

Comments on Consultation Paper Guidelines on sound remuneration policies under the AIFMD as issued by ESMA/2012/406

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1. Introduction

This document is jointly written by the Amsterdam office of Allen & Overy and Spiderbridge. Both firms have been extensively involved with the implementation of the CRD-III and related CEBS guidelines in multiple jurisdictions. In preparation to our response to the consultation paper 2012/406 (hereafter referred to as CP 406), we have held a conference on this topic for AIFMs in the Netherlands and received their views and opinions. These comments have been taken into account in our response to CP 406.

ESMA has invited interested and relevant parties to comment on the issued guidelines. It also offers the opportunity to express alternative views and to launch suggestions in respect of the interpretation as well as the execution and implementation of the directive.

The guidelines address the framework and the more detailed interpretation of a wide set of rules and regulations in relation to the directive. Instead of answering all these questions raised in CP 406, we will focus on some key issues. Where possible we will also introduce some more detailed suggestions in order to secure an effective implementation and to minimise the potential differences between the national interpretations. This will support and enhance an international level playing field that we consider essential.

CP 406 is based on the CEBS guidelines and, to a large extent, is identical to them. Although some sector specific issues (like carried interest and co-investment) have been addressed, in our view the proposed guidelines are not sufficiently tailored to fit the fund management sector. This is specifically the case with respect to section VIII on governance of remuneration, which is structured with large financial institutions in mind and not with the, normally, thinly staffed fund management companies. We will give some alternative views on this topic in section 2.4 of this document.

As said, you have taken the sector-specific remuneration practices of carried interest and co-investment into account. In our view, some additional clarification is needed as will be discussed in sections 3 and 4 of this document.

Since the fund management sector primarily deals in non-quoted securities and most AIFs are not quoted on a regulated market, the pay-out and award of variable remuneration in equity-linked instruments will pose many difficulties for the sector. These difficulties may even become counterproductive and could create a misalignment with the clients of the AIFM. We will discuss this in section 2.3.4.2.

This response to CP 406 will also address some concerns around level playing field in section 5.

But, firstly, we will begin with the proportionality issue. We will introduce some more detailed guidance which may help local supervisory authorities to respond to the wide variety of AIFMs in their markets. Clearly defined guidance from ESMA on this topic will also support a European-wide level playing field.

2. Proportionality

Section V of CP 406 gives guidance on the proportionality principles. These principles aim to match the remuneration policies and practices with the risk profile, risk appetite and strategy of the AIFM concerned and of the AIFs managed by such AIFM.

Our comments are related to the proportionality among different types of AIFMs and deals with your question number 9 at the end of section V.II on page 19 of CP 406.

Section V.II of CP 406 states that the criteria addressing the application of the proportionality principle among AIFMs are the size of the AIFM or AIF, the internal organisation and the nature, scope and complexity of the activities. For each criterion, sub-criteria are defined, resulting in a multitude of criteria that subsequently are to be combined for the purpose of assessment. Since the fund management sector consists of a wide variety of AIFMs and also a wide variety of clients, we propose a more practical guidance along the lines of having a checklist against which the assessment can be made. The latter is needed to maintain a European wide level playing field.

2.1 Proportionality levels

Based on the experience with the CEBS guidelines and the local interpretations and implementations by the national supervisory authorities, we propose an approach along the lines of the FSA. The FSA has given general guidance on proportionality. In the FSA rules, the main distinguishing characteristic is size, for the credit institutions expressed in the relevant total assets. Based on the size of a credit institution's relevant total assets, it is classified in a specific proportionality level. It is well understood that two firms in the same proportionality level may still differ in the extent to which full or partial implementation of all guidelines is needed. Such difference is based on the nature, scope and complexity of the credit institution. The initial classification is, however, purely based on size of the total relevant assets.

In our view, a similar approach would be practical for the fund management sector. Size should then be measured by referring to the total value of the assets under management (indeed including any assets acquired through the use of leverage), hereafter referred to as AuM. Specific thresholds are to be defined to classify the different AIFMs by size of their AuM. In this section possible thresholds are given. An initial classification of the AIFM's in proportionality levels will be done based on their AuM.

Before a final classification can be done, however, we need to look at the type of clients of the AIFM or AIF managed by such AIFM. Clear guidance is given by the European Commission to what extent clients of the AIF are to be protected by all kinds of measures when confronted with financial products offered. Such guidance, among others, is given e.g. in MiFiD. It is, therefore, good practice to take this into account when dealing with proportionality. In our view, professional investors are better equipped to understand, accept and control risk levels of investment products than less professional parties. What we understand from institutional investors is that they carry out extensive due diligence on the AIF/AIFM, including the alignment of interest through remuneration of the AIFM and its key executives. They see these additional requirements as an unnecessary increase of costs. This means that in case an AIFM or AIF only invests on behalf of and for the account of professional parties, such AIFM or AIF should be classified in a lower proportionality level.

Based on such an approach, we propose the following classification guidelines, taking into account the following:

- Level 1 is the highest and level 3 is the lowest level, meaning that level 1 will need to apply more sophisticated policies and practices in fulfilling the requirements than level 2 or 3;
- Firms in the same proportionality level still need to tailor their policies to their individual circumstances based on their nature, scope and complexity, which may require one firm to be more strict and may allow another to be less strict with the remuneration guidelines.

The proportionality levels will subsequently give guidance on which remuneration and governance principles need to be applied.

AuM	Initial Level	Professional clients only	Level
> 2bn	1	Yes	2
		No	1
> 0.5bn but < 2bn	2	Yes	3
		No	2
< 0.5bn	3	Yes / No	3

2.2 Proportionality and general risk alignment requirements

All AIFMs covered by the AIFMD will remain fully subject to the general requirements on risk alignment (section IX of CP 406). The classification in a given proportionality level will not have an impact on the application of these general requirements. This means that each AIFM still needs to have a remuneration policy and a pension policy (if applicable).

2.3 Proportionality and specific risk alignment requirements

Based on paragraph 37 in section V of CP 406, proportionality can be applied to Fully flexible policy on variable remuneration (section X.I) and to Pay-out process (section X.IV).

In this chapter of our response to CP 406, we propose further guidance with respect to the application of proportionality in connection with the specific requirements on risk alignment. The extent to which an AIFM is allowed to proportionately apply the guidelines in such case is linked to the AIFM's proportionality.

2.3.1 Proportionality and fully flexible policy

In our view, every AIFM should comply with the fully flexible principle. This should not mean that AIFMs are bound to set ratios between fixed and variable remuneration. The AIFM and its employees negotiate the employment terms and conditions. It is the responsibility of the AIFM to structure the right pay mix in line with its corporate strategy. The policy and the remuneration strategy of the AIFM, however, should allow the organisation to reduce the variable part to zero, if this is required, based on the financial performance and or the financial position of the AIFM. In our view, therefore, the proportionality must coincide with the risk alignment process (performance and risk measurement process, award process and pay-out process).

2.3.2 Proportionality and performance and risk measurement process

Based on sections X.II C and D of CP 406, AIFMs need to have a detailed risk management policy and performance management policy. As part of the performance and risk measurement process, risk management calculations are made and the AIFM should be able to demonstrate the breakdown of these calculations over the AIFs and business units of the AIFM. Such a detailed process requires the availability of sufficient internal qualified staff (in control functions) or available external resources. The extent of sophistication of these policies and procedures is linked to the proportionality level of the AIFM. Larger AIFMs should, in principle, be able to internally organise these requirements, whereas others need to outsource these functions to external providers. In most cases, the requirements will lead to additional costs. Such additional costs should also be proportionate to the size of the organisation and its affordability.

We, therefore, propose the following approach to proportionate application of the performance and risk measurement process:

Proportionality level	Extent of full application	Comments
1	High	Detailed risk and performance management policies are defined and executed, mainly by means of qualified internal staff in control functions. Full break down of risk calculation throughout the organisation.
2	Medium	Appropriate risk and performance management policies are defined and executed, partly or fully outsourced to qualified external service providers. Break down of risk calculations by AIF managed.
3	Low	Basic risk and performance management policies are defined and executed, outsourced to the extent needed. No break down of risk calculations throughout the organisation needed.

2.3.3 Proportionality and award process

Based on sections X.III paragraph 145 of CP 406, AIFMs need to consider the full range of current and potential (unexpected) risks associated with the activities undertaken. Ex-ante adjustments should be applied to ensure that the variable remuneration is fully aligned with the risks undertaken. Paragraph 146 of CP 406 states that AIFMs should determine to what level they are able to risk adjust their variable remuneration calculations. To what extent is a breakdown of these calculations over the AIFs and business units of the AIFM or even individual levels needed? The extent of sophistication of these ex-ante measures should be linked to the proportionality level of the AIFM. Larger AIFMs should, in principle, be able to risk adjust the variable remuneration calculations to the individual levels, whereas others can suffice with risk adjustment calculations at AIF level or business unit level. In most cases, the requirements will lead to additional costs. Such additional costs should also be proportionate to the size of the organisation and its affordability.

We, therefore, propose the following approach to proportionate application of the ex-ante risk adjustment calculations in the award process:

Proportionality level	Extent of full application	Comments
1	High	Detailed ex-ante risk adjustment calculations are made and applied to correct the variable remuneration to be awarded. Full break down of risk adjustment calculations throughout the organisation to individual levels.
2	Medium	Appropriate ex-ante risk adjustment calculations are made and applied to correct the variable remuneration to be awarded. Break down of risk calculations by AIF managed.
3	Low	Basic risk adjustment calculations are made and applied to correct the variable remuneration to be awarded. No break down of risk calculations throughout the organisation needed.

2.3.4 Proportionality and pay-out process

In accordance with section X.IV of CP 406, there are three key requirements in the pay-out process. These requirements are a division between an upfront pay-out of a maximum of 60% and a deferred pay-out of at least 40%, a minimum pay-out of 50% in equity-linked instruments and ex-post incorporation of risk. Based on paragraph 37 of section V of CP 406, proportionality can be applied to all three key requirements. It is, however, insufficiently clear to which extent proportionality can be applied.

In the CEBS guidelines certain requirements can be neutralised based on proportionality. Paragraph 19 of the CEBS guidelines states that certain requirements (minimum deferral period, minimum deferral portion and minimum portion to be paid in instruments) are real minima and, as such, it is not possible to apply lower criteria based on proportionality within an institution. Neutralisation based on proportionality between institutions (paragraph 20 of the CEBS guidelines) can however be applied to the same requirements as stated in CP 406. CP 406, however, does not mention the possibility of neutralisation. Since CP 406 is based on the CEBS guidelines and has the intention of a mutually comparable implementation of remuneration guidelines within the broader financial services industry, we strongly recommend allowing neutralisation based on proportionality as defined in the CEBS guidelines. This supports the level playing field within the financial services industry.

Based on our earlier defined proportionality levels, we propose the following guidance below. In our guidance we allow for neutralisation as defined under the CEBS guidelines.

2.3.4.1 Minimum deferral

CP 406 clearly sets out the minimum requirements applicable to deferrals, ie a minimum deferral period of three years in respect of a minimum of 40% of the variable remuneration should be deferred. Pro rata vesting is allowed, but should not occur more frequently than once a year, and the first amount should not vest sooner than 12 months after the accrual. In our view, these minimum requirements must apply to AIFMs classified in proportionality level 2. AIFMs in level 2 may need to apply the requirements more strictly if they are more complex than other level 2 AIFMs. AIFMs in level 1 must apply more stringent rules on deferrals, eg apply longer deferral periods, no pro-rata vesting or apply a higher minimum deferral percentage than 40% of variable compensation. Each AIFM in level 1 can tailor that to its risk profile and risk

appetite. In our view, AIFMs classified in proportionality level 3 may neutralise the deferral requirement, unless they are more complex than other level 3 organisations. This would mean applying the following guidance to deferrals:

Proportionality level	Extent of full application	Comments
1	High	Overall, the AIFM must apply more stringent requirements than the minimum requirements (see level 2). This could be a mix of higher deferral percentages, longer periods, no pro rata vesting and/or later vesting of the first amount than 12 months.
2	Medium	Minimum requirements to be met, being a deferral period of at least three years, a deferred portion of at least 40%, annual pro rata vesting and first amounts vests not sooner than 12 months after the accrual.
3	Low	Fully neutralised, unless complexity requires compliance at the minimum requirements or more.

2.3.4.2 Instruments

CP 406 clearly states that at least 50% of total variable compensation needs to be awarded and paid in equity-linked instruments. Equity-linked instruments are defined as units or shares of the AIF managed by the AIFM, or equivalent ownership interests or share linked instruments or equivalent non-cash instruments.

The basic purpose of remunerating staff in instruments is to put the staff into an owner-like position in order to align their interest with those of the stakeholders of the AIF. Most AIFMs already implemented this alignment effectively by means of carried interest and co-investment arrangements. The latter puts the staff member directly in an owner position, since he is making an own investment against normal market conditions in the AIF similar to other investors in the AIF. In these circumstances, the underlying purpose of remunerating staff in instruments is already accomplished and should, in our view, not be extended by means of additional allocation of units or shares. Therefore, identified staff already investing in the AIF they manage, through qualifying co-investment plans, should be exempt from the obligation to be paid variable remuneration in equity-linked instruments. The concept of equity-linked instruments comes from the CRD and the related CEBS guidelines. In the banking sector, the concept of co-investment is unknown. The owner-like position is rare in the banking sector. Therefore, pay-out of variable remuneration in equity-linked instruments in a credit institution to achieve risk alignment is sensible. However, as described here above, for AIFMs that have their staff invest in the AIFs they manage, such obligation is superfluous.

Those AIFMs that have not implemented a co-investment plan for staff responsible for the management of the AIFs should be put in an owner-like position. However, due to the legal structure of most AIFs, the pay-out in equity-linked instruments in the AIF may often be burdensome to the AIFM, as generally an AIF does not allow for additional units or shares during the term of the fund. In these circumstances, such AIFMs should be allowed to select alternative instruments that come as close as possible to reflecting the AIF's value creation, but are traded on a public exchange (possible by third party providers) and, therefore, are easily accessible for the AIFMs. From a costs perspective, it is not acceptable to force AIFMs to use phantom share-like solutions to mirror the units of the AIF exactly. The costs are two-fold: (1) the AIFM may be confronted with off-cycle valuations of the AIFs managed for compensation purposes; and (2) in case the value of the units go up and the AIFM has delivered the variable compensation by means of phantoms, the value increase becomes a direct additional cost which is not compensated with other value creation. In case the value of the units goes down, this could indeed become a benefit.

To summarise, the use of equity-linked instruments in the AIF should be exempt for AIFMs using co-investment plans for the AIFs they manage. In addition, AIFMs not applying co-investment plans should only be asked to use units or shares in the AIF, if those are legally available and there are no valuation issues. Otherwise, those AIFMs should be able to use tradable alternative instruments. Subject to the proposals made in this section, AIFMs in proportionality levels 1 and 2 must comply with the requirements of remunerating staff in equity-linked instruments. For AIFMs in proportionality level 3, the requirement of remunerating staff in equity-linked instruments should be neutralised.

2.3.4.3 Retention period associated with instruments

Another point of concern is the retention period associated with the remuneration in instruments. CP 406 states that large and complex organisations should apply retention periods on the upfront part that should surpass the deferral period for the deferred instruments. This is, in most cases, overdone and should only be applied to senior managers in very large and complex AIFs that involve large risks for non-professional investors. In other situations, shorter retention periods should be acceptable. On the basis of our experience with the implementation of the CEBS guidelines, we recommend a standard mandatory minimum retention period to be honoured in all member states. In the banking sector, some jurisdictions require a minimum of six months, others of 12 months and some of 24 months. A minimum period of one year seems practical both for the upfront and the deferred part of the instruments. Linking the above to the proportionality level, we propose the following: AIFMs in proportionality level 1 and 2 can, in principle, suffice with the minimum retention period of one year, unless the nature, scope and complexity of their activities warrant longer retention periods. Firms in proportionality level 3 are not confronted with retention periods at all, since they are not required to use instruments (in our proposed approach to proportionality).

Proportionality level	Extent of full application	Comments
1	High	At least 50% of total variable remuneration is delivered in equity-linked instruments, unless the AIFM already applies co-investment plans for its staff managing the AIFs. The retention period for staff will be at least for the minimum period of one year, unless longer periods are warranted due to the nature, scope and complexity of the activities.
2	Medium	At least 50% of total variable remuneration is delivered in instruments, unless the AIFM already applies co-investment plans for its staff managing the AIFs. The retention period for staff will be for the minimum period of one year, unless longer periods are warranted due to the nature, scope and complexity of the activities.
3	Low	Fully neutralised, unless complexity requires compliance at the minimum requirements or more.

2.3.4.4 Ex-post incorporation of risk

Based on sections X.IV C paragraph 179 of CP 406, AIFMs need to adjust, by way of reduction, the variable remuneration as time goes by and the outcomes of the staff member's actions materialise. These so-called ex-post adjustments should be applied to ensure that the variable remuneration is fully aligned with the risks undertaken. Paragraph 181 of CP 406 states that AIFMs should apply malus and reduce the value of the part of the deferred remuneration, taking into account the risk outcomes of the underlying performances of the AIFM as a whole, the business unit, the AIF and, where possible, the staff member. To what extent is a breakdown of these calculations over the AIFs, and business units of the AIFM, or even

individual levels needed? The extent of sophistication of these ex-post measures should be linked to the proportionality level of the AIFM. Larger AIFMs should, in principle, be able to risk adjust the variable remuneration calculations to the individual levels, whereas others can suffice with risk adjustment calculations at AIF level or business unit level. In most cases, the requirements will lead to additional costs. Such additional costs should also be proportionate to the size of the organisation and its affordability.

In all cases, however, the criteria for malus and/or clawback, as mentioned in paragraphs 182 and 183, should be incorporated in the remuneration policies of AIFMs classified in proportionality levels 1 and 2. AIFMs in proportionality level 3 should incorporate clawback in at least the criteria mentioned in paragraphs 182 and 183 of CP 406. Since, in our proposal, AIFMs classified in proportionality level 3 are not required to defer part of the variable remuneration, malus will only become applicable for those AIFMs if they have incorporated deferrals in their remuneration policies. We, therefore, propose the following approach to proportionate application of the ex-post risk adjustment calculations in the pay-out process:

Proportionality level	Extent of full application	Comments
1	High	Detailed ex-post risk adjustment calculations are made and applied to correct the variable remuneration to be paid out or already paid. Full break down of risk adjustment calculations throughout the organisation to individual levels. Malus and clawback fully incorporated in the remuneration policy.
2	Medium	Appropriate ex-post risk adjustment calculations are made and applied to correct the variable remuneration to be paid out or already paid. Break down of risk calculations by AIF managed. Malus and clawback fully incorporated in the remuneration policy.
3	Low	In principle, ex-post risk measures only resulting in clawbacks, unless the AIFM has incorporated deferrals in its remuneration policy. In that case, malus needs to be incorporated as well. Basic ex-post adjustment calculations are made and applied to correct the variable remuneration to be paid out or already paid.

2.4 Proportionality and governance of remuneration

Governance of remuneration in CP 406 is structured around three key topics: Management body, Remuneration Committee and Control functions. In this section we provide our response to these three key elements and, where appropriate, some guidance with respect to proportionality is proposed.

2.4.1 Management body

Each AIFM should design and adopt a remuneration policy that is consistent with, and promotes, sound and effective risk management. We agree with this requirement. The ultimate responsibility hereof lies with the supervisory function of the AIFM. This is in line with the CEBS Guidelines. In practice, however, most AIFMs do not have a separate, independent supervisory function or supervisory board. Paragraph 54 of CP 406 states that this supervisory function lies with the management body, which has ultimate jurisdiction and power of direction. Paragraph 55 states that, to properly perform its tasks on remuneration, the management body, in its supervisory function, should include non-executive members that, collectively, have sufficient knowledge of remuneration policies and structures. Smaller and less complex AIFMs may

have the person in charge of the management body to act as the supervisory function. Taken from a proportionality perspective, we propose that firms classified in proportionality level 1 need to have an independent supervisory function; level 2 may use the management body to that extent but needs to have access to external independent advice; whereas level 3 can rely on the person in charge of the management body. We also propose that the independent non-executive members of the supervisory function should, in principle, be remunerated with fixed remuneration only. For smaller firms (mostly those in proportionality levels 2 and 3) it is not feasible to separate the management function from the supervisory function. These firms, therefore, should not be required to comply with the remuneration requirements as mentioned in section V.III.B, paragraphs 61-64. This section therefore should be neutralised for AIFMs in levels 2 and 3, which is in line with the proportionality guidance given in paragraph 37 of CP 406.

The supervisory function is also responsible for the periodic review of the implementation of the remuneration policy. Paragraph 37 of CP 406 here as well allows for proportionality. Linking this to our proposed proportionality levels, we suggest that level 1 AIFMs need to perform such review on an annual basis, level 2 firms every two years and level 3 every five years. All AIFMs may partly or fully outsource this review to external service providers.

In summary, the following proportionate approach to the governance of the supervisory function of the management body is proposed:

Proportionality level	Extent of full application	Comments
1	High	Independent supervisory function, in principle, remunerated with fixed remuneration only and performing an annual review of the implementation of the remuneration policy.
2	Medium	Supervisory function can be embodied in the management body, but needs to have access to external independent advice, no specific requirements on remuneration, and performing a periodic review of the implementation of the remuneration policy at least every two years.
3	Low	Person in charge of the management body executes the supervisory function, no specific requirements on remuneration and performing a periodic review of the implementation of the remuneration policy at least every five years.

2.4.2 Remuneration Committee

Paragraph 72 of CP 406 states that AIFMs that are significant should establish a RemCo. Paragraph 74 provides for some examples of AIFMs that do not need to establish a RemCo. We propose to link the need for a RemCo to the proposed proportionality levels. Level 1 AIFMs need to establish a RemCo in accordance with the guidance given in CP 406. Level 2 AIFMs can establish a so-called RemCo Lite, which means that the supervisory functions need to receive external advice on the remuneration decisions to be taken by the supervisory function. Level 3 AIFMs are not required to establish a RemCo.

Proportionality level	Extent of full application	Comments
1	High	Full RemCo in accordance with guidelines of CP 406
2	Medium	RemCo Lite
3	Low	No RemCo required

2.4.3 Control functions

In principle, we have no comments on the paragraphs 83-94. It is, however, important to realise and to accept that certain control functions may be embodied in one person, who is responsible for multiple functions (such as risk and finance). Although it can be expected from AIFMs in level 1 that they work with separate control functions, most AIFMs will have limited resources and will have combined certain functions internally. This is certainly the case for AIFMs in levels 2 and 3. Where needed, firms need to obtain external advice if insufficient resources are available internally in order to ensure a proper execution of the roles of the control functions as stated in paragraphs 83-87 of CP 406.

3. Carried interest

In paragraphs 191-193 of CP 406, consideration is made to the fact that the traditional carried interest plans with the normal waterfall distribution schemes already meet the requirements on risk alignment of variable remuneration. This normal waterfall distribution entails that, firstly, all capital contributed by the investors of the AIF is returned and an amount of profits at a previously agreed hurdle rate has been paid to the investors in the fund. Only after these distributions can the identified staff receive any compensation from the carried interest plan. The compensation received by the identified staff needs to be subject to clawback arrangements until the liquidation of the relevant AIF. Such carried interest plan is compliant with the guidelines and, as such, no longer qualifies as variable remuneration as defined in CP 406 (hereafter “Qualifying Carried Interest Plans”). Paragraphs 191-193, therefore, refer to paragraph 19 of CP 406 which provides for a definition of remuneration. Qualifying Carried Interest Plans should be excluded from the definition of remuneration as given in paragraph 19. We propose that this is more clearly stated both in paragraph 19 and in section X.V. of CP 406. This needs to be clearly stated in order to prevent different interpretations at national level.

The usage of Qualifying Carried Interest Plans is very common in the fund industry and we are pleased to see that ESMA is of the same opinion that such plans are designed in the interest of all stakeholders and are often even required by the investors in AIFs. Any modification of such plans would only reduce the alignment of interest currently in place.

Any other plans which, although are called carried interest plans but do not meet the requirements stated above, are non-qualifying plans and, as such, are subject to the guidelines on remuneration of the AIFMD.

4. Co-investment

Paragraph 20 of CP 406 states that any payment made directly by the AIF to identified staff which consists of a pro rata return on any investment made by those staff members into the AIF does not represent remuneration within the meaning of the AIFMD and, therefore, is not subject to any of the remuneration requirements set out in the AIFMD and in CP 406. Such co-investment plans ensure a direct alignment of interest and no additional requirements need to apply.

CP 406, however, in paragraph 20 makes an important condition. The investment needs to consist in an actual disbursement made by the staff member. Loans granted by the AIFM to the staff member in order to allow a co-investment into the AIF should not be considered as an investment for the purposes of the exemption if the staff member has not reimbursed the loan by the time return is paid.

In most cases, such co-investment involves large investments compared to the regular remuneration of the staff member. Obtaining third party lending is often difficult. As a consequence such loans are regularly offered by the AIFM. In practice, any returns paid by the AIF to the relevant identified staff are firstly used to repay the outstanding loan from the AIFM. We, therefore, propose to change the abovementioned condition as follows:

“Loans granted by the AIFM to the staff member in order to allow a co-investment into the AIF should be considered as an investment for the purpose of the exemption if the loan is reimbursed by the staff member with the net returns paid. Once full repayment has been made of the outstanding loan, further returns distributed to the staff member under the co-investment plan will be fully exempt from the AIFMD and CP 406 requirements.”

5. Level playing field

In order to secure an effective and fair implementation of the remuneration guidelines, it is vital to have a level playing field for all AIFMs in the industry. Some AIFMs are part of a group. This could be a financial institution or a non-financial institution. In case they are part of a non-financial group and can be qualified as captives, they might be excluded from the AIFMD completely. This would mean that such AIFMs do not need to comply to any of the remuneration principles. AIFMs that are part of a financial institution need to comply with the CRD remuneration principles as detailed in the CEBS Guidelines. This could result in AIFMs financial institutions not benefitting from an exemption whereas, for other AIFMs, carried interest and co-investment (subject to conditions) are excluded from variable remuneration. In our view, that is not acceptable. It distorts the level playing field and it is certainly not in line with the purpose of the remuneration principles both in financial institutions (CRD) and fund managers (AIFMD). In our view, all AIFMs, even though they may be a part of a financial institution, need to comply with the remuneration principles of the AIFMD and the guidelines to be issued by ESMA. The remuneration guidelines to be applied should be to the specific sector of the firm or business unit first and, secondly, to the parent company of such AIFM (if applicable) in order to benefit from the exemptions granted under the ESMA guidelines, but not under the CEBS guidelines.

Currently, section VI of CP 406 is insufficiently clear as to which guidelines are leading (ESMA or CEBS) in case of AIFMs who are part of a group.

Furthermore, it is important to give more specific guidance (especially around proportionality) with respect to local implementation in the member states. The experience with the financial sector and the implementation of the CEBS guidelines has taught us that the absence of such clarity leads to significant differences of interpretation and levels of strictness. This leads to a distorted level playing field with a direct effect on the competitiveness of local markets, the emigration of staff to the least strict member state or other evasive attitude. Such consequences are, in our view, not to the benefit of the sector and its clients, and certainly not in line with the purpose and goal of the remuneration principles.

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