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Association for Financial Markets in Europe

Consultation Response

2nd September 2011

European Banking Authority Consultation Papers on: Guidelines on the remuneration benchmarking exercise (CP46) and Guidelines on the remuneration data collection exercise regarding high earners (CP47)

The Association for Financial Markets in Europe (AFME) welcomes the opportunity to comment on the European Banking Authority's (EBA's) Consultation Paper 46, Guidelines on the remuneration benchmarking exercise (CP46 draft Guidelines) and Consultation Paper 47, Guidelines on remuneration data collection exercise regarding high earners. (DP47 draft Guidelines).

AFME represents a broad array of European and global participants in the wholesale financial markets, and its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. AFME was formed through the merger of the London Investment Banking Association and the European operations of the Securities Industry and Financial Markets Association. AFME is listed on the EU Register of Interest Representatives, registration number 65110063986-76.

We summarise below our high-level response to the consultation, which is followed by the specific points of detail we wish to draw to the EBA's attention.

Executive Summary

AFME recognises the need for the EU remuneration benchmarking exercise and supports the issuance of EBA guidelines, which will ensure that firms throughout the EU are required to provide data to their Home State competent authorities on a clear and consistent basis.

We would, however, ask the EBA to:

- re-confirm the confidentiality of individual firms' benchmarking data, both at the national and EU level, particularly in circumstances in which the identity of an individual firm could,

by reference to particular data or data sets, be ascertained from a Home State competent authority's aggregate data; and

- compare the results of the benchmarking exercise against data that is available at a global level, to seek to identify areas where there should be a more level international playing field.

In relation to our specific feedback on CP46 and CP47, we wish to make three key general comments and a number of specific points, which are set out in subsequent sections:

1. **Accounting dates:** draft recital (4) in the CP47 draft Guidelines states that "Given that the closing of the final accounts of firms takes place by the end of June, it would be convenient that the remittance dates for the transmission of the data described in these Guidelines are after that point in time." However, both article 4.1 of the CP46 draft Guidelines and article 5.1 of the CP47 draft Guidelines provide that the remittance date is "the end of June."

   Under the UK Companies Act 2006, listed companies are required to file accounts at Companies House within 6 months of their year-end: hence the EBA's proposal that data be collected in June each year, aligns appropriately with a listed company's end of year salary and award process.

   A number of global investment banks, however, have local entities that are incorporated as private companies: in the UK private companies have a 9 month filing deadline. Hence, a private company with a 31st December year-end, will have a 30th September filing deadline. We understand that firms would also need a minimum of 4 to 6 weeks post 30 September to collate data, particularly if the scope of data requested by the EBA is not consistent with the CRD3 disclosure requirements. Hence, given that firms have until 31st December 2011 to publish the annual remuneration disclosures required under CRD3 and given the same level of information should be required for, and consistent between, both the public disclosures and the benchmarking exercise, we would recommend that the remittance deadline be set at the end of December.

2. **Transitional arrangements:** we would also note that the transition year, in which 2010 data is to be submitted by "October 2011" - notwithstanding that the EBA's consultation closes on 2nd September - may also set a particularly unrealistic deadline for both firms and national supervisory authorities. As discussed above, we ask that the transitional

arrangements be coterminous with the deadline for public disclosure, towards which firms are working currently.

3. **Availability of data:** we are concerned that the EBA may be under an assumption that firms will be able to extract the information requested fairly easily from their statutory accounts. However, a global investment bank, headquartered outside the EEA, may not have a single consolidated European entity and would need to carry out a specific exercise to collate data across multiple entities. Hence, such firms would need to invest time and effort in responding to these requests.

4. **Reporting currency:** the currency used by firms in their statutory accounts will typically depend on where they are headquartered. We suggest that firms report to their Home State competent authority in their local currency; then the EBA could mandate the appropriate foreign exchange rate to be used by non-Eurozone competent authorities, thereby removing the complexity and uncertainty for firms.

5. **Relationship with existing disclosure requirements:** We note that some of the information requested is duplicative of information firms have already submitted to Home State competent authorities or information firms are required to provide through public disclosures: it would be helpful if EBA could, where possible, give consideration to streamlining multiple requests for data and reporting.

Consultation Paper: Draft EBA Guidelines No xxx/2011 on the remuneration benchmarking exercise (CP46) – specific points

- **Article 2:** we note that firms will be required to provide information, in Annex 1, "in relation to all their staff", thereby going beyond the CRD3 public disclosure requirements. We note that CRD3 indicates that the benchmarking exercise will be based on the criteria for disclosure established in point 15(f) of part 2 of Annex XII, in other words based on the information disclosed by institutions concerning "Identified Staff" only. We would note that it will be very difficult for large consolidated banking groups to provide such information on a bank-wide level, particularly in such a short time frame and we are of the firm opinion that the EBA Guidelines should limit the scope of data to that defined by the CRD3.

  Notwithstanding, we would welcome clarity on the definition of the staff to be included in Annex 1 & Annex 2, as Home State competent authorities typically include different employee groups within the scope of their requirements (for example, some supervisors consider contractors and consultants to be included). Clarification on the inclusion of non-executive directors, both within Annex 1 and Annex 2, would also be welcomed.

- **Recital 4:** we are concerned by the reference to "EU-wide numbers" as we believe that the benchmarking exercise should be consistent with the CRD3 remuneration provisions, which apply at an EEA consolidated group level (thereby including non-EEA subsidiaries). In particular, under point 15 of Part 2 of Annex XII of CRD3, EEA firms must publically disclose information on a consolidated (world-wide) group basis. Whilst we believe that this may be a drafting issue - Article 3 states that the information is be supplied on an "EU consolidated basis" - limiting the benchmarking operation to EU-wide numbers would increase the administrative burden for firms - who would have to isolate EU figures - and, more importantly, distort comparisons between Member States, as the results would be significantly impacted by the geographical organisation of each firm's activities and, in particular, the proportion of Identified staff located outside the EU. We would ask the EBA to re-review the

drafting of the CP46 draft Guideline to ensure that the references to scope are consistent with CRD3 (including consistent use of references to the EU and EEA).

- **Recital 5:** we believe that 'identified staff' should be defined by reference to a firm's Home State competent authority's provisions.

- **Article 4.1**: as discussed above, we do not believe that the end of June is an appropriate remittance date given that private companies may not yet have filed statutory accounts.

- **Article 4.2**: the reference to "remuneration awarded for performance during the year preceding the year of remittance" appears to exclude remuneration paid during the performance year (e.g. salaries): we assume this is not intended.

- **Article 5:** we believe that a specific date should be stated (i.e. 31st October 2011) but would reiterate that, as discussed above, this deadline may be difficult to achieve for firms with a September 30th filing deadline. In addition, the transitional arrangements require submission of data relating to remuneration awarded in 2011 relating to 2010. As noted above, we assume that the EBA did not intend to exclude fixed remuneration awarded and/or paid in 2010 for the 2010 performance year (e.g., salaries)?

- **Annex 1:** we believe that this annex requires further explanation to avoid discrepancies in the provision of information. A few specific points are set out below:

  - Although the information required appears to be aligned to statutory reporting requirements, we would recommend that all *standard* benefits and pensions be excluded from total fixed remuneration to limit the impact of different market practices and, in particular, to avoid distortions between Member States. As the EBA will be aware, there are significant differences between Member States with respect to benefits (e.g. some Members States have flexible benefit provisions and some have state administered regimes). We do acknowledge, however, the need to include any discretionary benefits within the total, so as not to disguise overall remuneration levels.

- We note that the 'CEBS Guidelines' define variable remuneration as including any "additional payments or benefits depending on performance or, in certain cases, other contractual criteria". We assume that this definition includes forward looking long-term incentive awards, which are not solely dependent on performance within a particular performance year, and wonder whether a clarificatory note to Annex 1 would be helpful.

- We believe it is important that disclosure of remuneration should take appropriate account of performance conditions when determining value. If there is a requirement to disclose the full face-value of the award this may overstate the level of award if performance conditions make it unlikely the employee will receive the full value of the award.

- We believe it would be helpful to confirm which valuation approaches are appropriate.

- **Annex 2:**
  - We agree that it is appropriate to allocate senior management and control functions across the firm, rather than assign to specific business areas.

  - Our comments above regarding the valuation of variable remuneration and the exclusion of standard benefits are also relevant to Annex 2.

  - We believe that Box 13, 'Amount of performance adjustment applied in Year N for payments in Year N or remuneration awarded in previous year,' should also be clarified by an explanatory note. For example, to clarify that, inter alia, the amount of performance adjustment: (a) should include remuneration which has been forfeited or reduced due to performance conditions not being met; and, (b) does not include the levels of ex-ante adjustment calculated by firms for the current performance year (some firms would have difficulty clearly quantifying the level of adjustments made to the current year's remuneration, given that the process for determining remuneration levels is complex and not purely formulaic).

- We assume that the information will remain confidential at an entity level. Public disclosure could result in amounts of remuneration attributable to specific individuals being identified if the total employee numbers are low.

- Where discretionary pension benefits are paid, an employee may waive part of their bonus award and the firm may make an employer pension contribution in lieu. These waivers are usually made from the cash portion of variable remuneration an individual would otherwise have received. We assume that firms should report the discretionary pension benefit in the 'Total amount of discretionary pension benefits paid in year N' and exclude the waived cash from variable the "Total variable remuneration in Year N" and "Total variable in cash" columns.

Consultation Paper: Draft EBA Guidelines No xxx/2011 on the remuneration data collection exercise regarding high earners (CP47) – specific points

- **Recital 4:** as discussed above, we do not consider that this is a true reflection of the facts for all firms. Although Annex I does not require accounting information - and so the June date is less of a problem than for CP46 – we believe that the deadline should be coterminous with the CRD3 public disclosure requirements i.e. 31st December.

- **Article 1:** we note that the definition of "institution" in Article 1 refers to the definition of "credit institution" in the CRD (Directive 2006/48) and, hence, will require all credit institutions to submit data. We believe that the focus should be on the quality rather than quantity of data and, hence, we are of the firm opinion that the application of the CP47 draft Guidelines should be the same as for the CP46 draft Guidelines i.e. only large, cross-border banking groups, active in the EU and all institutions deemed to be significant by national competent authorities.

- **Article 3:** given that the CRD3 remuneration provisions apply to all firms in an EEA consolidated group, we wonder why "non-EU branches and non-EU subsidiaries of EEA parent companies have been specifically excluded from the information to be provided? We believe that this exclusion would run counter to both the CRD3 remuneration disclosure requirements and consolidated accounting principles and might impair the EBA's ability to compare properly EEA groups of a similar size but with different geographical footprints.

- **Article 4.2:** we note that there will be situations where the individual is working and paid in one jurisdiction, but the remuneration is awarded in another, e.g. mobile employees, dual contracts.

- **Article 5.2**: the reference to "remuneration awarded for performance during the year preceding the year of remittance" appears to exclude remuneration paid during the performance year (e.g. salaries): we assume this is not intended.

- **Article 6:** Given that firms have until 31st December 2011 to publish the annual remuneration disclosures required under CRD3, and given the same level of

information is required for both the public disclosures and Annex 1, we ask that the transitional arrangements be coterminous with the deadline for public disclosure, which firms are currently working towards.

- **Annex 1**
  - We do not believe that the name of the institution should be included on the document as the data is very sensitive: the Home State competent authority should simply track that they have received a response from a firm. Notwithstanding aggregation by the Home State competent authority, we remain concerned, that where a firm has a particularly small number of identified staff or high earners, their anonymity could be compromised: we wonder, therefore, whether there should be a de minimis level for publication, in order to preserve individuals' privacy?

  - Our comments in response to CP46 above, regarding the valuation of variable remuneration and the exclusion of standard benefits are also relevant to Annex 1 of CP47. We believe that clarification on these factors is critical to ensure that firms are reporting on a like for like basis.

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