

December 7, 2012

Mr. Steven Maijoor, Chair
European Securities and Markets Authority
103 Rue de Grenelle
75007 Paris
France

Re: ESMA's Consultation Paper on Guidelines on Remuneration Policies and Practices (MiFID)

Dear Mr. Maijoor,

The Investment Company Institute ("ICI")¹ and ICI Global² appreciate the opportunity to comment on the European Securities and Markets Authority's ("ESMA's") Consultation Paper on Guidelines on Remuneration Policies and Practices (MiFID) (the "Paper").³ Members of ICI and ICI Global are, in many instances, part of large financial services organizations operating in multiple jurisdictions around the globe, including Europe. For this reason, we are interested in ensuring that remuneration policies and procedures applicable to investment funds and their managers, such as the proposed MiFID Guidelines, appropriately reflect industry input and concerns.⁴ Our views on and concerns with the proposed MiFID Guidelines are described below.

¹ ICI is the national association of U.S. registered investment companies, including mutual funds, closed-end funds, exchange-traded funds, and unit investment trusts. ICI encourages adherence to high ethical standards, promotes public understanding, and otherwise advances the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of \$13.8 trillion and serve over 90 million shareholders.

² ICI Global is the global association of regulated funds publicly offered to investors in leading jurisdictions worldwide. ICI Global seeks to advance the common interests and promote public understanding of global investment funds, their managers, and investors. Members of ICI Global manage total assets in excess of US \$1 trillion.

³ The Consultation is available at http://www.esma.europa.eu/system/files/2012-570_0.pdf.

⁴ ICI and ICI Global also recently submitted a comment letter on ESMA's Consultation Paper on Guidelines on Sound Remuneration Policies under the AIFMD, available at <http://www.ici.org/pdf/26526.pdf>. ICI also submitted a comment

Unique Role of Asset Management Firms

We agree with ESMA that firms should have in place remuneration policies and practices that take into account conflicts of interest that arise in the provision of services to their clients and MiFID's conduct of business requirements, in addition to conflicts of interest of a prudential nature. We further support the goal of ensuring that asset management firms have remuneration policies and practices that are consistent with and promote sound and effective risk management and do not encourage inappropriate risk-taking (*e.g.*, risk-taking that is inconsistent with the risk profiles or instruments of incorporation of the funds they manage).

It is imperative, however, that the unique circumstances of asset management firms inform the development of regulations and guidelines related to remuneration in financial institutions. Specifically, policymakers must take account of the fact that, unlike certain other financial institutions, asset managers are both agents and fiduciaries that are engaged specifically to take disclosed risks with their clients' assets, and in the case of regulated funds, only as permitted under fund laws (*e.g.*, limits on type of investments, leverage, diversification, concentration, etc.). This directed risk taking on behalf of clients is markedly different from taking risks with a financial services firm's own assets.

In addition, it is important to recognize that activities of asset management firms vary dramatically as different clients seek varying expertise and services from asset management firms. This characteristic of asset management relationships is well illustrated in the context of an investment manager to a U.S. registered investment company, whereby the investment manager's activities and responsibilities – and its ability to take investment risk – are circumscribed by a written investment advisory contract as well as the Investment Company Act of 1940 and the Investment Advisers Act of 1940. Advisory arrangements for regulated investment funds in jurisdictions around the world are typically structured similarly, such that the investment manager is required to operate within certain regulatory parameters.

It is paramount that remuneration rules do not blunt the motivation or incentives for asset managers to carry out their responsibilities and take appropriate risks as directed by their clients.

Proportionality

The principle of proportionality has rightfully been incorporated by European regulators into the development of remuneration guidelines and codes for various types of entities in the financial

services industry, such as the CEBS Guidelines and the U.K. FSA's Remuneration Code. This principle has allowed firms to implement such codes and guidelines in a way that is appropriate for the size and internal organization of the firm, and the nature and scope of the firm's activities.⁵

We support ESMA's position⁶ that the MiFID Guidelines should be read together with the proportionality principle in the MiFID Implementing Directive, which provides that "Member States shall require investment firms to establish, implement and maintain an effective conflicts of interest policy set out in writing and appropriate to the size and organization of the firm and the nature, scale and complexity of its business."⁷ We reiterate the importance of this principle in consideration and implementation of these guidelines. Specifically, while we agree that firms should ensure that the fixed and variable components of the total remuneration are appropriately balanced and that the ratio between the fixed and variable components of remuneration should be appropriate in order to take into account the interests of the clients of the firm,⁸ we stress that it should ultimately remain for each firm to determine what is appropriate for that firm. It should be possible for asset management firms that appear to be similarly situated to legitimately come to different conclusions on the application and implementation of the MiFID Guidelines. There are simply too many differences among firms for a one-size-fits-all approach.

Alignment of Relevant Remuneration Initiatives

The regulation of the asset management industry in the European Union will fall under three directives once the Alternative Investment Fund Managers Directive ("AIFMD") and the UCITS V Directive enter into force: UCITS management companies⁹ under the UCITS Directive, alternative investment fund managers under the AIFMD, and individual portfolio managers under MiFID and in turn subject to elements of the Capital Requirements Directive ("CRD"). ESMA notes that, in developing these guidelines, it has considered other relevant remuneration initiatives, particularly the AIFMD remuneration guidelines. ESMA further explains that, although the interaction between the

⁵ In the proposed AIFMD guidelines, the Commission has similarly recognized the importance of affording firms the flexibility to apply the remuneration provisions of the AIFMD in a manner that accommodates differences among firms, by explicitly stating that "AIFM shall comply with [the principles in Annex II] in a way and to the extent that is appropriate to their size, internal organisation and the nature, scope and complexity of their activities." See Annex II of the AIFMD.

⁶ See Section II, paragraph 34.

⁷ Article 22 of the MiFID Implementing Directive.

⁸ See Questions 3 and 4 in the Paper.

⁹ The term "UCITS management companies" is used to refer as relevant to self-managed UCITS and/or UCITS management companies.

AIFMD and UCITS rules on remuneration is still to be determined, a UCITS management company or an AIFM providing MiFID services would be required to comply also with the MiFID remuneration rules under Article 6(4) of the UCITS Directive and Article 6(6) of the AIFMD.

Furthermore, the European Commission has proposed a recast of the MiFID (and the introduction of MiFIR) and a revision to the CRD (commonly known as CRD 4), both of which currently remain under negotiation between the European Council of Ministers and the European Parliament. Against the backdrop of significant reforms to these regimes, ESMA should develop its guidelines with extreme caution to avoid conflicts between the legislative regimes, the development of an unlevel playing field for the asset management industry, and inadequate acknowledgment of the need to tailor the approaches adopted for different sectors of the financial services industry.

In our response to the AIFMD Remuneration Consultation, we stated our agreement with ESMA that there is a need for consistency in the potential application of different requirements for AIFMs subject to other remuneration requirements.¹⁰ It is paramount that regulators develop a consistent approach for asset management firms across all of these guidelines. As we expressed in our earlier comment letter, we are concerned, however, that the existing patchwork approach of regulation will not result in a consistent approach.

We emphasize that the overarching principle in drafting the MiFID Guidelines and the AIFMD remuneration guidelines should be the rational alignment of these principles with the CRD remuneration principles. Any alignment should, however, take into consideration the different businesses within a group (*e.g.*, asset management, banking, insurance), and the fact that some of these businesses manage proprietary assets versus client assets. Further, alignment of these regimes should not impose incompatible or inconsistent requirements on asset management firms that are subject to more than one set of remuneration guidelines or principles.

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¹⁰ We noted that many firms that are subject to the AIFMD requirements are part of groups that currently comply with the remuneration provisions under CRD III, and will in the future need to comply with the UCITS and MiFID remuneration regimes. Asset management firms that are not banks are also covered by CRD in certain instances.

Mr. Steven Maijoor

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We appreciate the opportunity to provide comments on the Paper. If you have any questions about our comments or would like additional information, please contact the undersigned.

Sincerely,

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