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ESMA
European Securities and
Market Authority
103 Rue de Grenelle
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Reply to ESMA's guidelines on sound remuneration policies under the AIFMD

Assogestioni is grateful for the opportunity to comment on ESMA Guidelines on sound remuneration practices.

We welcome that ESMA seeks to develop the guidelines on the basis of the structure used in the CEBS Guidelines with due adaptations for the specificities of the asset management sector.

We also appreciate the purpose of using practical examples, in order to simplify the comprehension of the text, given the broad scope of the directive (in terms of jurisdictions and categories of vehicles), and the consequent difficulty to apply general rules to the specific cases.

Before answering specific questions, we would like to provide you with a few general comments.

First, in relation to the scope of the Guidelines, we noticed a difference between the directive and ESMA Guidelines. While the directive (article 13 and Annex II) only refers to remunerations of the 'Identified staff', Guidelines provide that "the general requirements on risk alignment should apply to AIFMs and their staff as a whole". In our opinion, given that the directive does not address the remuneration of the entire staff, ESMA Guidelines should be limited to the remuneration of those employees to whom the directive refers.

Secondly, we deem important to clarify how AIFMs have to apply the Guidelines in a group context. In this regard, while the Guidelines clearly state that when the AIFM belongs to banking, insurance or financial groups "the application of these remuneration principles [...] should be considered equivalent to the respect by such a group of the principles regarding remuneration applicable to the group", there is not a similar provision for the case in which the AIFM itself is the holding company of a group. In this case, it is not clear if the principle set out in the AIFMD shall be applied by AIFMs at group, parent company and subsidiary levels, including those established in offshore financial centers.



Furthermore, we consider the need for a specification on how the proportionality principle operates from a practical point of view, in particular for those AIFMs which, although their small size, cannot neutralize any of the requirements of the Guidelines. For example, in relation to the paragraph “fully flexible policy on variable remuneration”, in our opinion ESMA should take into account those vehicles which, because of their small size, deliberately keep the fixed part of the remuneration at a relatively low level with the purpose of rewarding the staff mainly in case of good performances. In such a case the staff bears the risk of a possible failure, and the variable remuneration is fully flexible.

Lastly, we have some concerns about the fact that the timing of entry into force of the directive (22 July 2013) could create practical problems in relation to the implementation of these Guidelines from a contractual point of view, given that funds, in general, define their remuneration policy on an annual basis (January-December). July 2013, means that funds have to comply with the new rules also in relation to the remuneration of 2013. It would be reasonable to allow an implementation of the Guidelines starting from the “salary year” following the entry into force of the guidelines. This will also leave more time for the AIFM to modify employment agreements.

Please find attached our detailed responses to the questions in the paper.

We hope that our observations will be of help and remain at your disposal for any clarification on the comments made in this response.

Yours sincerely

The Director General



Answers to questions raised in the Consultation Paper

1. 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.

We generally appreciate the purpose of developing the ESMA Guidelines on the basis of the structure used in the CEBS Guidelines. It will simplify the compliance with the new rules for those AIFMs which, belonging to a group, are obliged to apply the set of rules of the group as a whole. Therefore, we also see merit in following the same approach with regard to the “MiFID remuneration guidelines” that ESMA is developing in order to enhance the investors protection in the investment services sector. The consistency between the rules is necessary given that AIFMs are allowed to provide portfolio management and investment advice services.

Furthermore, consideration should be given to the fact that in the future many AIFMs will also be holding licenses as UCITS Management Companies and consequently will also be required to apply the rules on remuneration for UCITS. It is therefore crucial to ensure consistency between the different guidelines while leaving enough room to take the specificities of the different business models into account.

2. SCOPE OF THE GUIDELINES

Q2: Do you agree with the above considerations on the scope of the Guidelines? In particular, do you agree with the clarifications on what should be considered as a remuneration falling into scope and what should be considered an ancillary payment or benefit falling outside the scope of the Guidelines? If not, please state the reasons for your answer and also suggest an alternative approach.

Yes, we generally agree with the considerations on the scope of the Guidelines.

We would appreciate, as in relation to the carried interest for the private equity sector, that ESMA give some clarification on the management and performance fees, typically used in the open-ended funds. In this regard, it should be clearly stated (as also underlined in the answer to question 6) that the fees accrued to the AIFM as a whole should not be considered as remuneration paid to the staff members.

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.



No, we do not see merit in setting a quantitative or qualitative threshold, because, in our opinion, the entire portion of the payment made by the AIF to the categories of staff as a return for the investment made into the AIF should not be considered remuneration and therefore should not fall into the scope of the Guidelines.

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?

Yes, we agree.

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)?

We do not consider that the AIFMD remuneration principles should also apply to payments made to any entity to whom an activity has been delegated by the AIFM.

In this regard we consider that the directive (article 13) only refers to the remuneration paid by the AIFM or the AIF to the benefit of certain categories of staff of the AIFM, and that there is no room to extend the scope also to the delegated entities.

Moreover It is important to note, that the entity receiving the delegation of portfolio management will be obliged to apply the “MiFID remuneration guidelines” and not the AIFMD principles on remuneration.

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)?

No, we do not agree. In our opinion, ESMA should make a clear distinction between the part of profits accrued to the AIFM as a whole (to the legal entity) and the part of profits that are paid to staff members as remuneration.

In particular, for those vehicles in which the management is partner of the AIFM it should be clearly stated that the part of profits accrued to the staff member in relation to the participation to the company (dividends, incomes) is not considered remuneration.



3. WHICH ENTITIES AND WHICH STAFF TO BE IDENTIFIED

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.

We generally agree with the categories of staff above which should be subject to the remuneration principles set out in the Guidelines.

However in our opinion, the first category of staff (members of the governing body), could be limited to the “executive members”, according to CEBS Guidelines.

Furthermore, inside the category of executive directors, a distinction could be made between those executives who have a material impact on the AIFM risk profile and those who don't. Some members of the governing body, even if they are delegated with specific functions, do not raise big issues from a risk perspective because, for example, they are not involved in the strategic decisions of the AIFM or in trading activities.

Similarly, the category of “other risk takers” should not, in our opinion, include categories of staff, such as the sales persons, who do not have a material impact on the risk profile of the AIFM. In this regard, we ask ESMA to modify the examples of “other risk takers” provided in paragraph 31, and to give more criteria in order to assess whether or not to include some categories.

Q8: Please provide qualitative and quantitative data on the costs and benefits that the rules proposed in this Section IV (Scope of the Guidelines) would imply.

No comment.

4. 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.

As we indicate in the general remarks, we see merit in better specifying how the proportionality principle operates from a practical point of view, in particular for those AIFMs which, although their small size, cannot neutralize any of the requirements of the Guidelines. Clarification could be given for example on the application of the principle on “fully flexible policy on variable remuneration” which seems too strict for those AIFMs that reward the staff mainly in case of positive performance, keeping the fixed portion of the remuneration relatively low, so that the overall remuneration could significantly drop in some circumstances.



In this regard, we consider that a staff member, even if included in the Identified staff, should not be required to apply the rules on the deferred schemes, if the variable remuneration is low to such an extent that it can be considered inopportune to defer and to vest it on a pro rata basis.

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.

Yes, we agree.

Q11: Please provide qualitative and quantitative data on the costs and benefits that the rules proposed in this Section V (Proportionality principle) would imply.

No comment.

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?

Yes, we agree.

5. AIFMs BEING PART OF A GROUP

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.

We agree that there is a need for consistency in the potential application of different requirements for AIFMs which belong to a group. However, we are concerned that the proposed Guidelines will not result in a consistent approach, given the different approaches to proportionality and neutralization.

In this regard, we would appreciate some clarifications on the application of the guidelines to the remuneration of the staff of non-EU branches of EU AIFMs.

As we explain in the general remarks we also see merit in clarifying if the principle set out in the AIFMD and in the present Guidelines shall be applied by AIFMs at group, parent company and subsidiary levels, including those established in offshore financial centers.



Q14: Please provide qualitative and quantitative data on the costs and benefits that the rules proposed in this Section VI (AIFMs being part of a group) would imply.

No comment.

6. FINANCIAL SITUATION OF THE AIFM

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.

We generally agree with the purpose of preserving the financial situation of the AIFM. However, we noticed that the goal of preserving the soundness of the AIFM's financial situation is already achieved by the capital adequacy requirements for the AIFM under the AIFMD. We also deem appropriate having a remuneration policy that links the individual remuneration to the performance at AIF level and not at AIFM level so that the remuneration paid to personnel relates to their performance in services towards clients.

Q16: Please provide qualitative and quantitative data on the costs and benefits that the rules proposed in this Section VII (Financial situation of the AIFM) would imply.

No comment.

7. 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.

Yes, we agree.

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.

Yes, we generally agree. However, we ask ESMA explanations for those AIFMs which are not required to have a remuneration committee. In these cases, for example, according to paragraph 40, the remuneration of the senior staff responsible for heading the control functions should be overseen by the supervisory function. We ask ESMA if this provision applies for all Rem Co functions or not. In other words, we ask ESMA to clarify who, in the absence of a Rem Co should perform the tasks that in other AIFMs are performed by the Rem Co.



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.

Yes, we agree.

Q21: Please provide quantitative data on the costs and benefits that the proposed criteria to determine whether a RemCo has to be set up would imply.

No comment.

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.

No, we do not see merit in this clarification.

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.

We generally agree with the rules on the composition of the RemCo. However, in relation to the mandatory presence of members with sufficient expertise and professional experience concerning risk management and control activities in the committee, we deem reasonable to apply the same provision of CEBS, which requires that only one member have sufficient expertise and professional experience concerning risk management and control activities, or, alternatively, that the presence of members with specific skills could be replaced by the support.

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

No, we do not see merit in additional rules.

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

Yes, we agree.

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.

Yes, we agree.

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.

No, we do not.

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

Yes, we agree.

Q29: Please provide qualitative and quantitative data on the costs and benefits that the rules proposed in this Section VIII (Governance of remuneration) would imply.

No comment.

8. 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.

Yes, we agree.

Q31: Do you consider appropriate to add any further guidance on the payments related to the early termination of a contract? If yes, please provide suggestions.

No, we do not.

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.

Yes, we do.

Q33: Please provide qualitative and quantitative data on the costs and benefits that the rules proposed in this Section IX (General requirements on risk alignment) would imply.

No comment.

9. 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.

We generally agree with the specific requirements on risk alignment. However, we consider that not all errors should be taken into account in the ex post risk adjustment, but only those caused by gross negligence or criminal intent on the part of the relevant person. A direct linkage of errors to variable remuneration might encourage non-reporting of errors.

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

Yes, we agree.

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?

Yes, we agree that the AIFM should take into account all material risks arising from the additional management of UCITS. However, we ask ESMA to clarify that the part of the remuneration derived from the management of the UCITS should not be treated as the part derived from the management of the AIF (in terms of deferral schemes, 50% in instruments...). It would be an inopportune anticipation of the enter in to force of the set of rules on remuneration policies for UCITS.

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.

Yes, we agree.

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.

Yes, we agree.

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.

Yes, we agree.

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.



In this regard we noticed that measurement performance fees collected by AIFMs is not risk adjusted because it is based on realised performance without consideration of the risk involved.

In addition, the internal quantitative risk management measures are already taken ex-ante based on the risk budget for each AIF that the AIFM Senior management is required to determine due to the fact that it has the responsibility for the investment strategies. Therefore, there is already a risk constraints environment where the funds manager has to comply due to the governance of the company. So, It seems not appropriate to use a quantitative ex-ante risk adjustment if the portfolio manager has to comply with the constraints of a risk budget assigned by the Senior management.

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.

We generally agree with the guidance on the different components to be considered in relation with the deferral schedule.

However, we have a doubt which arises from the reading of Annex I. It explains, under the concept “accrual period”, that “the right to receive the variable remuneration is earned (‘awarded’) at the end of the period or during the period”; under the concept “vesting point” it explains that “an amount of remuneration vests when the staff member receives payment and becomes the legal owner of the remuneration.” We ask ESMA to clarify what happens if a staff member leaves the AIFM after the end of the award process but before the vesting point. In this case, it is not clear if the staff member keeps the right to receive the variable part of the remuneration.

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

We agree with the types of instruments composing the variable remuneration which have been identified by ESMA. We also appreciate that ESMA, taking into account the legal difficulties of providing part of the variable remuneration in part of AIF, included the reference concerning the use of “alternative instruments” that reflect the AIF’s value and have the same intended effect as share-linked instruments. We, ask therefore ESMA to provide the industry with some practical examples of instruments that could be used by AIFMs for the purpose.

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.



No, we do not.

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.

Yes, we agree.

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.

Yes, we agree.

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

Yes, we agree.

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.

No, we do not.

Q48: Please provide qualitative and quantitative data on the costs and benefits that the rules proposed in this Section X (Specific requirements on risk alignment) would imply.

No comment.

10. 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.

In relation to the requirements on disclosure, we have some concerns about the application of article 22 of the directive to small AIFMs. In particular, we consider that in some cases the requirement to provide information on “the aggregate amount of remuneration broken down by senior management and members of staff of the AIFM whose action have a material impact on the risk profile of the AIF” may conflict with the confidentiality and applicable data protection legislation (to whom Guidelines refer in paragraph 152), given that the number of staff of the AIFM makes the individual remuneration easily identifiable. This being said, we consider reasonable to apply, also in these cases, the rule that paragraph 153 provides for



the information required under paragraph 8 of the Recommendation that small or non-complex AIFMs/AIFs “are not expected to provide all the information...”

Along this line CEBS Guidelines put this kind of information at the same level of the other information (according to annex II, Part 2 point 15, of the CRD directive) and consequently allow small or non-complex institutions to provide only qualitative information and very basic quantitative information also in relation to this point.

Q50: Please provide qualitative and quantitative data on the costs and benefits that the rules proposed in this Section XI (Disclosure) would imply.

No comment.