

MEMO# 33716

August 5, 2021

ESMA Issues Consultation Paper on Guidelines on MiFID II Remuneration Requirements

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TO: ICI Global Members SUBJECTS: International/Global
MiFID, EMIR, AIFMD, UCITS V RE: ESMA Issues Consultation Paper on Guidelines on MiFID II Remuneration Requirements

On July 19, the European Securities and Markets Authority (ESMA) published a consultation paper with draft guidelines on certain aspects of the MiFID II remuneration requirements (Consultation Paper), with comments due by October 19, 2021.[\[1\]](#) ESMA expects to publish a final report, and final guidelines, by the end of Q1 2022.

The purpose of the new guidelines is to enhance clarity and foster convergence in the implementation of certain aspects of the new MiFID II remuneration requirements, replacing the existing ESMA guidelines that were issued in 2013. Adopted in 2014, MiFID II includes specific remuneration requirements for investment firms, including some of the recommendations set out in the 2013 guidelines.

The new guidelines, which will apply to competent authorities and firms, build off the 2013 guidelines while broadly aligning with them. ESMA has deleted from the 2013 guidelines provisions that were directly incorporated into the MiFID II framework, and removed any guidelines that became unnecessary.

Highlighted below are the more significant changes or additions that are proposed by ESMA.

We are considering submitting a response to this consultation and will reach out to members to further discuss.

Draft Guidelines

The 2013 guidelines were reorganized into three guidelines to ensure clarity. Under the draft guidelines, guideline 1 now exclusively relates to the design of remuneration policies and practices, guideline 2 solely focuses on governance aspects, and section V.II. of the

2013 guidelines has become guideline 3 in the new guidelines. Section V.III. of the 2013 guidelines has been entirely deleted.

Guideline 1 - Design of Remuneration Policies and Practices

- Introduces a provision stating that firms' remuneration policies and practices should ensure that the criteria used to assess career progression comply with the MiFID II remuneration requirements. ESMA explains that career progression is relevant because it may have an impact on fixed remuneration, and that firms should define appropriate criteria to align the interests of the relevant persons and that of the clients in respect of all types of remuneration, not just variable remuneration.
- Explicitly states that firms should consider including ex-post adjustment criteria of the variable remuneration (e.g., malus and clawback). This principle was previously featured as a good practice in the 2013 guidelines.
- Puts further emphasis on the remuneration policies and practices for control functions and members of the management body or senior management through the addition of three new paragraphs, including one specifying that the structure and criteria to assess remuneration should not create conflicts of interest that may lead such persons to favor their own interests or the firms' interests to the detriment of clients.

Guideline 2 - Governance of Remuneration Policies and Practices

- Introduces an ad-hoc review requirement upon the occurrence of certain events, supplementing the existing requirement to review remuneration periodically.
- Makes clear that the persons involved in the design, monitoring, and review of the remuneration policies and practices should have access to all relevant documents and information. This guideline is to ensure that such persons understand the background to and decisions that led to the remuneration policies and procedures.

Guideline 3 - Controlling Risks that Remuneration Policies and Practices Create

- Guideline 3 primarily reorganizes sections of the 2013 guidelines and does not have any substantive additions.
- Converts some good practices in the 2013 guidelines into guideline requirements^[2] and deletes items that were made redundant by Level 1 and 2 changes.

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endnotes

^[1] The Consultation Paper is available at <https://www.esma.europa.eu/press-news/esma-news/esma-consults-remuneration-requirements-under-mifid-ii>.

^[2] For example, paragraph 50 of the new guidelines requires frequent reviewing of the management tools used to adequately capture the qualitative data required to determine the variable remuneration. This was previously a good practice.

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