

**MEMO# 29273**

August 21, 2015

## **ESMA Consultation on UCITS Remuneration Guidelines - Member Call on 3 September**

[29273]

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TO: ICI GLOBAL REGULATED FUNDS COMMITTEE No. 50-15  
INTERNATIONAL COMMITTEE No. 45-15 RE: ESMA CONSULTATION ON UCITS  
REMUNERATION GUIDELINES - MEMBER CALL ON 3 SEPTEMBER

As we previously informed you, on 23 July the European Securities and Markets Authority (ESMA) launched a consultation on proposed Guidelines on sound remuneration policies under the UCITS V Directive (with an amendment to one provision of the AIFMD remuneration guidelines). [\[1\]](#) The Guidelines are intended to clarify the UCITS Directive's provisions on establishing and applying a remuneration policy for certain staff categories and to ensure a convergent application of the remuneration provisions. The Guidelines, which will apply to UCITS management companies and national competent authorities, provide guidance on issues such as proportionality, governance of remuneration, requirements on risk alignment and disclosure.

Comments are due by 23 October and ESMA aims to finalise and publish the UCITS Remuneration Guidelines and a final report by Q1 2016, ahead of the March 18 transposition deadline for the UCITS V Directive.

We will be holding a member call on Thursday, 3 September at 3 p.m. London time / 10 a.m. U.S. Eastern time. Please RSVP to Lesley Dunn at [lesley.dunn@iciglobal.org](mailto:lesley.dunn@iciglobal.org) if you intend to participate. The dial-in details are as follows:

UK CALL 0844 737373 - USE PIN 432147

US CALL +1 415 363 0833 - USE PIN 491937

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\* If you will be calling from a jurisdiction that is not listed, please contact Lesley Dunn at

## **ESMA's Proposed Guidelines**

The Consultation is described briefly below, along with certain issues or questions that we propose to discuss to help us formulate our response.

Despite earlier indications that ESMA may follow the approach that has been proposed by the European Banking Authority (EBA), ESMA's draft Guidelines are based on the remuneration guidelines already issued under the AIFMD, and ESMA has departed from them only if and when strictly necessary. However, in the consultation ESMA states that has also taken into consideration the provisions of the EBA consultation paper on remuneration published in March 2015.

Described below are the key elements of the guidelines, along with questions and issues for consideration. Although questions are specified only on certain issues, we welcome your feedback in all of these areas.

1. Proportionality: ESMA is proposing the same proportionality regime as has been adopted under the AIFMD. In particular, this includes the possibility of dis-applying certain of the provisions in exceptional circumstances.

This approach has been proposed because ESMA members were able to gather a majority to counter the willingness of the European Commission and ESMA staff to align the UCITS guidelines to the EBA approach. Consequently, although ESMA is proposing to follow the AIFMD approach, it has been asked to request feedback regarding the impact generally, and more specifically the costs and burdens, should ESMA take a different approach (i.e., one that does not allow for any disapplication).

We welcome input from members with respect to this query. In particular, see the cost/benefits analysis in the ESMA consultation. Beyond legal arguments that the EBA approach is inaccurate, what are the policy arguments to sustain that UCITS managers should be entitled in some circumstances to decide not to apply the requirements on: variable remuneration in instruments; retention; deferral; ex post incorporation of risk for variable remuneration?

We continue to discuss the EBA interpretation of proportionality with the European Commission (DG JUST), EBA, ECB, national banking regulators, and bank associations, as it is reported that the EBA guidelines could be delayed. We welcome members' views on the consequences/impacts if the EBA imposes its "reverse" proportionality notion to banks, including bank affiliate UCITS managers, and ESMA applies a more reasonable/sensible approach for non-bank owned AIFMs and/or UCITS managers.

2. Proportionality with respect of the different categories of staff: ESMA permits some proportionality for categories of staff whose professional activities have a material impact on the risk profile. The same criteria of size, internal organization and the nature, scope and complexity of the activities should apply. In addition, some other elements should be taken into account, where relevant.

We would like your input on whether the articulation between the two types of proportionality (at entity level and at individual level) is clear enough?

3. Management companies as part of a group: The guidelines clarify that in a group

context, non-UCITS sectoral prudential supervisors of group entities may deem certain staff of the UCITS management company which is part of that group to be identified staff for the purpose of their sectoral remuneration rules.

We see three potential outcomes:

- i. The ECB, EBA and banking regulators agree not to apply CRD IV to any UCITS managers and/or AIFMs on the ground that: investment fund management is a proposition different from banking, subject to as equally effective and adapted rules regarding remuneration (policy arguments); and/or that applying CRD IV to bank owned UCITS managers and/or AIFMs would be an extension of SSM supervision powers to non-banks, which would be contrary to TFEU or would require legislation unanimously adopted (legal arguments);
- ii. The European Commission supports the EBA in reading article 92 of CRD IV as applying to all affiliates of a banking group irrespective of their nature, regulatory regime, size, etc.; or
- iii. The EBA and ESMA agree that CRD IV may apply to some individuals/staff members within bank-owned UCITS managers and/or AIFMs.

The first scenario would be ideal. The second is increasingly losing ground but still represents a menace. The third scenario would constitute a compromise but would raise many questions.

Consequently, we welcome input from members in the respect of:

- What makes a bank-owned UCITS managers different from a UCITS manager whose shareholders are not banks? Why should the former be deemed riskier than the latter?
- On what basis should the distinction between staff members subject to CRD IV remuneration rules and professionals subject to UCITS V rules be made? Individuals seconded by the parent bank to the UCITS manager? But what if they only have UCITS management functions/duties? Distinction according to the type of duties?
- If the third scenario prevails, how can it be ensured that the delineation drawn by ESMA between different sectoral rules (CRD IV on the one hand and UCITS V and/or AIFMD on the other hand) is clear enough? How can legal certainty be ensured for our members (i.e., that the EBA or national banking regulators do not override ESMA interpretation)?
- How it this question handled for AIFMs in the different Member States? Any need for harmony between AIFMD and UCITS V on the one hand versus CRD IV on the other hand?
- Organizational consequences: What about firms dominantly regulated as a UCITS manager and/or AIFM with potentially a MiFID license (typical of some Member States), versus entities that are investment (MiFID) firms with a UCITS and/or an AIFM license (typical of other Member States)?

4. Application of different sectoral rules: In the case of an employee that performs services falling under more than one of UCITS V, CRD, and AIFMD, ESMA proposes two options for paying such personnel: (i) subjecting a pro rata amount of such person's remuneration to each applicable directive based on objective criteria such as the time spent on each service, or (ii) applying the sectoral remuneration principles that are deemed more effective at discouraging excessive risk taking and aligning the interests of the relevant persons with the funds that they manage.

Do you consider that these approaches are workable, or is there a lack of clarity with respect to certain situations or issues? For example, it may be unclear whether this would allow firms to apportion pay for purposes of the bonus cap under CRD IV. It may also be unclear whether parent company shares will be able to be used in certain circumstances, as is currently permitted by the FCA and prohibited in few other Member States.

ESMA also asks whether the performance of MiFID ancillary services should be subject to the UCITS or AIFMD remuneration principles, or whether these activities present different risks and should not be covered. What is your view on this (see question on organisational consequences above)?

5. Definition of performance fees: The guidelines set out a common definition of performance fees based on the IOSCO Final report on elements of international regulatory standards on fees and expenses of investment funds.

6. Application of the rules to delegates: The guidelines set out proposals to prevent management companies circumventing the remuneration rules through the delegation of activities to external service providers. ESMA suggests introducing a system of equivalence between the AIFMD, CRD IV, and UCITS V remuneration rules.

ESMA does not propose equivalence with MiFID remuneration rules. Is this problematic?

Also, ESMA proposes equivalence with CRD IV firms and not all “CRD” firms (as is the case under AIFMD). Specifically, it is not clear whether the FCA would interpret this as including CRD III firms (UK BIPRU firms).

ESMA is informally looking for concrete evidence of the existing arrangements in AIFMD implementation? ESMA is concerned that delegating AIFMs only request an attestation from the delegated firm that its remuneration policy does not prevent the delegating AIFM from complying with ESMA guidelines and AIFMD? We do not intend to provide ESMA with such information. However, our members should be aware that ESMA has the power to conduct peer-reviews of NCA implementation. What should we reply, if anything, in the context of the present ESMA consultation?

Is the Member State divergence in implementing this part of the ESMA guidelines on AIFMD remuneration and potentially the guidelines on UCITS V remuneration problematic for our members?

Should we suggest to ESMA that proportionality and/or sectoral rules should be applied to delegation arrangements; i.e., a delegated firm, including non-EU portfolio managers, could decide to dis-apply some payout measures on the basis of size, nature, complexity or to subject delegated portfolio managers to a remuneration policy respecting UCITS V remuneration rules but only for the portion of the bonus corresponding to UCITS portfolio management?

7. Payment in instruments: The guidelines provide guidance on how to comply with the rules on the payment of variable remuneration in instruments under the UCITS Directive. The definition of instruments excludes shares of the UCITS management company or the parent company if relevant. Staff should only be remunerated using instruments if it does not trigger interest misalignment or encourage risk-taking which is inconsistent with the risk profiles or rules of the relevant UCITS.

Should we suggest to ESMA that all this should be clarified for the sake of legal certainty? In

this respect, implementation of AIFMD remuneration guidelines varies considerably at Member State level. Is this problematic?

8. AIFMD Remuneration Guidelines Revision: The consultation also proposes a revision of the AIFMD Remuneration Guidelines by clarifying that in a group context, non-AIFM sectoral prudential supervisors of group entities may deem certain staff of an AIFM in that group to be identified staff for the purpose of their sectoral remuneration rules.

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**endnotes**

[1] The Consultation is available at <http://www.esma.europa.eu/news/ESMA-consults-UCITS-remuneration-guidelines?t=326&o=home>.

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