

EUROPEAN ASSOCIATION FOR INVESTORS
IN NON-LISTED REAL ESTATE VEHICLES

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EUROPEAN SECURITIES AND MARKETS AUTHORITY (ESMA)
MR. RICHARD STOBO, SENIOR OFFICER
MR. CLÉMENT BOIDARD, OFFICER

11-13 AVENUE DE FRIEDLAND
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Letter

SUBJECT
INREV response to ESMA's
consultation paper

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27 September 2012

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Dear Mr Stobo and Mr Boidard,

INREV is the European Association for Investors in Non-Listed Real Estate Vehicles. We provide guidance and information related to the development and harmonisation of professional standards, reporting guidelines and corporate governance within the non-listed property funds industry across Europe. In addition, INREV undertakes research and surveys of the industry and constructs the INREV Index which covers the performance of institutional non-listed real estate funds investing in Europe.

INREV currently has 347 members. Our member base includes 188 fund managers, as well as institutional investors, fund of funds managers, investment banks and advisors representing all facets of investing into the non-listed real estate industry. Our fund manager members manage 449 European non-listed real estate investment funds with a combined Gross Asset Value (GAV) of EUR 231 billion. INREV's members represent almost all jurisdictions of the European Union's internal market and a range of underlying investment vehicle structures.

We appreciate the opportunity to comment on the proposed guidelines on sound remuneration policies under the AIFMD. In general, we agree with the approach suggested by ESMA for developing the remuneration guidelines. In particular, we support ESMA's taking the proportionality principle into account and cooperating closely with the EBA to ensure consistency between CRD remuneration guidelines with the AIFMD guidelines. We would point out, however, that many AIFMs in the non-listed real estate industry are part of financial groups that are not banks. Some of these entities operate globally and have a dozen or more different sector-specific investment centres, all with a common supervisory board, for example. Requiring the supervisory board of such groups to apply the proposed

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AIFMD guidelines would be extremely difficult in practice, if even possible.

We agree with much of the guidance that ESMA has developed in the area of remuneration, support the principle of remuneration oversight and welcome ESMA's efforts to ensure consistency with remuneration guidelines embodied in CRD. However, ESMA should recognise that not all specific guidelines can be applied easily by these AIFMs, as the parent company in the group could also be an insurance company or a financial entity subject to MiFID, UCITS or other regulations.

We would urge ESMA to address the difficulty that these AIFMs would have in applying the proposed remuneration guidelines. Several possible approaches come to mind. One would be to expand the proportionality principle, which currently provides only for tailored application of the remuneration principles by small AIFMs. Expanding the ability to apply the proportionality principle to AIFMs that are part of non-bank financial groups so that they could apply the remuneration principles, for example, through a single supervisory board at the group level, rather than at the AIFM level, would ensure consistent application of remuneration policies throughout the group.

Another approach would be to expand the guidance for AIFMs that are subsidiaries of a credit institution in Section VI to specifically include AIFMs that are part of non-bank groups as well. A third possible approach would be to develop a single financial sector remuneration guideline that would apply to all entities subject to regulation under CRD, AIFMD, UCITS and MiFID, which we understand are intended to apply consistent remuneration principles. None of these suggestions would result in AIFMs being able to circumvent applying the principles of the remuneration guidelines, but each would offer the advantage of providing for the consistent application of sound remuneration policies throughout group structures.

In addition to our concerns about AIFMs that are part of non-bank financial groups, in several other areas of the proposed guidelines noted in our submission we would welcome more detailed guidance, especially where it is unclear how specific guidelines would be applied in practice. We urge ESMA to ensure that sufficient clarity is provided so that the criteria are applied in a consistent manner by the Member States in order to avoid regulatory arbitrage.



You will find our complete response to the consultation attached. We hope to provide a meaningful contribution to your work to support the development of a sound EU regulatory framework and remain available should you have any specific questions about the non-listed real estate fund industry.

Kind regards,

A handwritten signature in blue ink that reads "Matthias Thomas". The signature is written in a cursive, flowing style.

Matthias Thomas

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Attachments:

INREV response to ESMA's consultation paper

List of questions

II. Background

Q1: Do you agree with the approach suggested above for developing the present Guidelines? If not, please state the reasons for your answer and also suggest an alternative approach.

INREV Response:

In general, we agree with the approach suggested for developing the remuneration guidelines. In particular, we support ESMA's taking the proportionality principle into account and cooperating closely with the EBA to ensure consistency between CRD remuneration guidelines with the AIFMD guidelines. We would point out, however, that many AIFMs in the non-listed real estate industry are part of financial groups that are not banks. Some of these entities operate globally and have a dozen or more different sector-specific investment centres, all with a common supervisory board, for example. Requiring the supervisory board to apply the proposed AIFMD guidelines would be extremely difficult in practice, if even possible.

We agree with much of the guidance that ESMA has developed in the area of remuneration, support the principle of remuneration oversight and welcome ESMA's efforts to ensure consistency with remuneration guidelines embodied in CRD. However, ESMA should recognise that not all specific guidelines can be applied easily by these AIFMs, as the parent company in the group could also be an insurance company or a financial entity subject to MiFID, UCITS or other regulations.

We would urge ESMA to address the difficulty that these AIFMs would have in applying the proposed remuneration guidelines. Several possible approaches come to mind. One would be to expand the proportionality principle, which currently provides only for tailored application of the remuneration principles by small AIFMs. Expanding the ability to apply the proportionality principle to AIFMs that are part of non-bank groups so that they could apply the remuneration principles, for example, through a single supervisory board at the group level, rather than at the AIFM level, would ensure consistent application of remuneration policies throughout the group.

Another approach would be to expand the guidance for AIFMs that are subsidiaries of a credit institution in Section VI to specifically include AIFMs that are part of non-bank groups as well. A third possible approach would be to develop a single financial sector remuneration guideline that would apply to all entities subject to regulation under CRD, AIFMD, UCITS and MiFID, which we understand are intended to apply consistent remuneration principles. None of these suggestions would result in AIFMs being able to circumvent applying the principles of the remuneration guidelines, but each would offer the advantage of providing for the consistent application of sound remuneration policies throughout group structures.

IV. Scope of the Guidelines

Q3: Do you see any benefit in setting a quantitative or qualitative threshold at which the portion of the payment made by the AIF exceeding the pro-rata investment return for the investment made by the relevant staff members is transformed into carried interest? If yes, please make suggestions on the threshold to be used.

INREV Response:

We do not believe that there is benefit to be gained by setting such thresholds, as they would be very difficult to define, are necessarily arbitrary and would invite remuneration structures that attempt to work around such thresholds.

Q4: Do you agree that the AIFMD remuneration principles should not apply to fees and commissions received by intermediaries and external service providers in case of outsourced activities?

INREV Response:

We agree that the AIFMD remuneration principles should not apply in such cases, but would welcome further clarification on the definition of “intermediaries and external service providers”. Among other things, this would help clarify whether remuneration principles would be applied under more than one regime.

For example, when AIFMs are part of a banking group and they outsource activities to other parts of that group, the entities performing those services are subject CRD principles and should not be required to comply with AIFMD remuneration principles. In other circumstances, when AIFMs are part of non-bank financial groups, it is possible that remuneration could be subject to UCITS V principles. Defining when entities are considered “intermediaries or external service providers” or perhaps a straightforward exclusion from scope for entities covered by remuneration principles under certain other regulations would avoid the same remuneration being subject to overlapping regulatory regimes.

In any case, we would welcome more detailed guidance about the scope of remuneration principles and how it would be applied in practice. We would urge ESMA to ensure that sufficient clarity is provided so that the criteria are applied in a consistent manner by the Member States in order to avoid regulatory arbitrage.

Q5: Notwithstanding the fact that the provisions of the AIFMD seem to limit the scope of the principles of remuneration to those payments made by the AIFM or the AIF to the benefit of certain categories of staff of the AIFM, do you consider that the AIFMD remuneration principles (and, therefore, these Guidelines) should also apply to any payment made by the AIFM or the AIF to any entity to whom an activity has been delegated by the AIFM (e.g. to the remuneration of a delegated investment manager)?

INREV Response:

We do not believe that it is necessary to apply the remuneration principles contained in the

guidelines to payments made by the AIFM or AIF to entities to whom activities have been delegated by the AIFM. The AIFMD remuneration rules' scope is limited to the remuneration of individuals employed by the AIFM. Fee payments between an AIFM or AIF and a service provider should be left subject to negotiation between the parties to allow competition between service providers across the EU. Further, it should be noted that entities, if performing a significant portfolio or risk management function as a delegate, will likely be regulated entities themselves subject to either AIFM or other remuneration rules, for example under MiFID.

In the real estate context, entities performing only asset management services, such as property managers and leasing agents, are not involved in regulated activities and should remain outside the scope of the guidelines. The AIFMD does not apply to them and, even though they may have some indirect impact on the risk profile of the AIF, they should not be brought within the scope of the directive through application of guidelines. The AIFM retains ultimate responsibility for how the delegated functions are executed. Application of the guidelines to the AIFM should ensure that effective policies and procedures are adopted so that any potential incentives for risk-taking by these third-party service providers are controlled and aligned with the agreed risk for the AIF.

Q6: Do you consider that payments made directly by the AIF to the AIFM as a whole (e.g. payment of a performance fee or carried interest) shall be considered as payments made to the benefit of the relevant categories of staff of the AIFM and, therefore, fall under the scope of the AIFMD remuneration rules (and, therefore, of these Guidelines)?

INREV Response:

This would only be relevant when such payments were to be used as a part of the remuneration scheme of the relevant staff. We believe however that these payments would generally already be reported by the AIFM or AIF under the proposed provisions.

Q7: Do you agree with the categories of staff identified above which should be subject to the remuneration principles set out in the Guidelines? If not, please state the reasons for your answer and also suggest an alternative approach.

INREV Response:

We believe that the staff responsible for heading both marketing and human resources should not be presumed to be included in Identified Staff, and should only be considered Identified Staff if it is demonstrated that they have a material impact on the AIFM's risk profile. Accordingly, they should be listed in the category of "other risk takers". This change would effectively shift the burden of proof with regard to whether these individuals have a material impact on the AIFM's risk profile.

V. Proportionality principle

Q9: Do you agree with the clarifications proposed above for the application of the proportionality principle in relation to the different criteria (i.e. size, internal organisation and nature, scope and complexity of activities)? If not, please state the reasons for your answer and also suggest an alternative approach.

INREV Response:

While the criteria listed appear to reflect a sensible approach and we support ESMA's view that the size, internal organisation and nature, scope and complexity of activities of an AIFM should collectively be taken into account in determining how the remuneration provisions apply to it, we would welcome more detailed information about how they would be applied in practice. We would urge ESMA to ensure that sufficient clarity is provided so that the criteria are applied in a consistent manner by the Member States in order to avoid regulatory arbitrage.

Q10: Do you agree with the clarifications proposed above for the application of the proportionality principle to the AIFM's categories of staff? If not, please state the reasons for your answer and also suggest an alternative approach.

INREV Response:

While the criteria listed appear to reflect a useful approach, we would welcome more detailed information about how they would be applied in practice in this area as well. We would urge ESMA to ensure that sufficient clarity is provided so that the criteria are applied in a consistent manner by the Member States in order to avoid regulatory arbitrage.

VI. AIFMs being part of a group

Q12: Do you agree that there is a need for consistency in the potential application of different requirements for AIFMs which belong to a group subject to other principles?

INREV Response:

We agree that consistency in the application of different requirements for AIFMs which belong to a group subject to other principles is necessary. In that regard, we are concerned that the proposed guidelines in general seem to have been developed with the model of a stand-alone AIFM in mind. Special consideration is given in Section VI to AIFMs that are part of a group; however, that section is specifically focussed on AIFMs that are part of a banking group and endeavours to ensure that there is consistency only between the application of AIFMD and CRD remuneration principles.

Many AIFMs in the non-listed real estate industry, however, are part of financial groups that are not banks. Some of these entities operate globally and have a dozen or more different sector-specific investment centres, all with a common supervisory board, for example. Requiring the supervisory board to apply the proposed AIFMD guidelines would be extremely difficult in practice, if even possible. We agree with much of the guidance that ESMA has developed in the area of remuneration, support the principle of remuneration oversight and welcome ESMA's efforts to ensure consistency with remuneration guidelines embodied in CRD. However, ESMA should recognise that not all specific guidelines can be applied easily by these AIFMs, as the parent company in the group could also be an insurance company or a financial entity subject to MiFID,

UCITS or other regulations.

We would urge ESMA to address the difficulty that these AIFMs would have in applying the proposed remuneration guidelines. Several possible approaches come to mind. One would be to expand the proportionality principle, which currently provides only for tailored application of the remuneration principles by small AIFMs. Expanding the ability to apply the proportionality principle to AIFMs that are part of non-bank groups so that they could apply the remuneration principles, for example, through a single supervisory board at the group level, rather than at the AIFM level, would ensure consistent application of remuneration policies throughout the group.

Another approach would be to expand the guidance for AIFMs that are subsidiaries of a credit institution in Section VI to specifically include AIFMs that are part of non-bank groups as well. A third possible approach would be to develop a single financial sector remuneration guideline that would apply to all entities subject to regulation under CRD, AIFMD, UCITS and MiFID, which we understand are intended to apply consistent remuneration principles. None of these suggestions would result in AIFMs being able to circumvent applying the principles of the remuneration guidelines, but each would offer the advantage of providing for the consistent application of sound remuneration policies throughout group structures.

Q13: Do you agree that the proposed alignment of the CRD and AIFMD remuneration provisions will reduce the existence of any conflicting remuneration requirements at group level for AIFMs whose parent companies are credit institutions subject to the CRD? If not, please state the reasons for your answer and provide quantitative details on any additional costs implied by the proposed approach.

INREV Response:

We agree that the proposed alignment of the CRD and AIFMD remuneration provisions could reduce conflicting requirements at group level for AIFMs whose parent companies are credit institutions subject to the CRD. However, as we point out in our response to Question 12, alignment of AIFMD remuneration provisions with other regulations such as UCITS and MiFID would also be necessary to reduce conflicting requirements at group level for AIFMs whose parent companies are other types of institutions subject to other regulations' remuneration provisions.

VII. Financial situation of the AIFM (Annex II, paragraph 1(o) of the AIFMD)

Q15: Do you agree with the above principle aimed at preserving the soundness of the AIFM's financial situation? If not, please state the reasons for your answer and also suggest an alternative approach.

INREV Response:

We agree with the principle of preserving the soundness of the AIFM's financial situation in the process of applying the remuneration rules.

VIII. Governance of remuneration

Q17: Do you agree with the proposed split of competences between the members of the management function and those of the supervisory function? If not, please provide explanations.

INREV Response:

We agree with the proposed split insofar as it is suited to stand-alone AIFMs which typically have the assumed management and supervisory structures. However, as we noted in our responses to other questions, INREV is concerned that the proposed guidelines in general seem to have been developed with the model of a stand-alone AIFM in mind. Special consideration is given in Section VI to AIFMs that are part of a group; however, that section is specifically focussed on AIFMs that are part of a banking group and endeavours to ensure that there is consistency only between the application of AIFMD and CRD remuneration principles.

Many AIFMs in the non-listed real estate industry, however, are part of financial groups that are not banks. Some of these entities operate globally and have a dozen or more different sector-specific investment centres, all with a common supervisory board, for example. Requiring the supervisory board to apply the proposed AIFMD guidelines would be extremely difficult in practice, if even possible. We agree with much of the guidance that ESMA has developed in the area of remuneration, support the principle of remuneration oversight and welcome ESMA's efforts to ensure consistency with remuneration guidelines embodied in CRD. However, ESMA should recognise that not all specific guidelines can be applied easily by these AIFMs, as the parent company in the group could also be an insurance company or a financial entity subject to MiFID, UCITS or other regulations.

We would urge ESMA to address the difficulty that these AIFMs would have in applying the proposed remuneration guidelines. Several possible approaches come to mind. One would be to expand the proportionality principle, which currently provides only for tailored application of the remuneration principles by small AIFMs. Expanding the ability to apply the proportionality principle to AIFMs that are part of non-bank groups so that they could apply the remuneration principles, for example, through a single supervisory board at the group level, rather than at the AIFM level, would ensure consistent application of remuneration policies throughout the group.

Another approach would be to expand the guidance for AIFMs that are subsidiaries of a credit institution in Section VI to specifically include AIFMs that are part of non-bank groups as well. A third possible approach would be to develop a single financial sector remuneration guideline that would apply to all entities subject to regulation under CRD, AIFMD, UCITS and MiFID, which we understand are intended to apply consistent remuneration principles. None of these suggestions would result in AIFMs being able to circumvent applying the principles of the remuneration guidelines, but each would offer the advantage of providing for the consistent application of sound remuneration policies throughout group structures.

Q18: Do you agree with the guidelines above on the shareholders' involvement in the remuneration of the AIFM?

INREV Response:

We agree with the guidelines on shareholder involvement in the remuneration of the AIFM so long as they remain subject to the requirements of Member State law.

Q19: Do you agree with the criteria above for determining whether or not a RemCo has to be set up? If not, please provide explanations and alternative criteria.

INREV Response:

INREV believes that the criteria are inherently too general to provide any real standards regarding when setting up a RemCo is required. While we support the use of principle-based guidance, where the principles are too general, the risk arises that authorities in different Member States will interpret and apply the requirement differently, which could easily lead to inconsistent standards and ultimately perhaps regulatory arbitrage as a result. We therefore believe that more clarity is necessary.

Q20: Do you agree that in assessing whether or not an AIFM is significant, consideration should be given to the cumulative presence of a significant size, internal organisation and nature, scope and complexity of the AIFM's activities? If not, please provide explanations and alternative criteria.

INREV Response:

We agree, but as noted in our response to Question 19, would welcome more specific guidance on how to determine whether an AIFMD is significant in practice. Sufficient clarity is important so that the criteria are applied in a consistent manner by the Member States in order to avoid regulatory arbitrage.

Q22: Do you see merits in adding further examples of AIFMs which should not be required to set up a RemCo? If yes, please provide details on these additional examples.

INREV Response:

INREV believes that it would be helpful to state that AIFMs that are part of a group that have a RemCo at the group level which performs the functions envisaged by the guidelines should not have to set up a RemCo at the AIFM level. Such AIFMs might be considered significant in terms of the size, internal organisation and nature, scope and complexity of their activities; however, we believe that a RemCo at the group level that fulfils the same role should be sufficient to ensure the application of sound remuneration principles to the AIFM.

Q23: Do you agree with the principles relating to the composition of the RemCo? Please provide quantitative data on the costs and benefits that the proposed principles on the composition of the RemCo would imply.

INREV Response:

While the principles are reasonable for AIFMs that have supervisory boards with non-executive members, we would point out that this is often not the case for non-listed real estate funds. Small non-listed real estate funds may not have such complicated supervisory board structures, as ESMA

has acknowledged in its discussion of the proportionality principle. In addition, AIFMs that are part of a group may not have supervisory boards themselves, as the supervisory board could be at the group level. In AIFMs that do have a supervisory board, the non-executive members are often shareholder representatives and so, while independent of the fund management, may not be independent third parties in a legal sense.

Q24: Do you see any need for setting out additional rules on the composition of the RemCo?

INREV Response:

We do not believe that additional rules are necessary in this regard.

Q25: Do you agree with the role for the AIFM's RemCo outlined above? If not, please provide explanations.

INREV Response:

The role as outlined seems reasonable for AIFMs that are required to have a RemCo under the guidelines.

Q26: Do you agree with the principles above on the process and reporting lines to be followed by the RemCo? If not, please provide explanations.

INREV Response:

The principles outlined seem reasonable for AIFMs that are required to have a RemCo under the guidelines.

Q27: Do you consider that the AIFM's RemCo should provide adequate information about the activities performed not only to the AIFM's shareholders' meeting, but also to the AIFs' shareholders' meetings? When providing your answer, please also provide quantitative details on the additional costs involved by such requirement.

INREV Response:

We do not believe that the RemCo should also have to provide information about its activities to the AIF's shareholders' meetings. We believe that the disclosure requirements of Article 22 of the AIFM Directive should be sufficient in this regard and there is no need to go beyond the annual reporting requirement contained in Article 22.

Q28: Do you agree with the above criteria on the remuneration of the control functions? If not, please provide explanations.

INREV Response:

We are concerned that a strict reading of the criteria on remuneration of the control functions could result in prohibiting their participation in employee stock ownership plans and general profit sharing plans. We believe that the ability of persons in control functions to participate in such plans should be explicitly permitted.

IX. General requirements on risk alignment

Q30: Do you agree with the principles related to the treatment of discretionary pension benefits? If not, please provide explanations.

INREV Response:

We agree in general with the principles related to the treatment of discretionary pension benefits, but would raise two issues. The first is that we believe that the lock-up restrictions for pensions should not be more restrictive than those related to other remuneration, and we would encourage ESMA to ensure the lock-up restrictions are consistent across all types of remuneration.

Secondly, we believe that in some circumstances, there should be exceptions to fixed periods of delayed vesting of pension benefits. For example, when a closed-end fund winds up and fund proceeds are distributed among the fund investors sooner than five year after a staff member's retirement or termination of employment, discretionary pension benefits vested to the staff member should no longer be subject to retention. This exception is recognised in paragraph 155 related to the pay-out process for non-deferred and deferred remuneration, but should be recognised as an exception in paragraph 104 related to vesting and pay-out of discretionary pension benefits as well.

Q32: Do you consider that the above guidance is sufficiently broad to cover any kind of hedging strategies that may be pursued by a member of the staff of an AIFM? If not, please provide details on how the scope of the guidance should be enlarged.

INREV Response:

We consider the guidance provided to be sufficiently broad to cover the possible hedging strategies that may be pursued.

X. Specific requirements on risk alignment

Q34: Do you consider these common requirements for the risk alignment process appropriate? If not, please provide explanations and alternative requirements.

INREV Response:

INREV considers the common requirements for the risk alignment process to be appropriate.

Q35: Do you agree with the proposed criteria on risk measurement? If not, please provide explanations and alternative criteria.

INREV Response:

We agree with the proposed criteria on risk measurement.

Q36: Do you agree that in order to take into account all material risks AIFMs should also take into account the risks arising from the additional management of UCITS and from the services provided under Article 6(4) of the AIFMD?

INREV Response:

We agree that risks arising from the additional management of UCITS and from services provided under Article 6(4) of the AIFMD should be taken into account by AIFMs.

Q37: Do you agree with the proposed guidance for the financial and non-financial criteria to be taken into account when assessing individual performance? If not, please provide explanations and alternative guidance.

INREV Response:

We agree with the proposed guidance for financial and non-financial criteria to be taken into account when assessing individual performance.

Q38: Do you agree with the proposal to distinguish between absolute and relative performance measures on one side and between internal and external performance measures on the other? If not, please provide explanations.

INREV Response:

We agree with the proposal to distinguish between absolute and relative performance measures on one side and between internal and external performance measures on the other.

Q39: Do you agree with the requirement set out above to document the policy for the award process and ensure that records of the determination of the overall variable remuneration pool are maintained? If not, please provide explanations and an alternative procedure.

INREV Response:

We agree with the documentation and record keeping requirements. We would like to point out, however, that the timeframe for record keeping obligations for the determination of the overall variable remuneration should be aligned with other record keeping obligations of the relevant country.

Q40: Do you agree with the proposal according to which AIFMs should use both quantitative and qualitative measure for the ex-ante risk adjustment? If not, please provide explanations and an alternative proposal.

INREV Response:
We agree with the proposal.

Q41: Do you agree with the guidance on the different components to be considered in relation with the deferral schedule for the variable remuneration? If not, please provide explanations and alternative guidance.

INREV Response:
We agree with the guidance on different components to be considered in relation with the deferral schedule for the variable remuneration. In particular, we welcome the acknowledgement in paragraph 155 that if the life cycle of the AIF is shorter than three to five years, the minimum deferral period may also be shorter.

Q42: Do you agree with the types of instruments composing the variable remuneration which have been identified by ESMA? If not, please provide explanations.

INREV Response:
We agree with the types of instruments identified by ESMA.

Q43: Do you consider that additional safeguards should be introduced in these Guidelines in order to ensure that the payment of the Identified Staff with instruments does not entail/facilitate any excessive risk-taking by the relevant staff in order to make short-term gains via the instruments received? If yes, please provide details.

INREV Response:
We believe that the safeguards proposed by ESMA are sufficient to ensure that the payments of the Identified Staff with instruments does not entail or facilitate any excessive risk-taking.

Q44: Do you agree with the proposed guidance for the retention policy relating to the instruments being a consistent part of the variable remuneration? If not, please provide explanations and alternative guidance.

INREV Response:
We agree with the proposed guidance for the retention policy.

Q45: Do you agree with the proposed guidance for the ex-post risk adjustments to be followed by AIFMs? If not, please provide explanations and alternative guidance.

INREV Response:

We support the criteria suggested by ESMA in determining when 'malus' provisions should apply to deferred remuneration, and support the view that, in order to provide certainty to AIFM staff, the ex-post risk adjustment provisions should apply only in very limited circumstances.

We would also welcome clarification from ESMA that, where government measures including tax charges have arisen that significantly affect fund performance, such amounts would be excluded from malus and ex-post risk adjustment requirements.

Q46: Do you agree with the analysis on certain remuneration structures which comply with the criteria set out above? If not, please provide explanations.

INREV Response:

INREV agrees that the risk alignment requirements in relation with variable remuneration may be met where both 192 a) and 192 b) are complied with. However, we believe that an AIF complying with either of these subparagraphs, but not necessarily both, may also meet the risk alignment requirements in relation with variable remuneration. Therefore, we would urge ESMA to change “and” at the end of sub-paragraph 192 a) to “or”.

We would also welcome further explanation regarding the intended application of the analysis on certain remuneration structures that comply with the criteria set out in paragraphs 191 and 192.

We would also urge ESMA to confirm our understanding of paragraph 192 that meeting these criteria is not the only means by which an AIFM can comply with the risk alignment requirements in relation with variable remuneration. For example, real estate investment funds can be very long-term closed-end structures or open-end structures and often have an income component that forms a significant part of the expected return to investors. The criteria referenced in paragraph 192 are not logical for such structures. We believe that remuneration structures which take account of the AIFM having met the income targets agreed with investors over a period of time without eroding capital values and which are subject to clawback provisions, for example, should also be considered to meet the risk alignment requirements in relation with variable remuneration.

More fundamentally, however, INREV is concerned that the ESMA guidance regarding compliance of certain remuneration structures with the requirements on the risk alignment of variable remuneration, award and pay-out process inappropriately transfers the commonly accepted concepts applicable to performance fees for the AIFM with remuneration of the AIFM's Identified Staff. While the guidance may be appropriate for the payment of performance fees to the AIFM itself, it is not clear how the risk alignment would be furthered by reducing variable remuneration of Identified Staff who have responsibly furthered the investors' interests and, for example, who may have even succeeded in limiting losses incurred by the AIF in a significantly down market.

Q47: Do you consider that there is a need for submitting to an equivalent/similar treatment any other form of remuneration? If yes, please provide details of the remuneration structure(s) and of the specific treatment that you consider appropriate.

INREV Response:

We believe that it is not necessary to submit any other forms of remuneration to equivalent/similar treatment.

XI. Disclosure

Q49: Do you consider appropriate to require AIFMs to apply the same level of internal disclosure of remuneration as they apply to their external disclosure? Please state the reasons of your answer.

INREV Response:

We consider it appropriate to require AIFMs to apply the same level of internal disclosure of remuneration as they apply to their external disclosure.