropriate for the client, more complex products). The co-legislators should therefore work with an aim to ensure a capital market consisting of both small and large players (manufacturers and distributors) that can compete with each other, as this lowers fees and leads to a wider and better range of products for clients. Competition requires a flexible regulatory framework that does not unnecessarily limit different market and compensation models. However, the SSMA sees an imminent risk that the EC's proposal will lead to the opposite result, i.e., that the effect of RIS will be a reduced product range, and that competition will deteriorate among the players on the market depending on if they offer execution services or advice. We also consider that by favoring one business model (advice) before another (execution services), EC might in fact introduce new conflicts of interest on the EU capital market, which would be most unfortunate. In our view, the RIS-proposal on inducements is a political product which fails to consider the needs of diversity and competition on EU capital markets. This is both serious and disappointing.

SSMA's views on the perceived benefits of a partial ban:

1. *Retail investors would no longer incur inducement charges for self-directed sales.* The impact assessment does not show that the existence as such of inducements is a concern for retail investors, rather the focus for retail investors is on total cost. It is only in the context of an inducement leading to a bias in the activities of the distributor that there is a legitimate concern in relation to the retail investor. As there is no advisor influencing the decisions of retail investor in a self-directed sales process, such conflict of interest is limited to the potential influence the platform itself may give in terms of presenting investment opportunities. It is very difficult to see that the measure of a ban is proportionate in this context given that there is no advice given and therefore no bias/conflict of interest.

2. *The partial ban would remove incentives to give more prominence to certain products in the product offering.* There is nothing in the impact assessment showing that inducements for non-advised sales is a real issue for retail investors or that distributors or platforms typically act in this way. Should that be the case, this concern could be catered for through disclosure rather than a ban on inducements. The typical retail investor using internet to purchase financial instruments themselves are used to this type of disclosures when purchasing travel services, housing or other consumer goods where prominence is given to certain products based on fees paid to the distributor of those products and where this is highlighted in the interface with the customer.
3. *Retail investors could be more confident that products purchased without advice would not include additional charges linked to the payment of inducements, thereby giving them access to products carrying lower costs.* As stated above, the mere existence of inducements in the context of non-advised sales (where there is no bias to promote one product in front of another) is not an issue. What matters to the retail investor is the total cost of a product and that cost can, in a non-advised environment, be compared with other financial products available to the retail investor on one or several platforms. It should be mentioned that active retail investors (which is common for retail investors buying products through non-advised sales) typically are fully capable of comparing fees between different providers of financial products.

The proposal to ban inducements for non-advised sales lacks proper justification as selling through this type of distribution has not been presented as a true issue in the impact assessment nor in the proposal as such.

The SSMA's starting point is therefore that the current legislative framework is well-written and sufficient. What has been missing is a stronger and more harmonized supervision and enforcement of the current rules. One could also consider improvements or harmonization related to disclosure of inducements as well as the value-added services provided to clients. This approach would ensure that the current open architecture in the market is maintained, that sound competition between different market players is upheld and that retail clients continue to have access to a wide range of financial instruments.

The EC states that by removing the incentives created by inducements, intermediaries and providers would be able to compete more easily and to use an open architecture model. Given the points below, the SSMA believes that the EC's proposals will have the opposite effect.

2.4.2. SSMA's views on specific parts of the proposal

(i) The proposals in practice come close to a full ban and will harm RIS objectives

The EC argues that a partial ban would have less impact on existing distribution systems compared to a full ban. On the surface this may look to be true but, when considering the EC proposals in detail, the suggested rules will cause major disruptive consequences for the

European financial sector and consumers' access to investment and insurance protection. In essence, the proposals de facto lead to the same end result as a full ban.

Firstly, the new partial ban leads to the situation where distributors providing both execution services and investment advice will need to maintain two distinct and separate product offerings e.g. ringfencing investment funds provided through advice and funds provided through execution services. It is central to the successful retail investment strategy to ensure that retail investors are able to move freely between advisory and execution services without friction without e.g. being forced to sell all the investment products hence triggering tax consequences. It also needs to be ascertained that the ECs proposal does not make it more difficult for retail clients to move between different investment firms, contrary to the policy objectives of Open Finance.

Secondly, many retail clients in full service financial institutions make use of a combination of both execution services and advisory services. Given the structure of the ECs' proposals it is highly uncertain how these clients should be handled and which types of transactions that could be said to be connected to advisory services, for example how to treat situations when clients initially invest through advice and then subsequently after a period of time want to invest more money in the same instruments on their own. Another example relates to the situation where a client has existing holdings bought through execution services and later on seeks advice on such holdings. Situations will arise where a client has bought a few instruments based on an advisor recommendation and the rest via execution only services. These clients will be in a situation where the financial institution only receives payment for providing further advice on a portion of the client's portfolio, which is unfortunate from both the client's and the firm's point of view, since investment advice is about looking at the customer's overall risk exposure and portfolio diversification. These types of situations lead to excessive complexities and increased costs, to the detriment of clients, and could in practice force distributors towards the implementation of a full ban on inducements.

Thirdly, the review clause, stipulating that a revision of the inducement's rules will take place within three years after application of the new regime, means that it is questionable whether distributors will find it at all feasible to adapt to and invest in solutions to cater for the extended partial ban with the risk of a formal full inducements ban after such a short period of time. Firms would then have to unravel their distribution models yet again. All in all, this essentially put firms at risk of excessive costs and no predictability of the future.

Contrary to the RIS objectives, these implications of the EC's proposals would lead to diminishing product diversity, fewer products for the clients to choose from and create barriers for smaller manufacturers to get a foothold on the market.

Should the EC's proposal for a ban on inducements on non-advisory transactions become reality, it must be ensured that the regulatory framework caters for a prudent treatment of clients who utilize advisory services and execution services interchangeably or that move from advisory services to non-advisory services. In this context clients should be allowed to define how parts of their total portfolio of assets, or their entire portfolio of assets should be handled. In other words, if a client is provided with advice as a service and the client's suitability assessment is periodically reviewed, then that client should have access to a

universe of inducement bearing funds based on that client's wish to include such products within the scope of his/her advisory portfolio. Then it should not matter whether the advisor initiates the transaction specifically connected to an advisory session or whether the client initiates a transaction himself/herself in-between contacts with the advisor. Ultimately, that type of client-initiated transaction would be covered and included in that client's next advisory session or periodic suitability review. This approach does not prevent a situation where the same client could have a separate portfolio of assets excluded from the advisory portfolio, where the client would then have access to pure execution services and inducement-free products.

In the current market environment retail investors benefit from the situation that they can sign up as clients to providers of execution services (through platforms or otherwise) free of charge. This creates flexibility and freedom for investors to pick and choose one or several providers on a completely open market, since the costs and charges paid are only applied based on the investments made. The benefit to retail clients of execution-only services is evidenced by the large extent of retail clients who choose this type of investment service in Sweden today. It should be underlined that retail clients are also offered other value-added services in the case of execution-only e.g., information materials, analysis and sorting-tools and other tools in order to be able to follow the performance of their investments.

If providers of execution services would need to start charging direct client fees for access to their platforms upfront, this could limit investor choice, create new barriers for investors and platforms and in the end harm retail participation in the market in a broader sense.

Overall, a grand-fathering clause should be established to handle the following situations where clients have purchased financial instruments carrying inducements prior to the application of the proposed ban on inducements (if the "accept and retain" wording of the current inducement ban is replaced with a clear-cut prohibition to received inducements at all):

A) No available inducement free share class in an investment fund; and
B) No available equivalent inducement free financial instrument

(ii) Inducement rules should not apply to primary market transactions

The SSMA agrees with the EC that an investment firm must of course be able to charge its issuer clients for the services provided on the primary market. Otherwise, the MiFID II rules could have significant distorting effect on companies abilities to finance themselves on the EU capital markets, with negative consequences for the real economy as a result.

To that background, the SSMA considers it positive that the EC's proposal clarifies that compensation paid to an investment firm for "placing and underwriting" should not be affected by the new partial ban on inducements for execution services. From a CMU perspective, however, it is important to ensure that the same principle applies to all financial instruments that are issued by corporates for financing purposes. We therefore do not support the exemption for PRIIPs products, as it also covers certain bonds and therefore could have detrimental effects on their use as means of financing. Against this background we propose that the reference to PRIIPs is deleted. It should be noted that for PRIIP products

other than bonds this should not be any problem as for such products, e.g., investment funds, insurance products and derivatives, underwriting and placing services are not provided anyway.

Moreover, the classification of underwriting and placing fees as inducements give rise to many additional questions. In fact, if placing and underwriting fees are to be considered as an (allowed) inducement, there will be a need to clarify how to apply the disclosure rules in MiFID II for this type of fee which is clearly not a "cost" for the end-client. In which format and with what frequency should such disclosures be made? Will disclosure requirements apply to all types of clients? Such clarifications are important for all investment services to end-clients where an inducement is allowed e.g., also in case of advice.

Although the SSMA supports the proposed exemption for underwriting fees and placing fees (apart from the PRIIPs reference) per se, we consider that a reasonable alternative solution that would lead to the same policy objective, without the risk of unintended negative consequences, would be to declare (e.g., in a recital) that fees from another client are not to be considered as inducements at all but as a potential conflict of interest which should be disclosed accordingly. This solution would be significantly less complex and would avoid creating unintended negative effects on the EU capital market (which would be the case if a ban on inducements prevents firms from getting paid for their services on the primary market). In fact, this is how we understand that the UK FCA has decided to deal with this issue.

(iii) No amendments to "accept and retain"

In the explanatory text, the EC states that the existing ban on inducements for independent advice and portfolio management is intended to be kept unchanged. However, the SSMA notes that this is actually not the case. In fact, in article 24a (1) of ECs proposal, the ban on inducements for portfolio management prevents "pay or receive" which is a significant difference from the current legal text "accept and retain". In fact, if the new wording is adopted, it will no longer be possible to receive and pass on commissions to clients making use of portfolio management services. Such a change could have major consequences on the market structure in EU. However, we are not sure if this amendment is intentional or not, in particular as we note that it has not been subject to an impact assessment and the same proposal is not made for independent advice. In the opinion of SSMA, it is of outmost importance that the scope of the ban on inducements ("accept and retain") is the same for all investment services that are subject to a partial ban on inducements i.e., independent advice, portfolio management and, if agreed between the co-legislators, execution services to retail clients. From a competition perspective it is particularly important that EU regulation creates a level playing field between different business models and investment services.

Passing on inducements in full to clients effectively removes the perceived conflict of interest which the EC argues is one of the major reasons behind the extended partial inducements ban. Furthermore, by keeping the possibility to kick back all inducements to the clients, it is ensured that clients can continue access the full range of products available throughout all distribution channels. If there is a partial ban on inducements in the EU, the

market has to operate with a dual product range and kicking back inducements to clients can in certain circumstances be an effective way for clients to gain access to specific investment products. If it is no longer possible to pass on inducements, it would reduce the number of financial instruments available for portfolio managers and in self-service channels since clean share classes are not always available.

For this reason, the SSMA requests that the existing wording concerning inducements in relation to portfolio management is maintained, since the proposed change i) does not seem to serve to the EC's stated purpose concerning inducements and does not seem to be the EC's clear intention, and ii) may create undesired consequences by distorting the existing distribution models, which is exactly what the EC wanted to avoid by not proposing a full ban on inducements.

(iv) New client best interest test is a complex regime and a bad "replacement" for QE

In SSMA's opinion, the new client best interest test will not deliver as good consumer outcomes as the existing QE regime would do, if properly implemented and enforced. In fact, this new test rather seems to reduce the scope of client protection, since it is primarily focused on providing the *cheapest* products to clients. This means that the new test actually has a narrower scope than the existing QE regime, which focuses on the provision of service features and management of conflicts of interest in a broader sense.

We note that the criterion "appropriate range of products" is already included as a QE requirement for execution services and one of the advisory options. However, when applied as a general conduct of business requirement as proposed by EC, it would have a detrimental impact on non-MiFID firms providing investment advice, i.e., UCITS Management Companies or AIFMs having extended licenses to provide investment advice only on the funds managed by themselves. Given that these companies can only provide advice on a limited range of products, that they do not receive inducements and that they cannot not be qualified as non-independent investment advisors it would be unnatural to apply the criterion of "appropriate range of products" and in the end it would create negative consequences for competition in the market. Thus, the QE regime works better as it is only required for non-independent inducement-takers whilst small firms selling their own products only are not subject to it.

The two criteria in the best interest of client test focusing on the actual product recommendations clearly signals that, according to EC, cheap equals the most suitable. The SSMA questions how this fits with the nature of the existing suitability rules, where product cost is just one of several components that are relevant to determine a suitable course of action for a retail client.

Furthermore, the EC has stated that the client best interest test is supposed to replace the QE regime. However, the test is introduced for all advisory services to retail clients (regardless of whether inducements exist or not) which means that it simply is an addition to existing suitability requirements in general. This brings some concerns. The starting point in a free market must be that firms may on their own decide which product types and individual products that shall be included in the firm's services and distribution channels. This point should then be the decisive factor when selecting products to be included in

advisory services in accordance with the firm's distribution strategy. It is then questionable how and to what extent the legislator can dictate what type of products should be included in firms' advisory services and ultimately in the firms' recommendations.

The requirement to recommend *"a product or products without additional features that are not necessary to the achievement of the client's investment objectives and that give rise to extra costs"* raises several questions about scope and reach. It would for example be detrimental to the market's sustainability efforts and increasing retail investments in sustainable products to consider sustainability aspects as additional features, which they in fact are and which could also come with extra costs. This is especially troublesome given that there is no negative target market connected to sustainability preferences, which today means that also clients who do not have a sustainability preference could be recommended a product with additional sustainability features.

In summary the SSMA finds it difficult to understand how this new test will increase investor protection for retail clients as the cheapest product is not always the most suitable product for retail clients. The proposal also adds unwanted complexity to MiFID II by introducing many new concepts with unclear meaning such as "cost-efficient" and "additional features." There is also a lot of uncertainty how this new concept relates to other MiFID rules such as suitability assessment, sustainability preferences/objectives and the proposed new value for money concept.

2.5. Product Governance; Value for money

The SSMA supports that investment products should deliver value for retail clients, but we are critical to the proposal regarding Value for Money-assessments (VfM-assessments) which are based on common benchmarks on costs and performance developed by ESMA and EIOPA. In our view EC's proposal comes remarkably close to price regulation and goes against the general principles of a market economy.

The SSMA notes that a Vfm-concept already is part of existing rules on product governance requirement and suitability assessments in MiFID II. If clarification of the existing rules is considered necessary, a *high-level principle* should be introduced that the duty to act in the best interest of clients implies that VfM-assessments are required. However, the SSMA does not support detailed requirements setting out exactly how the VfM-assessments are to be done and does not support the suggestion that VfM-assessments are to be done based on common benchmarks on costs and performance developed by ESMA and EIOPA. The SSMA does not support the idea to have centralized benchmarks developed at an EU-level, since such an approach makes it difficult to ensure that VfM-assessments are properly suited to market situations for the country in question. The SSMA therefore find that flexibility in the regulation is needed to ensure that financial companies in each country can develop and suit their VfM-assessments to fit the market situations and business model for the country in question.

The new requirements and benchmarks are primarily focused on costs, and the SSMA fears that such requirements in reality constitute price regulation and form a price cap creating barriers for innovative products and distorting competition. For a price or cost benchmark to serve its intended comparison purpose it should be relevant for the product in question.

There is a substantial risk that the benchmarks will not be granular enough nor consider product features of actively managed products sufficiently (products which might offer other qualities and therefore be more expensive), e.g., thematic funds or funds that promote sustainability features or have sustainable investment as their objective. The sole focus on performance and costs disregards that some products also deliver value to customers in other ways, e.g., by providing quality of service such as having in place safe and secure infrastructure or above-average investor communication. In addition, an adequate benchmark may not be available for specific products and as such it will be impossible to demonstrate the proportionality of the cost and charges. This will discourage firms from creating innovative products for which the initial cost could be higher but would in the long term enrich the offering to consumers.

The EC proposal very closely resembles price setting. Even though the argument could be made that the benchmark does not set costs, costs higher than the benchmark could in some cases create burdensome reporting obligations and thus could lead into a *de facto* price cap, which should not be the consequence of introducing the benchmark. The intention of the EC to use the benchmarks to lower costs could also have an opposite impact and backfire if benchmarks would lead to cost harmonization, which, albeit lowering the costs in some European markets, could also have the contrary effect in some other European markets.

The SSMA's view is that the regulation may lead to promoting only passive funds and disadvantage actively managed, thematic and/or sustainable funds. As a result, the regulation will, unintentionally, induce customers into, for example, low priced index products with lesser sustainability features. This will have the effect of limiting product offerings to the investors and risks damaging the quality and diversity of the products offered on the market, as well as affecting the diversification of the retail investors' investments across and within asset classes.

The SSMA supports strongly to maintain the current flexibility allowing firms to develop a VfM framework that is suited to the business model in question. The SSMA's view is therefore that firms should have a flexibility to define an appropriate VfM framework that they find to be the most feasible and accurate way of measuring value given their individual business model. These requirements should allow firms to consider other, more qualitative measures of value as well. VfM-assessments are thus to be seen as more than a mere performance/cost ratio and flexibility should be given to allow for qualitative criteria to be considered in the VfM-assessments, while at the same time having in mind an overall obligation to ensure that customers can be expected to receive a proper expected return that outweighs the customer's expected total costs.

When measuring value as a part of VfM-requirements the SSMA suggests creating flexibility to assess value-adding *product features* as well as value-adding *services* that are provided to customers. An example of value-adding product features could be for example capital protection mechanisms, ESG-features, product liquidity features, such as guaranteed daily liquidity etc. In addition to these value-adding product features the SSMA also finds it of importance to acknowledge that a product cannot be seen in isolation from the services that are provided to customers by distributors. Such services constitute an integral part of the

customer experience and, hence, of their value-appreciation. For example, investment advice services or other market information or product valuation services may help investors reach proper investment decisions. The requirements should therefore allow for that value-adding services could be incorporated in the VfM-assessments.

The SSMA also is of the opinion that a general one-size-fits all approach to VfM assessments is not suitable to apply for all PRIIPs products. Flexibility is needed to allow for the need to calibrate the VfM assessments according to asset classes and product types. An effective VfM framework shall acknowledge that diverse products may call for different methodologies.

Further, we believe it needs to be clarified if these rules shall be applied to all PRIIPs instruments manufactured/distributed by the firm, or only those intended to be distributed to retail clients. We believe that it would be proportional to limit it to instruments intended for retail clients. This has a significant impact on the amount of data to be reported for e.g., derivatives.

Furthermore, the SSMA is of the opinion that for derivative instruments, especially for financial instruments with the objective to hedge commercial risk, an exemption should apply. It is difficult to see how the benchmarking would work for derivatives where counterparty risk, collateral and maturity are crucial factors in the pricing of the product. This is yet another example of how ill placed derivatives for the purpose of hedging is under PRIIPs and the SSMA reiterates its request to the EC to reconsider the application of PRIIPs to derivatives for hedging purposes.

The SSMA cannot support the EC's proposal that distributors are required to have products pass VfM-assessments not only if products are *"recommended"* but also when products are *"offered."* Since a very large number of products could be available to customers through execution services the SSMA finds that requiring distributors to do VfM-assessments also for products that are only offered, but not recommended, is disproportionate. Manufacturers could be required to do VfM-assessments regardless of whether a product is intended for distribution through advice or through execution services. Distributors should, however, only be required to do VfM-assessments for products *recommended,* and products *offered* should not be in scope for distributor VfM-assessments.

The SSMA also has some concerns as regards the reporting and note that it is very difficult to evaluate the proposals without level 2. First of all, the proposal must be further analysed from a competition law perspective as it can be very sensitive for firms to share price information with other market participants. Secondly it is unclear from the proposals how frequent this reporting would be. Each time a product is manufactured and or distributed, or periodically? If the former, that would for derivatives mean a trade-by-trade reporting of costs which would be quite burdensome. Proportionality is especially important.

2.6. Suitability and appropriateness assessment

2.6.1. Appropriateness – risk tolerance and ability to bear loss

The SSMA finds it difficult to see a clear connection between the proposal to introduce new criteria for the appropriateness assessment and the overall goal of RIS to facilitate retail

customers participating in the financial markets. The new criteria lead to the creation of new thresholds for investments, which neither encourages nor facilitates the participation of retail clients in the capital market. In addition, the proposal, if carried out, would create a significant boundary-drawing problem between the today's well-established concepts “suitability assessment” and “appropriateness assessment.” This would be very unfortunate as it would make the EU rulebook even more complex and difficult for clients to understand. Another consequence of making the appropriateness assessment similar to the suitability assessment is also that the risk increases that clients will be misled into believing that they are in fact receiving investment advice when this is not the case, which from a customer protection perspective is important to avoid.

We are not in favor of changing the appropriateness assessment to assess whether the investment service or financial instrument is appropriate for the client as proposed but would rather like to keep the existing assessment “to assess if the customer has necessary knowledge and experience to understand the risks associated with the investment or investment service.” It would add unproportionate complexity to the appropriateness assessment to include an assessment of the client’s ability to bear losses. Moreover, we think it’s difficult to understand what information the capacity to bear losses/risk tolerance in the appropriateness assessment should be based on and how often it needs to be updated. While knowledge and experience can be assumed to remain over time (or at least not deteriorate significantly), ability to bear losses can change more frequently. It is preferred that the appropriateness assessment is not made into a trade-by-trade process as this will have a detrimental effect on speed of execution.

In this context it should also be noted that access to retail focused AIFs is currently hindered by the fact that ESMA categorically consider all AIFs to be automatically complex instruments, and that they cannot be assessed against article 57 of the Delegated Regulation EU/2017/565[2]. There are plenty of AIFs in the market which by their nature are not complex and UCITS-like in the sense that they only to a lesser degree deviate from the diversification rules of UCITS funds[3]. These types of funds can provide a greater diversification of client portfolios as well as exposure to asset classes which can enhance portfolio performance. In addition, while certain investment features, for example sustainability aspects or non-listed equity, by their nature implies that the investments are illiquid, it does not mean that they are automatically complex. Based on these considerations, SSMA is of the opinion that AIFs as a minimum should be eligible to be assessed against article 57 off the Delegated Regulation EU/2017/565. ESMA’s Q&A should be amended accordingly.

If the purpose of the proposal is to strengthen investor protection when selling complex products, it would, in our opinion, be a more effective solution to ensure that the existing product governance rules are applied. New rules are not necessarily the solution.

[2] ESMA Q &A on investor protection and intermediaries topics (ESMA 35-43-348) section 10, question 1 updated 6 June 2017.

[3] For example, Swedish so called “Specialfond” which are regulated as AIFs but have to adhere to certain UCITS requirements.

2.6.2 Suitability light for independent advisors

As regards the new "suitability light" for independent advisers, the SSMA welcomes the introduction of relaxations regarding the rules on suitability assessments but questions from a competition perspective whether it is appropriate for EC to use the regulatory framework to favor one business model (independent advice) over another (not independent advice). The client's interest in receiving suitable advice should be the same. It is also very unclear how the proposal relates to existing rules on proportionality, which apply to all types of investment advice.

Moreover, the reason to remove the requirement to assess knowledge and experience of the client is based on the nature of the products as such, i.e., that they in general can be considered as fair and good options for retail investors and perhaps in particular for first time investors. To then only pinpoint independent advisors would effectively mean that many European retail investors could not benefit from the type of easy access to products which this proposal aims to ensure, and in the end be contrary to the objective of increasing retail participation in the market. Furthermore, a different approach between independent and non-independent advice could also be confusing to clients when moving between non-independent and independent advisory services and no rational explanation of why the difference exists could be given.

2.6.3 Suitability – portfolio diversification

The EC also proposes that, in connection with a suitability assessment, the investment firm must obtain information about and consider the retail client's existing portfolio/s. We note that this requirement to a certain extent already follows from ESMA's level 3 guidance. In connection with the rule being converted into binding level 1 requirements, it is important from a legal certainty point of view to be clear about how far the investment firms' obligation extends, in particular as regards information on holdings in other institutions. The investment firm can be required to ask questions, but it must be voluntary for the customer to provide information about holdings held by others. The investment firm has no way of obtaining such information from its competitors. From a retail client perspective, it is important that the firm is not prevented from giving advice to retail clients who are not willing to share information about external portfolios, provided that it is made clear to the client that the advice in such a case is based on incomplete information which is not possible today when giving advice (cf. warning).

Another crucial point is that the possibility for the customer to receive one-off or limited advice must also be kept, it should not in every advice situation be necessary to go through the composition of all existing portfolios. Thus, the principle of proportionality must be applicable also for internal holdings. It is not necessarily reasonable to consider portfolio diversification based on the client's entire holdings if the advice concerns e.g., investments on behalf of children or a limited amount. If the advice is one-off or limited or full portfolio advice should be documented to emphasize the difference.

2.6.4 Report on information collected

The EC proposes the introduction of a new obligation for investment firms to draft a report on the information collected within the framework of suitability or appropriateness

assessment at the customer's request. We currently find it difficult to evaluate the consequences of this proposal because it depends on the level 2 and whether new requirements are introduced that affect the scope and level of detail in the information to be obtained from the client. A general comment is that it is important with proportionality and that the institutions have flexibility in terms of the design of questions to their customers, so that these can be adapted to the type of service and the type of instrument and distribution channel. A one-size-fits-all should be avoided.

2.7 Knowledge requirements for advisers

The SSMA is positive that the EC has refrained from proposing an EU certification of advisers because we believe it is important that there is room to make national adaptations.

We do, however, question the proportionality of this requirement. The regulator makes no distinction between professional and non-professional clients. To the extent firms give investment advice to professional clients, we believe that the existing knowledge and training requirements should be sufficient, given that these clients do not need as high investor protection.

In any case, it would be valuable to have the regulators to develop the argumentation for applying this requirement without any proportionality when it comes to the types of clients, or the extent of services provided by firms affected (e.g., no differentiation between staff who give advice on ongoing basis and those who only do so ad hoc when requested by a particular client).

The SSMA also notes the risks for overlap between MiFID II and IDD and consider that 15 h must also apply to a person who provides advice according to both regulations (i.e., not 15 + 15).

The SSMA has no objection to the knowledge requirements being moved from level 3 to level 1, but we want to emphasize that it is important that the requirements are clearly drafted so that one understands what knowledge is required. (For example, we believe that point g) should be clarified).

2.8 Client categorization; opt-up

The SSMA is positive that the EC has proposed rules that make it easier for sophisticated non-professional clients to request to be treated as professional clients (opt-up) under certain conditions. For the Swedish capital market, where many sophisticated clients are active, this is a particularly critical issue that the SSMA has pursued for a long time. We would however like to emphasize the need to review all the existing criteria. For instance, the criterion linked to the number of transactions needs to be more flexible and adapted to the characteristics of different types of financial instruments and market conditions. For example, 10 transactions/quarter is difficult to apply for illiquid instruments such as bonds, which limits sophisticated retail clients' opportunities to be active in the Swedish corporate bond market. To achieve this, ESMA could be given a mandate to calibrate the number of transactions for different asset classes in level 2 rules.

It is also important to clarify how the various criteria relate to each other, for example whether the criteria proposed for legal entities in terms of balance sheet are sufficient but

that other criteria can also be applied to legal entities. We would prefer if these were alternate requirements.

2.9 Supervision; cross border

The EC proposes extensive new reporting obligations for investment firms that conduct cross-border activities. We understand that there is an interest from the national supervisory authorities and ESMA in having access to such information, but wishes to emphasize that the question of when/in which situations an investment firm crosses borders and conducts business in another Member State without establishing a branch is a complicated legal issue and must be subject to proper discussion and analysis, not least considering the digital society we live in. Another level of complexity is added if one also considers that EEA branches of an investment firm would also be deemed to be included in the suggested requirements.

For the information on cross border activity to add some value and be comparable, clear criteria must be established at level 2 so that the investment firms report in the same way. In addition, it is important to note that the position that an investment firm crosses borders leads to many other legal requirements in MiFID II becoming applicable and that the effects of these proposals therefore go way beyond a reporting obligation.

We encourage the regulators to clarify that the reporting obligation should only apply for a member state when firms have more than 50 clients in the specific member state. I.e., it should not apply on the basis that a firm has more than 50 cross-border clients anywhere in the EU in general.

3. Financial Education

Financial education of retail clients is a prominent issue for the EU capital market, and the SSMA is therefore positive that Member States receive new overall obligations in this regard. In this context, we would like to emphasize that ESAs also play a key role, e.g., through the preparation of fact sheets and other types of information material**.**

4. Specific comments on PRIIPs

4.1 PRIIPs scope

From a general perspective, the SSMA welcomes the ambition to clarify the scope of PRIIPs, which for many years has proven difficult to apply for both investment firms and retail clients. We also note that in the context of RIS, the EC proposes to introduce new references to PRIIPs in MiFID II (see above re. inducements and product governance/value for money) which means that the legal implications for an investment to be in scope of PRIIPs may become even greater in the future.

However, the SSMA is concerned with certain parts of EC’s proposal. Firstly, we note that with the updated reference to the new prospectus rules, the range of investment products explicitly exempted from the KID requirement is reduced, suggesting that more financial instruments might fall within scope. In addition, it appears that the reference to the updated prospectus regulation refers to a paragraph that does not exist which makes the EC’s proposal very difficult to understand. It is not clear to us if these are merely editorial errors

or if the intention of the EC is to extend PRIIP's scope beyond its current application. If the latter is the case, it would in our view be highly questionable since no impact assessment appears to have been conducted which analyze the effects of these proposals. The SSMA is strongly opposed to any initiative expanding the scope of PRIIPs and in the forthcoming process we seek confirmation that the reference to the current prospectus regulation is partly wrong and that the scope has not been amended in this regard.

The SSMA supports EC's proposal to clarify that corporate bonds with make whole clauses are explicitly exempt from PRIIP's scope. However, we would like some additional guidance on level 1 when it comes to bonds in general (plain vanilla) as well as bonds with specific features. In our view, it is important to look not only at the intention of the regulation but also at the purpose of a financial instrument. The focus of PRIIPs should in our view be on products and investments that has a true element of "packaging." The purpose of issuing a bond, irrespective of the structure, is to seek funding for the issuer, not to issue a packaged product. In our view, all bonds should therefore fall outside PRIIP's scope.

Another important type of financial instrument that should be explicitly excluded from PRIIP's scope is derivatives which are used for hedging. Hedging derivatives are not "investments" but are commonly used by small and medium sized companies (often classified as retail investors) to mitigate risk rather than taking risk and the KID information for them can therefore be confusing or even misleading. If a change in PRIIPs scope for hedging derivatives cannot be achieved in the context of RIS, it should at least be possible to adjust the KID in order to ensure that the information provided is relevant and not misleading for clients(e.g., it is desirable if the heading and static text is allowed to be changed depending on whether the instrument is to be used for investment or hedging). As mentioned above, PRIIPs scope has an effect on the product governance pricing process proposal, and we question the relevance of hedging derivatives being in scope of those MiFID rules.

<u>PRIIPs KID</u>

The SSMA supports the proposal to provide retail investors with a summary of the most relevant information regarding the investment through a section called "product at a glance." Having said that, we do question how this new section shall fit into the three-page KID document. The same concern applies to the proposed new section on sustainability.

While being supportive of the addition of a new dedicated sustainability section in the PRIIPs KID, the SSMA is concerned about the fact that the information to be displayed in this section will not be representative for all products that qualify as a PRIIP under the PRIIPs Regulation, but that do not qualify as a financial product under Regulation (EU) 2019/2088 (the "SFDR"), but which nevertheless has sustainability-related objectives as part of their defined target market (i.e. a focus on either environmental, social or governance criteria or a combination of them). For example, this could be the case for structured products and green bonds (not qualifying under the EU Green Bond Standard) that has sustainability-related objectives as part of their defined target market. The SSMA would therefore propose a more flexible approach that entails disclosing the binding sustainable commitments made by the product to ensure that the retail investor receives the most relevant information in this

regard. Furthermore, when it comes to financial products under SFDR the new sustainability section solely focuses on environmental factors whilst social objectives are also recognised under the SFDR.

On a further note, the EC states that the new ESG dashboard section would be devised in such a way as to only reuse information that is already included in other pre-contractual documents pursuant to the SFDR and the EU Taxonomy. However, as certain data under those regulations are currently not displayed, we consider that the new requirements should clearly pertain only to already existing and available data and that the specifications that are to be made by the ESA's takes this into account as well as the need for alignment with other pre-contractual disclosures. It should also be clarified if this section should be listed as N/A or removed for products with no sustainable features.

As regards Multiple Option Products, the SSMA welcomes the EC's proposal. This is a particularly important issue in Sweden, as many insurance-based investment products (IBIPs) allow the retail investor a choice between thousands of underlying investment options. Not having the opportunity of providing a generic KID would likely lead to a reduction of underlying options in Sweden which would have negative effects for retail investors. We also believe that a requirement on a specific KID for each IBIP depending underlying investment would be very costly and challenging to implement from an IT perspective.

Digital format

As many Swedish retail investors invest and operate on the market by using digital means, the SSMA is positive to allowing the KID being provided digitally, by default.

The SSMA is also positive to being able to use layered information so that the information presented to retail investors can be customized as appropriate. However, we wish to underline the importance of taking different markets and instruments into account when designing the RTS in this respect.

*****