AFG/AMAFI/ASF/FBF response to the ESMA consultation paper on the amended 2013 Guidelines on certain aspects of the MiFID II remuneration requirements

The undersigned associations welcome the opportunity to respond to this consultation paper on ESMA's Guidelines on certain aspects of the MiFID II remuneration requirements. Before answering to the questions raised in the consultation, we would like to highlight some specific comments.

Preliminary remarks (please also refer to answer to question 13 – cost/benefit analysis)

At least four European Directives already regulate in detail remunerations of high-level staff members, senior management and risks takers in the European Union's ("EU" or "EU-27") financial sector, notably with European Directives CRD4, UCITS, AIFMD, and IFD, which cover almost all topics addressed in the draft ESMA's Guidelines.

Extending this scope beyond, to people who are directly or indirectly involved in the distribution of financial instruments (several tens of thousands of people might be concerned in many international banking groups) would have many drawbacks.

In our opinion, this scope is too large, only senior management, control functions, any employee receiving total remuneration that falls into the remuneration bracket of senior management[1] and key function holders and/or staff whose professional activities have a material impact on the firm's risk profile, should be concerned by these Guidelines, as provided for in ESMA Guidelines 2016/575[2], in ESMA Guidelines 2013/232[3] and in EBA Guidelines 2015/22[4], on sound remuneration policies.

In addition, the consultation on Guidelines on sound remuneration policies [in investment firms] under Directive (EU) 2019/2034 (EBA/CP/2020/26) is now closed and the final draft of these Guidelines is expected this month of October 2021.

Moreover, in a practical way, there is a risk of deeply disrupting the EU's dynamic by impacting a huge number of transactions on financial instruments which would be put under review of compliance teams.

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[1] and whose professional activities have a material impact on the firm's risk profile

[2] ESMA Guidelines 2016/575 on sound remuneration policies under the UCITS directive

[3] ESMA Guidelines 2013/232[3] on sound remuneration policies under the AIFMD

[4] EBA Guidelines 2015/22[4] on sound remuneration policies under Articles 74(3) and 75(2) of Directive 2013/36/EU and disclosures under Article 450 of Regulation (EU) no 575/2013 (117)

For instance, paragraph 19 suggests that the investment firms should use information-gathering tools to assess the investment returns received by clients over various timelines and paragraph 26 provides that firms should verify that "relevant persons" should not promote products with high short-term returns but presenting many risks in the long term in the detriment of clients' interest.

Such monitoring would be extremely difficult to implement in respect of the large number of staff members and financial transactions potentially concerned.

Also, it would be very difficult to assess whether a transaction might have been completed to the detriment of a client.

For instance, for all transactions performed by a client during a year, some might have been advised by the client's advisor whereas others might have been completed by the client himself. A same transaction might be profitable for the client in the short term, unprofitable in the middle term and ultimately highly profitable in the long term.

Paragraph 26 could also be very hard to implement, suggesting that firms should consider ex-post adjustment criteria of the variable remuneration of staff members who would have advised a client to invest in products with short returns but presenting more risks in the long term.

Indeed, an investment firm will not be able to wait and see what the long-term performance of a product has been to pay variable compensation to a financial advisor (ex-post adjustment mechanisms cannot be triggered, for instance, ten years after the payment of the variable compensation).

The various points highlighted above very much revolve around the competitiveness of EU market actors and the attractiveness of the EU regulatory framework which are core concerns in a post-Brexit environment. For the EU, Brexit means that it loses its main financial centre. The EU therefore has a sovereignty issue at stake in being able to rebuild within its borders the capacity to ensure the proper financing of its economy and to meet the expectations of its savers.

In an environment that is becoming highly competitive with the United Kingdom, it is therefore particularly essential to ensure that EU financial players are able to attract the highly qualified staff needed to provide the quality of service that our public institutions, companies and investors expect.

Faced with this challenge, remuneration policies will be a central element in this capacity to attract. At a time when various elements suggest that the rules applicable in this area in the United Kingdom are going to diverge fairly rapidly from those implemented in the EU, it is absolutely essential that ESMA takes into account this risk, which is one of the necessary conditions for EU players to play effectively their role. It is essential that the EU Authorities raise not unjustifiably the level of constraint on EU actors and monitor closely the measures that may be taken by the British authorities in this area.

Q1: Do you agree that career progression is likely to have an impact on fixed remuneration and that, consequently, firms should define appropriate criteria to align the interests of the relevant persons or the firms and that of the clients in respect of all types of remuneration (not just in respect of variable remuneration)? Please also state the reasons for your answer.

Career progression has of course an impact on fixed remuneration, but achieving commercial objectives relates to (generally annual) performance measurement and is distinct from the holistic considerations

which determine career progression within firms, as already provided for in the EU's regulatory requirements in this respect.

Indeed, fixed remunerations are defined in the framework of a comprehensive remuneration policy in each firm and depend on experience or seniority, expertise, level of responsibility, capacity to manage staff, etc.

This complies in particular with EBA Guidelines on sound remuneration policies[5] which prescribe that remuneration is fixed where the conditions for its award and its amount:

- *are based on predetermined criteria*,
- are non-discretionary reflecting the level of professional experience and seniority of staff,
- are transparent with respect to the individual amount awarded to the individual staff member,
- are permanent (ie. maintained over a period tied to the specific role and organisational responsibilities),
- *are non-revocable* (only changed via collective bargaining or following renegotiation in line with national criteria on wage setting),
- *cannot be reduced, suspended or cancelled*,
- do not provide incentives for risk assumption,
- do not depend on performance.

Considering these requirements set out by EBA Guidelines for setting fixed remuneration of staff, senior management and members of the management body, we believe there is no need "to define criteria to align the interests of the relevant persons and firms on those of the clients" (there is no risk of non-alignment in any way).

Q2: Do you agree with the suggested approach on career progression? Please also state the reasons for your answer.

We consider it might be difficult to justify and to document that any staff member's promotion is based on acceptable reasons (greater expertise or enlargement of responsibilities for instance) instead of non-appropriate reasons within the meaning of these Guidelines.

Implementing this supplementary work would be a "first" in -and a departure from- the existing EU regulations in the field of remuneration, and would be extremely burdensome for HR departments and Compliance departments, with significant operational risks attached (i.e. burden of proof), significantly weighing on EU firms' international competitiveness.

Q3: Do you agree that, to align the interests of relevant persons or the firms with the interests of clients on a long-term basis, firms should consider the possibility to adjust remuneration previously awarded through the use of ex-post adjustment criteria in their remuneration policies and practices (such as clawbacks and malus)? Please also state the reasons for your answer.

[5] EBA Guidelines (EBE/GL/2015/22)

And Q4: Do you agree with the suggested approach on ex-post adjustment criteria? Please also state the reasons for your answer.

Such adjustment mechanisms are already required for risks takers under several EU directives (CRD, UCITS, AIFMD, soon under IFD as well). Adding another layer through these Guidelines would make their implementation difficult for financial market actors.

For such staff members, malus and claw-backs are a relevant part of remuneration schemes.

But these mechanisms should not be applied to a larger number of staff members. Only people with high responsibilities (i.e. risk takers, senior management or members of the management body), should be concerned.

For instance, when a high-level manager has been engaged in misconduct, all members of his teams should not be impacted by a malus or a remuneration claw-back.

That's why we disagree with the last two sentences of paragraph 27 stating that adjustment mechanisms should be applied, on a collective basis, to "persons whose responsibilities and roles include the areas where the relevant events crystallised provided that such persons have an impact, directly or indirectly, on the investment and ancillary services provided or on the corporate behaviour of the firm".

In our opinion, for the sake of fairness, such adjustment mechanisms should be applied exclusively to people who were personally involved in the misconduct.

Besides, in certain EU Member States, the ability to use claw-back mechanism is strictly restricted by national law. For this reason, paragraph 26 of the Guidelines should begin with the following section: "Without prejudice to the general principles of national labour law".

Additionally, it might be difficult to identify relevant events that must trigger adjustments mechanisms, as mentioned in paragraph 27, since these events will not be prudential ones but will consist in misconduct or failings towards clients. Moreover, paragraph 27 mentions that these events should not be limited to those giving rise to regulatory action, fines or sanctions.

Thus, we can imagine that staff members concerned by adjustment mechanisms, especially by claw-backs will be prompt to contest these decisions in many cases, including before jurisdictions.

In our opinion, investment firms should thus use these mechanisms very carefully and only for high-level staff members and decision-makers.

The principle of proportionality should also be applied when referring to deferral of variable compensation. Indeed, under other regulations concerning compensation, institutions can disapply deferrals to variable compensation which is considered non-significant. The ESMA Guidelines could potentially be aligned with this principle and exclude low level variable compensation from the scope of deferrals.

Q5: Do you agree with the added focus and suggested approach on the remuneration policies and practices for control functions and members of the management body or senior management? Please also state the reasons for your answer.

We fully support that the remuneration of the control functions should be independent, in particular, of quantitative commercial performance of the persons they have the responsibility to control.

More specifically, we consider such approach with regards to the remuneration of control functions is already in place within institutions which comply with requirements under CRD (paragraphs 195 to 197 of the CRD Remuneration Guidelines), AIFMD (AIFMD Guidelines on sound remuneration policies 2013/232 in paragraphs 70 to 76), UCITS (UCITS Guidelines on sound remuneration policies 2016/575 in paragraphs 72 to 78) and IFD (notably, article 30-1-h and 30-1-i of directive (EU) 2019-2034, to be supplemented soon by more detailed Guidelines, the publication of which is imminent[6]).

Besides, considering the examples of good and poor practices highlighted in paragraphs 37 and 38, we do not see any reference to the variable remuneration of the control functions as per paragraph 35. Therefore, we do not see the benefit of the added focus on remuneration policies and practices for control functions.

Q6: Do you believe that guideline 1 should be further amended and/or supplemented? Please also state the reasons for your answer.

We are concerned by the wording used in paragraph 38 (a) as it mixes (i) a political agenda i.e. current debate on inducement and whether a ban should be contemplated with (ii) a poor practice. These two issues are completely different and should not be mixed up.

Paragraph 38 (a) should clearly state why it is not a good practice and that if it does not go against the interest of the client then it should not be considered as a poor practice. As such, we believe paragraph 38 (a) should be redrafted as followed:

> *Example of poor practices:*
> *A firm has started offering advisers specific additional remuneration to encourage clients to apply for new fund products in which the firm has a specific interest. This often involves the relevant person having to suggest that their clients sell products that they would otherwise recommend they retain so they can invest in these new products.* ***This could be considered poor practice, unless such recommendation goes in the interest of the clients.***

Q7: Do you agree that the remuneration policy should not only be reviewed on a periodic basis but also upon the occurrence of certain ad hoc events as described in new general guideline 2? Please also state the reasons for your answer.

Generally speaking, we are in line with the fact that remuneration policy should not only be reviewed on a periodic basis but also upon the occurrence of certain ad hoc events.

[6] - expected in October 2021

We believe these events should be structural and significant such as for instance the purchase of a competitor with a different remuneration policy or the purchase of a new activity, which would require the identification of material risk takers.
Besides, we consider it is important for the management body to retain enough prerogatives to act as a responsible body, and notably to ensure stability for the remuneration policy, as and when may be needed.

Q8: Do you agree that the persons involved in the design, monitoring and review of the remuneration policies and practices should have access to all relevant documents and information to understand the background to and decisions that led to such remuneration policies and procedures? Please also state the reasons for your answer.

We fully disagree with paragraph 41 which states that:

> […] *the compliance function should have access to all relevant documents and information regarding the remuneration of relevant persons, including regarding the remuneration of members of the management body and senior management.*

The prerogatives of the compliance function are to evaluate behaviours and to ensure that procedures as well as rules upfront the determination of variable remuneration and if necessary, to review remuneration mechanisms in light of the clients' interests, but not the amount itself.

The compliance function should not have access to individual remuneration data as it is not part of its prerogatives. Such confidential data should only be accessible by human resources and members of the management body or senior management.

Furthermore, corporate governance rules give to the Board of Directors the responsibility to supervise individual remunerations of the management body and senior management.

All in all, one should not aim at creating a management system where the compliance function would intervene alongside the human resources and the management body/senior management.

We therefore do not see any need of such new regulation given the existing comprehensive framework already mentioned (CRD, AIFMD, UCITS, IFD). Further, article 27(3) of MIFID II Delegated Regulation, which is referred to in paragraph 41, does not mention nor entail the need to access individual remuneration of staff and management.

Q9: Do you believe that guideline 2 should be further amended and/or supplemented? Please also state the reasons for your answer.

As highlighted in our answer to the previous question, we believe paragraph 41 should be redrafted and we propose the following:

> *In order to fulfil its advisory role regarding the firm's remuneration policy as per Article 27(3) of the MiFID II Delegated Regulation, the compliance function should have access to all relevant documents and information regarding the remuneration* ***policy and can take part to the discussions for the elaboration of remuneration policies and practices****.* ~~*of relevant persons,*~~

~~*including regarding the remuneration of members of the management body and senior management.*~~

Q10: Do you agree with the amendments made to guideline 3? Please also state the reasons for your answer.

And Q11: Do you believe that guideline 3 should be further amended and/or supplemented? Please also state the reasons for your answer.

There are many distribution models, this diversity should be preserved. The reference to third party distributors should be suppressed from these Guidelines on remuneration policy as they are already covered via the Guidelines on inducement.
Third-party distributors are not staff members and are therefore not covered by the internal remuneration policies. These distributors might receive inducements, but these are subject to specific Guidelines.
Inducements and remuneration of staff members are two different things, which should not be mixed together in these Guidelines.

Rather than examples likely to restrict the competitiveness of asset managers by adding complexity, it seems clearer, more efficient and operational, to summarize the essentials with the idea of avoiding forms of circumvention of the rules in place. As an example, article 52(d) appears particularly complex, and could perhaps be dealt with more simply, by the reference to an anti-circumvention provision.

Q12: Do you agree with the deletion of Section V.III. of the 2013 guidelines? Please also state the reasons for your answer.

Yes, we do. For the sake of simplicity and efficiency of the body of EU rules.

Q13: Do you agree with the arguments set out in the cost-benefit analysis in Annex IV? Do you think that other items should be factored into the cost-benefit analysis and if so, for what reasons?

We have the quite important following remarks, which we would like to make regarding the cost-benefit analysis of this proposed update of the 2013 MIF Remuneration Guidelines.

1. Since 2013, new rules on remuneration have been introduced which give less uncovered space on these subjects. We believe essential for the new Guidelines to consider the regulatory developments that took place between 2013 and 2021.
   As numerous texts have been introduced to significantly strengthen the protection of investors and the framework for conflicts of interest, certain provisions are not necessary. In particular, the product governance resulting from MIFIDII has significantly reduced the risk of mis-selling and thus, has considerably strengthened -by other means than remuneration regulation- the protection of the clients' interest. Hence, we believe that the Guidelines can usefully seize the opportunity of this update, to remove many provisions that have become, actually, redundant.

2. The principle of proportionality, essential for all these subjects, should be more explicitly and frequently mentioned as applicable (e.g. when describing detailed control requirements in paragraphs 46 and 47 or when referring variable compensation in paragraphs 26, 29 and 37). We also note that the scope of application is changed, and the lesser applicability of these Guidelines to professional / institutional clients appears no longer mentioned.

3. By way of illustration, please find attached an appendix providing a correspondence between the articles from the Guidelines under consultation and the ESMA Guidelines on UCITS management companies' remuneration, knowing that similar provisions (with different numbering) apply to AIFMD management companies' remuneration. Similarly, an equivalent exercise on CRDV gives equally eloquent results in terms of the risk of redundancy or of involuntary divergence between EU texts. For the proper development of the Single market, it seems essential that the Guidelines under consultation intervene only as a specific and strictly necessary complement. It seems to us they should focus strictly on the *product / service-level* needed provisions (as may be the case), as *firm-level* frameworks are now defined and well-established for banks and management companies, and investment firms should be covered as from 2022, by their new own IFD requirements. Therefore, these Guidelines should to the least provide that such regulatory frameworks are deemed equivalent and applicable by subsidiarity, and thus prevent accumulation of different layers of regulation in the area of identified staff and senior management remuneration.

The AFG *federates the asset management industry for 60 years, serving investors and the economy. It is the collective voice of its members, the asset management companies, whether they are entrepreneurs or subsidiaries of banking or insurance groups, French or foreigners. In France, the asset management industry comprises 680 management companies, with €4355 billion under management and 85,000 jobs, including 26,000 jobs in management companies.*
The AFG commits to the growth of the asset management industry, brings out solutions that benefit all players in its ecosystem and makes the industry shine and develop in France, Europe and beyond, in the interests of all. The AFG is fully invested to the future.

Association française des marchés financiers i*s the trade organisation working at national, European and international levels to represent financial market participants in France. It acts on behalf of credit institutions, investment firms and trading and post-trade infrastructures, regardless of where they operate or where their clients or counterparties are located. AMAFI's members operate for their own account or for clients in different segments, particularly organised and over-the-counter markets for equities, fixed-income products and derivatives, including commodities. Nearly one-third of members are subsidiaries or branches of non-French institutions.*

The ASF (French Association of Financial Companies) *represents 280 members, finance companies, credit institutions or specialized banks, investment firms, payment institutions and electronic money institutions whose common feature is to offer financial services and specialized financing to companies and households. Their activities are all regulated and supervised by the Autorité de contrôle prudentiel et de résolution (ACPR) or the Autorité des marchés financiers (AMF).*

The French Banking Federation (FBF) *represents the interests of the banking industry in France. Its membership is composed of all credit institutions authorised as banks and doing business in France, i.e. more than 390 commercial, cooperative and mutual banks. FBF member banks have more than 38,000 permanent branches in France. They employ 370,000 people in France and around the world, and service 48 million customers.*

Annex 1: Summary correspondence between UCITS V remuneration Guidelines and Proposed MIFID Remuneration Guidelines

UCITS Remuneration Guidelines (ESMA 2016/575)	**Proposed Revised MIFID Remuneration Guidelines (ESMA 35-36-2324)**
40, 41, 43, 80, 83, 97, 107, 108, 109, 112, 113, 115, 153	16 -> 21 ; 23 ; 24 ; 33 ; 50
96	22 ;25
150->160	26->28
127->133	29
107->109 ; 150->160	30
170	31
14	32
72->78	34 ;35