

EFAMA's comments on the EBA's Consultation Paper on Draft Guidelines on sound remuneration policies under Article 74(3) and 75(2) of Directive 2013/36/EU and disclosures under Article 450 of Regulation (EU) No 575/2013 (EBA/CP/2015/03)

EFAMA welcomes the opportunity to respond to the present consultation paper. EFAMA is the representative association for the European investment management industry. We represent through our 26 national association members, 63 corporate members and 25 associate members about EUR 17 trillion in assets under management, of which EUR 11.3 trillion managed by 55,600 investment funds at end-December 2014. Over 36,100 of these funds are UCITS (Undertakings for Collective Investments in Transferable Securities) funds.

Before illustrating our concerns with regard to the present orientation of the EBA consultation paper on draft *Guidelines*, we wish to highlight the fact that bank-owned asset management companies may in the present circumstances have to comply with four overlapping pieces of EU legislation on remuneration:

1. CRD IV – as portfolio management entities managing assets on a discretionary basis in line with mandates from clients (including UCITS and AIF managers);
2. UCITS – as UCITS management companies operating UCITS for retail and institutional investment;
3. AIFMD – as AIF management companies operating AIFs for retail and institutional investment; and
4. MiFID – as distributors of asset managers' own and other third party UCITS and AIFs.

In conjunction with these requirements, there are also a series of already applicable *Guidelines* framing remuneration policy for credit institutions under the 2010 CEBS *Guidelines*¹ (to be replaced in the near future by the EBA *Guidelines* emerging from this consultation), for MiFID firms², for AIF managers³ and, by the end of 2015, for UCITS managers on which ESMA intends to consult over the course of the coming months. Viewed together, we maintain that these overlapping pieces of legislation add up to

¹ Please refer to CEBS *Guidelines on Remuneration Policies and Practices* of 10 December 2010; available at: <https://www.eba.europa.eu/documents/10180/106961/Guidelines.pdf>

² Please refer to ESMA Final Report *Guidelines on remuneration policies and practices (MiFID)* of 11 June 2013; available at: http://www.esma.europa.eu/system/files/2013-606_final_report_guidelines_on_remuneration_policies_and_practices_mifid.pdf

³ Please refer to ESMA Final Report *Guidelines on sound remuneration policies under the AIFMD* of 11 February 2013; available at: <http://www.esma.europa.eu/system/files/2013-201.pdf>

a regulatory burden that is largely disproportionate in light of the relatively non-complex and “agency” business that characterises the asset management industry and which sets it visibly apart from that of credit institutions. Regrettably, we consider that still not enough appreciation has been given to the fundamental fact that, unlike credit institutions, asset management companies do not commingle their own balance sheet assets with the funds or assets of their clients. On the contrary, the latter’s assets are legally segregated and held in bankruptcy-remote custody accounts with a depositary institution that in turn typically operates under a banking license. Important for the EBA to bear in mind is also the fact that, ultimately, it is an asset manager’s client that chooses - in the investment management agreement with the management company – its own tolerable risk level and where the portfolio manager needs to adhere to this pre-specified level of risk while carrying out its fiduciary duty. It would therefore be factually incorrect to assume that the individual portfolio manager – or any other identified “risk taker” – is freely capable to adjust the risk profile of an investment hoping to boost his/her own variable remuneration component.

In addition to this brief introduction, the substance of our reply wishes to focus primarily on the application of the principle of proportionality. In this respect, we have deep reservations around the EBA’s interpretation of the proportionality principle, especially with regard to its (non-)application to the variable remuneration principles under Article 94 of CRD IV, as suggested in the present consultation paper. In this respect, we invite the EBA to consider our following preliminary remarks:

- We are of the opinion that the EBA’s proposed *Guidelines* are incompatible with the will of the EU Legislator to allow for proportionality with regard to remuneration policies for subsidiaries that are neither credit institutions (i.e. falling expressly within the remit of CRD IV), nor investment firms (i.e. falling within the remit of the MiFID framework). Particularly with regard to the principle imposing a cap on variable remuneration (“bonus cap”), we wish to remind the EBA that its application to the UCITS remuneration framework had been proposed and thoroughly discussed during the European Parliament and Council “trilogues” concerning “UCITS V” and, subsequently, deliberately discarded;
- EFAMA believes that the EBA’s reading of the relevant clauses of CRD IV – as reflected in the consultation paper and considering the principle of proportionality applied to the variable remuneration principles of the directive – would not be in line with their intended objective. Differently, we contend that the intention of the EU Legislator was for less-complex firms and/or non-CRD subsidiary institutions to apply the remuneration principles under Article 94 proportionately;
- EFAMA would also like to stress that there are different underlying rationales for applying remuneration rules to credit institutions and asset management companies: whereas for the former, remuneration rules are intended to align risks from dealing on own account with the need for credit institutions to reconstitute their capital base, for asset management companies, remuneration rules intend to improve the alignment between the interests of the portfolio manager and its clients. Such differences should be appreciated in light of the fact that the notion of “identified staff” in the CRD context does not equate with the corresponding notion under the AIFM/UCITS framework;

- Finally, we call on the EBA to recognise that AIFM and UCITS sectoral remuneration rules lie within the remit of the ESMA and that poor coordination among the ESAs risks making present harmonisation efforts more difficult. In this regard, we believe it extremely useful for the EBA and the ESMA to issue a joint consultation on the applicability of the proportionality principle, so as to avoid the risk of a one-sided interpretation of group remuneration policies. This would be most welcome by our industry, especially at a time when the ESMA is drafting its own consultation around remuneration *Guidelines* for UCITS management companies and the general orientation is to seek a broad alignment with the existing remuneration *Guidelines* for AIFMs for the purpose of greater harmonisation.

Bearing these considerations in mind, below please find our responses to the two most relevant questions that in our view would merit the EBA's attention going forward. We have conveniently structured our answer to Question 4 in seven topical sections.

Q 4: Are the guidelines regarding remuneration policies and group context appropriate and sufficiently clear?

1. The application of the proportionality principle to variable remuneration requirements

We invite the EBA to acknowledge that CRD IV (in comparison to the wording of CRD III) did neither substantially alter, nor remove, the existing proportionality principle, stressing that remuneration should be appropriate to an institution's size, internal organisation and the nature, scope and complexity of its activities⁴. Had it been the EU Legislator's intention to limit the application of the proportionality principle by issuing a "new" interpretation of the CRD IV remuneration principles, it would have had to be expressly stated at the time of the relevant CRD IV proposal and accompanying negotiations.

Whereas the EBA expressly recognises that CRD IV remuneration rules should apply in light of the proportionality principle, it remains of the opinion that such principle should not apply to non-bank subsidiaries, especially to those already subject to their own equivalent remuneration rules (i.e. in particular, the relevant ESMA *Guidelines on sound remuneration policies under the AIFMD* of July 2013, applicable to group subsidiaries that are themselves AIFM companies). In the words of the EBA consultation paper:

"Although the former CEBS Guidelines on Remuneration Policies and Practices allowed for the so-called 'neutralisation' of some provisions in small and less complex institutions. The terms of the

⁴ The definition of proportionality is indeed broader in CRD IV than in CRD III. While Recital 9 of CRD III states that "[...] the principle of proportionality is of great importance since it may not always be appropriate to apply those requirements in the context of small credit institutions and investment firms", Recital 66 of CRD IV reads that "[...] the provisions of this Directive on remuneration should reflect differences between different types of institutions in a proportionate manner, taking into account their size, internal organization and the nature, scope and complexity of their activities. [...]"

CRD do not explicitly grant for such a right and therefore the preliminary assessment of the EBA is that a full waiver of the application of even a limited set of remuneration principles for smaller and non-complex institutions would not be in line with the CRD.⁵ (Emphasis added by EFAMA)

The consultation paper also admits that the above interpretation would hinge on what was - until the recent EBA public hearing held in London on 8 May 2015 - an undisclosed opinion of one part the European Commission's services, regarding the interpretation of the proportionality principle and including possible waivers thereto⁶. According to the recently published correspondence between the EBA and the Commission's relevant services, the EBA bases its opinion on the view "[...] *that the CRD IV remuneration principles themselves must be considered proportionate [...]*". This opinion is in our view neither supported by the legislative intention, nor the wording of the CRD IV. Had the remuneration principles in the CRD IV been deemed by the EU Legislator as inherently proportionate, Articles 92(2) and 94 of CRD IV would have stated otherwise. Instead, the Level 1 text merely reiterates the wording of CRD III, i.e. that the same remuneration principles are only to be applied in a manner and to the extent appropriate having regard to the institutions' size, internal organisation and the nature, scope and complexity of their activities. In this regard, we wish to caution EBA that its re-interpretation of the proportionality principle under Article 92(2) of the CRD IV - despite the wording being identical to the wording of CRD III - appears aimed at obtaining a wholly different outcome⁷.

In light of these considerations, EFAMA believes that the EBA's reading of the relevant clauses of CRD IV - as reflected in the consultation paper - would not be in line with their express wording or intended objective. In fact, Article 92(2) of CRD IV clearly provides that proportionality should be applied to all remuneration principles:

"Competent authorities shall ensure that [...] institutions comply with the [...] principles in a manner and to the extent that is appropriate to their size, internal organisation and the nature, scope and complexity of their activities" (emphasis added by EFAMA).

With regard to the scope of this relevant clause (and consequently that of Article 94), we note that "institution" is defined by Article 3(1) point (3) of CRD with a direct reference to Regulation (EU) No 575/2013, Article 4(1) point (3), thereof, where expressly the term "*institution*" means a ***credit institution or an investment firm*** [...] (emphasis added by EFAMA). Consequently, the actual text of the Level 1 directive supports the view that the remuneration principles under Article 94 do not apply

⁵ In this regard, please see the EBA consultation paper, page 11.

⁶ In this regard, please see the EBA consultation paper, page 12: "*The EBA received confirmation from the EU Commission on the reading that Articles 92 and 94 CRD apply to all institutions, without any distinction, pointing beside others to the following aspects: the general principles as implicitly referred to in the introductory part of Article 92(2) CRD can in no way justify the non-application of one or the other rule contained in that provision, or indeed in Article 94(1) CRD. This applies in particular to the provisions referring to the deferral arrangements, the pay-out in instruments and the application of malus. Such provisions lay down clear rules and leave no room for exceptions or exemptions.*"

⁷ Such policy outcome is confirmed by the relevant section on "Proportionality" under the *Draft Cost-Benefit Analysis / Impact Assessment*, at paragraphs between 42 and 48 (page 104) of the EBA consultation paper.

in toto and automatically to subsidiaries that are neither credit institutions nor investment firms within the meaning of MiFID.

The application of the proportionality principle also features under the following Article 94, addressing variable elements of remuneration, including the principle of a bonus cap under paragraph 1, letter g) thereof. In the wording, there is in fact a direct reference to Article 92(2), ensuring that principles governing the variable remuneration components be applied "*under the same conditions*"⁸. This opinion also finds comfort in the European Commission's reply to the EBA dated 23 February 2015. As a result, the EBA therefore should not consider Article 94 in a vacuum and ignore the important cross-references to Article 92(2). Most critically, the EBA omits to discuss in the consultation paper the existence of Recital 66 of CRD IV which explicitly confirms that proportionality should be applied with regards to remuneration rules:

*"[...] The provisions of this Directive on remuneration should reflect differences between different types of institutions in a proportionate manner, taking into account their size, internal organisation and the nature, scope and complexity of their activities. In particular it **would not be proportionate to require certain types of investment firms to comply with all of those principles.**"* (Emphasis added by EFAMA)

When reading Articles 92(2) and 94 in conjunction with Recital 66 of CRD IV, it appears thus undeniable that the intention of the EU Legislator was for less-complex firms and/or non-CRD subsidiary institutions to apply all remuneration principles under Article 94 proportionately. The logic of therefore considering the CRD variable remuneration requirements as a "*minimum threshold*" (as mentioned in the consultation paper) is in clear contradiction with the allowed "*flexibility to adapt*" (see page 6 of the consultation paper) the application of some principles to a subsidiary institution (especially when not a CRD-entity) that may be substantially different especially in terms of the "nature" of its activities as clarified in Section 3 of our reply further below.

Finally, EFAMA wishes to point out to the EBA (and to the European Commission) the relevant difference between the responsibilities of the parent company to ensure the consistent **implementation** of proportionate group-wide arrangements, processes and mechanisms with the remuneration principles under Article 94 - as per Article 109 of CRD IV - and the requirement to materially **apply** these same principle as EBA assumes under paragraph 66 of its consultation paper. From a close reading of these combined clauses, one can reasonably conclude that the parent undertaking is responsible for ensuring the overall consistency of group-wide remuneration policies over its non-CRD or non-MiFID subsidiaries, while recognising the equivalence and hence the consistency of existing sectoral remuneration requirements, like those of ESMA for AIFM- and UCITS-specific management companies.

⁸ Article 94(1): "*For variable elements of remuneration, the following principles shall apply in addition to, and under the same conditions as, those set out in Article 92(2):*" (emphasis added by EFAMA)

2. The ESMA's considerations on equivalence of remuneration rules for CRD IV and AIFMD (and UCITS)

The fact that the EBA consultation paper has not sufficiently accounted for proportionality - for the possible subsequent non-application of certain CRD remuneration provisions - stems from the fact that the CRD IV should not be considered in isolation by the EBA (and the European Commission), thus neglecting that some CRD IV subsidiaries, such as AIFM and UCITS management companies, are governed by sectoral and equally effective remuneration rules. These sectoral rules largely mirror the CRD IV remuneration principles and follow their same goals of mitigating systemic risk and protecting investors by better aligning their interests with those of the "identified staff". The main and essential difference with the CRD IV principles is that the corresponding sectoral rules take into account the less complex business models of the asset management companies and the different nature of their business, while still achieving equivalent outcomes relevant to CRD IV. Thus, the EBA's preliminary assessment that these sectoral remuneration rules do not have the same equivalence in outcome as CRD IV, despite having been derived from the original CRD text *ab initio*, is in our view incorrect.

While the ESMA has already released its *Guidelines on sound remuneration policies under the AIFMD* in 2013, it expects to release an equivalent set of recommendations for UCITS later this year based on the EU Legislator's mandate under UCITS V. Within the boundaries of the AIFM directive, the ESMA has already opined that the CRD IV remuneration rules should be considered as equivalent to those under the AIFM directive⁹ and that compliance with sectoral remuneration policies by AIFMs belonging to a group should be considered sufficient for the group to satisfy the remuneration principles applicable to the group¹⁰. This is true particularly where the ESMA has recognised that equivalence already exists between the AIFM framework and the CRD rules within a group context, particularly with regard to the corresponding rules around the deferral of variable remuneration, the pay-outs in instruments and the *malus*, i.e. those principles under points l), m) and n) of Article 94(1) of CRD IV which are also recalled in the European Commission's aforementioned reply to the EBA, dated 23 February 2015.

In this sense, while both the AIFM directive and CRD IV contain provisions which require remuneration rules to be applied at a group, parent undertaking and subsidiary undertaking levels to avoid

⁹ Please refer to the ESMA's *Questions and Answers – Application of the AIFMD* as per below:

Question 4 [last update 17 February 2014]: *In a delegation arrangement where the delegate is subject to the CRD rules, can the delegate be considered to be subject to regulatory requirements on remuneration that are equally as effective as those applicable under the Remuneration Guidelines?*

Answer 4: *Provided that the staff of these entities who are identified staff for the purpose of the Remuneration Guidelines are subject to the CRD rules, these entities are subject to regulatory requirements on remuneration that are equally as effective as those applicable under the Guidelines.*

¹⁰ Please refer to the ESMA's *Guidelines on sound remuneration policies under AIFMD* (ESMA/2013/232), paragraphs 32-33: 32. *These guidelines apply in any case to any AIFM. In particular, there should be no exception to the application to any of the AIFMs which are subsidiaries of a credit institution of the sector-specific remuneration principles set out in the AIFMD and in the present guidelines.* 33. *Compliance with these sectoral remuneration principles by AIFMs which belong to banking, insurance, investment groups or financial conglomerates should be considered as ensuring the respect by such a group of the remuneration principles applicable to the group with specific regard to the AIFM.*

circumvention of the rules, we do not believe it was the intention of the EU Legislator to apply the rules to group companies which are already subject to equivalent European rules on remuneration. The ESMA recognises that firms which delegate portfolio management and risk management to firms which are themselves subject to CRD (within or without the same group) can treat the delegate as complying with rules equivalent to those under AIFMD. We believe this principle should apply in reverse, so that CRD rules should not have to apply to group companies which apply the UCITS or AIFM rules on remuneration.

We thus would recommend to the ESMA and the EBA to formally recognise the system of equivalence between CRD IV, AIFMD and UCITS V remuneration rules.

3. The different nature of asset management and the rationale of remuneration rules under AIFM and UCITS regimes

EFAMA maintains that it is of fundamental importance that the services of the European Commission and the EBA re-consider the nature of professional portfolio management (collective or individual) as fundamentally different – especially from a risk perspective – from that of a CRD-licensed firm operating on its own account. More specifically, all exposures and associated risks stemming from the investment activities that an AIFM or a UCITS manager undertake on behalf of their clients are not taken onto the balance sheet of the management company and thus do not imply a transmission of risk to the eventual CRD parent entity via consolidation. Asset managers, moreover, are legally restricted to provide services on an agency basis, i.e. investing client's money within the predefined parameters of a given mandate and in line with the client's risk/return profile. These differences also appear in the wording on proportionality under the CRD that distinguishes between the inherently different prudential risks to the financial system of markets participants who deal on own account from those agency-based market participants who do not deal on their own account. In our view, this sole factual reality would suffice to justify the non-application of certain principles under Article 94 of CRD IV in light of the proportionality principle. For these very reasons, the EBA's arguments are not correct when assuming that Article 109 of CRD IV precludes any remuneration rules to be applied in a more proportionate manner for non-bank subsidiaries.

EFAMA would also like to make incontrovertibly clear the fact that there are different underlying rationales for applying remuneration rules to credit institutions and asset management companies: whereas for the former, remuneration rules are intended to align risks from dealing on own account with the need for credit institutions to reconstitute their capital base, for asset management companies, remuneration rules intend to improve the alignment between the interests of the portfolio manager and its clients. As testimony to the fact that the CRD IV variable remuneration rules have a different scope compared to the analogous ones targeting non-CRD subsidiaries, we invite the EBA to consider the following passage under Recital 83 of CRD IV:

*“Restrictions on variable remuneration are an important element in ensuring that credit institutions and investment firms **rebuild their capital levels** when operating within the buffer range. [...]”*. (Emphasis added by EFAMA)

From this passage, it is clearly the objective of prudential supervision that inspires the remuneration principles under the CRD IV. The absence of an identical indication in AIFM and UCITS directives confirms that certain principles governing remuneration policies – for instance, the bonus cap - for bank and non-banking entities are different: while both are conceived to ensure sound and effective risk management, it is only for the CRD remuneration principles that a prudential *ratio* is additionally taken into account to define a bonus cap under Article 94(1) letter g). It is in light of this reasoning that the differences between the two sets of rules (i.e. different treatments for variable and fixed remuneration limitations) need to be assessed. The EBA's interpretation of the *“additional requirements of CRD IV”*, i.e. those *“which have not been included in other sectoral legislation”* is, therefore, not correct in so far as it fails to recognize the additional prudential *ratio* that governs remuneration policies only and specifically for entities dealing on own account, i.e. not asset management entities as regulated under the AIFM and UCITS directives. Both types of asset managers, in fact, may only operate within the limited boundaries of their activities centred on portfolio management and tightly regulated in their respective applicable EU directives. Compared to the wider scope of CRD activities, which range from deposit-taking, to dealing on own account to portfolio management, an asset manager's business is undoubtedly less “risky”.

The above differences should furthermore be appreciated in light of the fact that the notion of “identified staff” in the CRD context does not equate with the analogous notion of “risk taker” under the AIFM/UCITS frameworks. It is therefore somewhat discomfoting to realise that the EBA's preliminary conclusions are exclusively based on legalistic reasoning that remains far removed from factual reality, i.e. the fundamental differences between “sell-side” and “buy-side” firms respectively, both performing two essential, but very different, functions in today's financial markets.

4. Specific requirements – including prudential ones – already apply to asset management companies

Furthermore, both AIFMs and UCITS management companies are subject to general provisions, conditions for authorisation, operating conditions and transparency requirements which should be appreciated in parallel to those in the CRD. It is a common misconception in fact that neither AIFM nor UCITS management companies are bound by prudential requirements in the form of initial capital and own funds. Such misconception may be dismissed by recognising the separate wording of Article 9 of the AIFM directive and of Article 7 of the UCITS directive as two essential conditions for EU national competent authorities to grant both types of management firms their respective authorisations.

Beyond these requirements, UCITS management companies are also further restricted in terms of the nature, scope and complexity of their activities by virtue of the fact that the funds they operate are themselves governed by a product-level directive. Indeed, all UCITS are subject to detailed product

rules and a risk framework, requiring the UCITS management company to operate a dedicated independent risk function to set risk tolerances and oversee risk. This level of legislative prescription in product rules and oversight does not typically exist in other areas of the financial sector such as banking or insurance. Accordingly, it is both necessary and proportionate that the remuneration provisions sufficient in a controlled risk environment such as UCITS should logically be different to those required with respect to a credit institution.

To dismiss some of the EBA's concerns gathered during the public hearing of 8 May 2015 concerning the operational and reputational risks of an asset management firm and their potential impact on its viability as a going concern, we finally wish to highlight the fact that asset management firms cover risks stemming from their professional liability with additional own funds or by taking out professional indemnity insurance¹¹. On the basis of these additional requirements, EFAMA would convincingly rule out that remuneration policies and their related incentives in the asset management space could possibly directly or indirectly threaten the solvency of a management company, let alone that of a consolidated group.

5. Guarding the operational autonomy and independence of a group subsidiary

In addition, it should be noted that the approach taken by the EBA would also have the detrimental effect to hinder the independence of the subsidiary, which represents an essential element of the functioning of group entities. While pursuing common strategic objectives, it should not be forgotten that each subsidiary maintains its own operational autonomy and shall be considered as a separate and independent entity *vis-à-vis* the other undertakings of the group.

The forceful submission of subsidiaries to the logic of a banking group's profits would not only seriously undermine their operational independence, but could also create potential distortions to the detriment of their end-clients. The banking group's strategies and policies should therefore adequately weigh the interests of the group with the need to safeguard and enhance the capacity of asset management companies to act in the interests of their clients.

6. The EU Legislator has discarded the idea of a "bonus cap" for UCITS managers

EFAMA is surprised to witness a renewed attempt to re-introduce the bonus cap principle and in a manner which is inappropriate on at least two counts: (i) from a formal perspective, it takes the form of future *Guidelines*, i.e. a "Level 3" measure, amending two "Level 1" directives (UCITS and AIFM) in their relevant articles and which do not envisage such principle; and (ii), from a more substantial perspective, leads the EBA to overreach its mandate and impinge on the ESMA's primary competence for drawing up remuneration *Guidelines* applicable to AIFM and UCITS management companies.

¹¹ In this respect, please refer to Article 9(7) letters a) and b) of the AIFM directive, as further specified under the Delegated Regulation (EU) No 231/2013 under Articles 13, 14 and 15 thereof.

While the EBA explains¹² that its reasoning for the non-application of proportionality is partially based on a resolution of the European Parliament for reforming the structure of the EU banking sector (dated 3 July 2013), it must be noted that this text clearly and repeatedly refers to “banks” and supports the view that asset managers (or investment firms) should be able to not apply certain remuneration provisions where appropriate on grounds of proportionality and in line with the sectoral rules endorsed by their primary regulators. .

Furthermore, it can be noted that on the very same day of ratifying the above resolution, the European Parliament also voted the UCITS V directive. While the EP's Committee on Economic and Monetary Affairs (ECON) had preliminarily suggested to include a bonus cap for identified staff of UCITS management companies along the lines of CRD IV, this cap was deliberately and explicitly rejected by the Parliament's Plenary and ultimately did not feature in the final legislative text published in August 2014. These facts demonstrate that the European Parliament did discuss means to effectively remunerate other parts of the financial sector, but consciously decided not to include a bonus cap for UCITS management companies as an act of final political will. The EBA's proposals therefore would go against this political will of the EU Legislator should its “Level-3” *Guidelines* be implemented as drafted in the present EBA consultation paper.

Specifically with regard to the bonus cap, we nevertheless welcome the exclusion of it from those principles that the European Commission has deemed applicable with “no room for exceptions or exemptions” in its aforementioned reply letter to the EBA. Consequently, we invite the EBA to reconsider its conclusions around the necessary application of the bonus cap as a general principle to non-CRD subsidiaries.

Finally, from a practical perspective, the introduction of the bonus cap would run counter to the proper alignment between the incentives of the portfolio manager and those of the client. In fact, the cap would remove the inbuilt flexibility of current pay structures, allowing for performance to be assessed across a broader spectrum of variable pay outcomes over a typical 3- to 5-year deferral period. Were the bonus cap to apply up to 200% of the fixed amount and pressed by the need to retain talented individuals, asset management companies would in all likelihood respond by scaling up the fixed amount, leading to a more rigid variable pay structure that is less effective at rewarding different performance outcomes. In turn, fixed costs for asset managers would increase, with few opportunities

¹² See the EBA consultation paper, pages 12-13: “In addition, the EBA took into account the European Parliament (EP) resolution of 3 July 2013 on reforming the structure of the EU banking sector. The EP besides others urges the Commission and the EBA ‘to ensure full and comprehensive implementation of (...) the provisions on compensation and remuneration (...) to continue the reform of banks' compensation and remuneration culture by prioritising long-term incentives for variable remuneration with larger deferral periods up to retirement, and to promote transparency of remuneration policies (...) to ensure that remuneration systems prioritise the use of instruments such as bonds subject to bail-in, and shares, rather than cash, commissions or value-based items (...), that compensation and remuneration systems at all levels of a bank reflect its overall performance and are focused on quality customer service and long-term financial stability rather than short-term profits(...)’. Proportionality should also be taken into account by competent authorities in line with the *Guidelines*. In order to ensure an appropriate implementation of remuneration policies which is appropriate for the specific institution, an ongoing and open dialogue between institutions and competent authorities is necessary to facilitate the implementation of remuneration policies and practices.

to let off talented staff given the primary importance of long-standing client relationships, of the portfolio manager's lengthy experience, as well as his/her performance track-record. In this respect, EFAMA wishes to point to another significant trait of the asset management industry: hiring/firing decisions are significantly less cyclical compared to those of credit institutions.

7. Competitive disadvantage of CRD IV subsidiary asset management companies

Lastly, it also has to be acknowledged that the EBA's preliminary interpretation of CRD IV creates an uneven playing-field between asset managers belonging to a banking group and those that do not. A bank-owned AIFM or UCITS management company, which is not itself subject to CRD IV, would be required to observe the bonus cap principle on variable remuneration, merely for being a subsidiary of a firm subject to CRD IV. This asset manager will inevitably be placed at a competitive disadvantage compared to independent management companies. The EBA's suggested extension of the cap would thus create an uneven playing-field, contrary to the objectives of the EU remuneration rules and to Article 16 of the EBA founding regulation - Regulation (EU - No 1093/2010) - according to which, *Guidelines* are intended ensure the common, uniform and consistent application of EU law in the spirit of the Internal Market.

Q 6: Are the guidelines on the identification of staff appropriate and sufficiently clear?

The EBA proposals regarding the identification of material "risk takers" by applying the quantitative criteria of CRD IV's RTS to all subsidiaries is inappropriate for AIFM and UCITS management companies¹³. The recourse to the RTS *de facto* precludes the definition of identified staff in the AIFM and UCITS directives and clashes with the EBA's own statements that the remuneration principles should only apply to those staff members whose "*professional activities have a material impact on the group's risk profile on a consolidated basis*" (paragraph 63).

Again, EFAMA wishes to stress that the definition of "identified staff" already exists in the ESMA's AIFM remuneration *Guidelines* and we would support that this definition become the basis of the ESMA's upcoming remuneration *Guidelines* for UCITS. Ultimately, these should in fact define the notion of a "risk taker" in a way that is adapted and proportionate to an asset manager's activities as fundamentally different to those of the staff identified under the CRD IV and the accompanying RTS.

In conclusion, EFAMA's position is not to exclude AIFM and UCITS management company staff from the scope of the CRD IV remuneration principles altogether. Rather, we request that the EBA's future *Guidelines* adhere to the relevant clauses of the CRD IV Level 1 text by allowing for proportionality – especially in light of the fundamental differences of our industry's core activities and own prudential requirements compared to those of credit institutions. It is in our view also critical that the EBA and the relevant services of the European Commission recognise the legitimate remit of ESMA and the

¹³ Please refer to the European Commission's Delegated Regulation (EU) No 604/2014.

fundamental equivalence between CRD IV and AIFM (future UCITS) remuneration *Guidelines*. On this basis, there are no legitimate grounds for the EBA to persist with its interpretation of the relevant remuneration provisions of CRD IV *vis-à-vis* captive AIFMs and/or UCITS management companies as reflected in the consultation paper.

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