

European Securities and Markets Authority
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Submitted via Electronic Submission

18 October 2021

Dear Sir/Madam,

AIMA's comments to ESMA consultation on draft Guidelines on certain aspects of the MiFID II remuneration requirements

The Alternative Investment Management Association Limited (AIMA)¹ appreciates the opportunity to provide comments in connection with the European Securities and Markets Authority's (ESMA) consultation on its draft Guidelines on certain aspects of the MiFID II remuneration requirements (the 'draft Guidelines').

While we support most of the draft Guidelines in principle and the objectives they seek to achieve, we note that the lack of alignment of the draft Guidelines and Directive (EU) 2019/2034 ('IFD'), to which the former makes no reference, is surprising given that, with the exception of small and non-interconnected firms ('SNIs'), all MiFID firms will be subject to the remuneration requirements of the IFD.

Ex-post risk adjustment of variable remuneration

We note that paragraph 27 of the draft Guidelines states that "Ex-post adjustment mechanisms referred to in the previous paragraph should be triggered by relevant events impacting the firm's or relevant persons' compliance with the applicable provisions under MiFID II and its delegated acts aiming at the fair treatment of clients and the quality of services provided to clients." We note, however, that this wording is inconsistent with Article 32(1)(m) of the IFD, which only requires in-

¹ AIMA, the Alternative Investment Management Association, is the global representative of the alternative investment industry, with more than 1,900 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than \$2 trillion in assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programmes, and sound practice guides. AIMA works to raise media and public awareness of the value of the industry. AIMA is committed to developing skills and education standards and is a co-founder of the Chartered Alternative Investment Analyst designation (CAIA) – the first and only specialised educational standard for alternative investment specialists. AIMA is governed by its Council (Board of Directors). For further information, please visit AIMA's website, www.aima.org.

scope firms to be able to contract variable remuneration "where the financial performance of the investment firm is subdued or negative". The wording used in paragraph 27 of the draft Guidelines therefore ought to be amended to read "Ex-post adjustment mechanisms referred to in the previous paragraph should be triggered where the financial performance of the firm is subdued or negative" (emphasis added) and which cover situations where the individual in question participated in or was responsible for the relevant conduct or is no longer fit and proper.

In addition, it is worth noting that Article 32(1) of IFD limits the application of ex-post adjustment mechanisms to the "categories of staff referred to in Article 30(1)", which are those "categories of staff, including senior management, risk takers, staff engaged in control functions and any employees receiving overall remuneration equal to at least the lowest remuneration received by senior management or risk takers, whose professional activities have a material impact on the risk profile of the investment firm or of the assets that it manages" (commonly referred to as Material Risk Takers). In order to appropriately align the Guidelines with the requirements of IFD, the Guidelines should clearly note the employees to whom the ex-post risk adjustments may apply, given as drafted they appear to apply generally, which is not consistent with IFD.

We further note that where a co-legislator has made specific legislation on a particular point, it is unusual for Level 3 guidance (i.e., the draft Guidelines) to go further. We would encourage ESMA to consider whether certain changes should be made to the draft Guidelines, for example whether the ex-post risk adjustment mechanism guidance should be disapplied for firms which meet the definition of a SNI under the IFD.

Compliance function access to management body and senior management remuneration information

Another example where the draft Guidelines are not aligned with other regulatory requirements relates to paragraph 41 which states that

"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 of relevant persons, including regarding the remuneration of members of the management body and senior management."

We refer ESMA to the European Banking Authority's (EBA) draft guidelines on sound remuneration policies under Directive (EU) 2019/34 (the 'draft EBA Guidelines'). The draft EBA Guidelines only apply to Class 2 firms, i.e., non-small and non-interconnected firms ('non-SNIs') while the draft Guidelines will apply to both non-SNIs and SNIs. We note that the draft EBA Guidelines do not have a similar provision with regard to the compliance function's access to the remuneration documents and information as mentioned above. However, if it did have a similar provision, it would then not apply to SNIs and so, to that end, we ask ESMA to introduce a carve-out to this provision for SNIs whose compliance function would not have access to documents and information regarding the remuneration of members of the management body and senior management. We do not see a valid reason why this detailed information should be disclosed to compliance function staff as in smaller firms, particularly owner-managed businesses, it may be inappropriate for the compliance function to have visibility on the remuneration of the members

of the management body, and it would fall to those members themselves collectively to be responsible for remuneration design and implementation, including in accordance with MIFID and IFD.

Application of sectoral requirements

Finally, we note that the draft Guidelines will also apply to external AIFMs and UCITS management companies to the extent they are authorised to perform services under Article 6(4) of the AIFMD or Article 6(3) of the UCITS Directive, respectively. We note that for these firms, the MiFID top-up activities are generally secondary and complementary to the core business of AIFM or UCITS management. In our view, where a firm complies with the legislation tailored to its sector, such as the AIFMD/UCITS Directive requirements, then it should not, in addition, be required to apply the draft Guidelines' remuneration provisions to its MiFID activities. Instead, we would ask ESMA to allow these firms to apply the AIFMD/UCITS remuneration requirements on a firm-wide basis as seeking to comply with multiple remuneration provisions in parallel is likely to be a complex exercise and may place them at a disadvantage when compared to full-scope MiFID firms.

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We would be happy to elaborate further on any of the points raised in this letter. If you have any questions about these comments, or if we can provide further information, please do not hesitate to contact Jennifer Wood, Managing Director, Global Head of Asset Management Regulation & Sound Practices, at +44 (0) 20 7822 8380 or jwood@aima.org.

Yours sincerely,

A handwritten signature in blue ink, appearing to read "J Król".

Jiří Król

Deputy CEO, Global Head of Government Affairs
AIMA