

VIA ELECTRONIC DELIVERY

December 7, 2012

**European Securities and Market Authority**  
103 Rue de Grenelle  
75007 Paris  
France

**Re: Consultation on Guidelines on Remuneration Policies and Practices (MiFID)**

Ladies and Gentlemen:

You will find attached our comments to the draft Guidelines on remuneration policies and practices under the MiFID.

We routinely assist a number of investment firms, active in various European jurisdictions, also in connection with the structuring of their remuneration policies, and we would like to thank ESMA for this opportunity to submit our answers and other comments. We hope that you will find them helpful in your continued efforts to craft detailed rules for the application of the MiFID.

Please do not hesitate to contact us - at +39 02 8905 0320 or [dleone@cp-dl.com](mailto:dleone@cp-dl.com) - should you have any questions or wish to discuss any matters in connection with our submission.

Very truly yours,

Dante Leone

to: European Securities and Market Authority

from: Dante Leone, Barbara Braghiroli, Nicola Rapaccini

date: December 7, 2012

## Our Comments to Draft Guidelines on Remuneration Policies and Practices under the MiFID

### III. GOVERNANCE AND DESIGN OF REMUNERATION POLICIES AND PRACTICES IN THE CONTEXT OF THE MiFID CONDUCT OF BUSINESS AND CONFLICTS OF INTEREST REQUIREMENTS

- **Q1: Do you agree that firms' remuneration policies and practices should be aligned with effective conflicts of interest management duties and conduct of business risk management obligations so as not to create incentives that may lead relevant persons to favour their own interest, or the firm's interests, to the potential detriment of clients? Please also state the reasons for your answer.**

We agree that sound remuneration policies may be a very useful instrument, for investment firms, credit institutions, UCITS management companies and alternative investment fund managers, in order to prevent conflicts of interest in the provision of services to clients and to fulfill the objectives of the MiFID.

At the same time, we believe that it is important to stress that sales target or other incentives that lead relevant persons to pursue their firm's interest (or indeed their own interest) should not be considered always and automatically detrimental to the client's interests.

Which is why - as you may notice from our detailed comments below - we feel that the final Guidelines should be structured as a compendium of principles directing investment firms to the adoption of appropriate, customized remuneration policies and practices targeted at preventing and solving conflicts of interest that may arise in the provision of services to their clients, as opposed to a list of blanket requirements and detailed impositions automatically applicable to all firms falling within the purview of the Guidelines.

- **Q2: Do you agree that, when designing remuneration policies and practices, firms should take into account factors such as the role performed by relevant persons, the type of products offered, and the methods of distribution? Please also state the reasons for your answer.**

We believe that taking into account a multiplicity of factors would lend flexibility to the structuring of the policies and practices. As a result, we agree with the factors listed in the proposed Guidelines, and would also add - as additional factors to be taken into account - (i) the profile of the clients which purchase the products and (ii) the existing portfolio of such clients.

- **Q3: Do you agree that when designing remuneration policies and practices firms should ensure that the fixed and variable components of the total remuneration are appropriately balanced?**

We agree with the principle of an “appropriate” balance of fixed and variable remuneration. However, based on the suggestive approach of the proposed Guidelines, we fear that future readers might infer that variable remuneration is generally considered adverse to the interests of the clients and frowned upon by the regulators, whereas fixed remuneration is generally regarded as a non-controversial safe harbor. We believe that this would be the wrong message.

While it is certainly recommendable that fixed remuneration be set at a level sufficient to cover the basic living standards of the recipients, we are positive that variable remuneration can play a very important role in encouraging hard work, improving the efficiency of a firm and fostering good business conduct. And, if structured properly, variable remuneration is also likely to be an important component for the profitability of the firm, which is generally a good outcome both for the senior management and for all other stakeholders, including clients.

- **Q4: Do you agree that the ratio between the fixed and variable components of remuneration should therefore be appropriate in order to take into account the interests of the clients of the firm? Please also state the reasons for your answer.**

We agree that the best interests of the clients are one of the objectives that should be taken into account when balancing the fixed and variable components of the remuneration. Please also see our remarks in answer to Q3.

- **Q5: Do you agree that the performance of relevant persons should take account of non-financial (such as compliance with regulation and internal rules, market conduct standards, fair treatment of clients etc.), as well as financial, criteria? Please also state the reasons for your answer.**

We most certainly do. We believe that non-financial goals may be as conducive to the satisfaction of the clients and the well-being of the firm as are financial goals.

In fact, we believe that, in many circumstances, it would be appropriate to base a portion of the variable remuneration exclusively on the satisfaction of certain qualitative standards, such as (i) compliance with regulatory requirements and internal procedures, (ii) market conduct standards, (iii) fair treatment and satisfaction of clients and (iv) business retention.

- **Q6: Do you agree that the design of remuneration policies and practices should be approved by senior management or, where appropriate, the supervisory function after taking advice from the compliance function? Please also state the reasons for your answer.**

Yes, we agree that it would be correct for the primary responsibility for the design of remuneration policies and practices to be assigned to senior management, while requiring the advice of the compliance function in the course of the designing process.

- **Q7: Do you agree that senior management should be responsible for the implementation of remuneration policies and practices, and for preventing and dealing with the risks that remuneration policies and practices can create? Please also state the reasons for your answer.**

In principle, yes. However, to the extent that the compliance function participates in the structuring process of remuneration policies, we believe that responsibility for the prevention of risks arisen by remuneration policies and practices should also lie with the compliance function.

Along the same lines, we believe that it would be appropriate for a portion of variable remuneration of senior management to be based also on their continued prevention of risks potentially generated by remuneration policies and practices.

- **Q8: Do you agree that the organisational measures adopted for the launch of new products or services should take into account the remuneration policies and practices and the risks that the new products or services may pose? Please also state the reasons for your answer.**

Yes, we agree, because we believe that the offer of any new products and services should be accompanied by an estimation of the potential effects of those products or services on the organization of the firm and on potential risks to the firm itself and its clients.

This of course should not translate into a requirement that remuneration policies be customized for every single new product or service, but rather in a degree of

flexibility of the policies which should be able to (i) accommodate the various features of new products or services, and (ii) lend themselves to effective periodical assessments.

- **Q9: Do you agree that the process for assessing whether the remuneration features related to the distribution of new products or services comply with the firm's remuneration policies and practices should be appropriately documented by firms? Please also state the reasons for your answer.**

We certainly agree that the process for assessing the compliance of remuneration features with a firm's policies should be appropriately documented. And we would add that the process should be periodically documented, also in order to provide evidence as to whether and how the remuneration features have changed and/or improved over time, especially subsequent to the offer of new products.

However, we would hesitate to specifically require appropriate documenting of this process in particular, and would suggest instead including in the Guidelines a general principle of appropriate documentation of the (i) design, (ii) enactment and (iii) assessment of compliance of the remuneration policies and practices.

#### **IV. CONTROLLING RISKS THAT REMUNERATION POLICIES AND PRACTICES CREATE**

- **Q10 Do you agree that firms should make use of management information to identify where potential conduct of business and conflict of interest risks might be occurring as a result of specific features in the remuneration policies and practices, and take corrective action as appropriate? Please also state the reasons for your answer.**

By all means firms should make use of management information, which - if it is well structured, accurate and sufficiently detailed - may be a very good indicator of whether the remuneration policies and practices are generating potential conduct of business or conflict of interest risks.

- **Q11: Do you agree that firms should set up controls on the implementation of their remuneration policies and practices to ensure compliance with the MiFID conflicts of interest and conduct of business requirements, and that these controls should include assessing the quality of the service provided to the client? Please also state the reasons for your answer.**

Yes, we very much agree. In fact, as indicated in our remarks in answer to Q5, we believe that these controls may also be suitable for the purpose of determining

a portion of the variable remuneration.

- **Q12: Do you agree that the compliance function should be involved in the design process of remuneration policies and practices before they are applied to relevant staff? Please also state the reasons for your answer.**

We agree. Please see also our remarks in answer to Q7.

- **ANNEX I ILLUSTRATIVE EXAMPLES OF REMUNERATION POLICIES AND PRACTICES THAT CREATE CONFLICTS THAT MAY BE DIFFICULT TO MANAGE**

- **Q13: Do you agree that it is difficult for a firm, in the situations illustrated above in Annex I, to demonstrate compliance with the relevant MiFID rules?**

We agree. However, please see also our remarks in answer to Q14.

- **Q14: If you think some of these features may be compatible with MiFID rules, please describe for each of (a), (b), (c) and (d) in Annex I above which specific requirements (i.e. stronger controls, etc) they should be subject to.**

We believe that classifying the cases described in (d) - increasing returns for marginal sales or cliff edge schemes - *tout court* as examples of poor practice would be misguided: to the extent that the marginal sales are made in accordance with high, measurable qualitative standards, there should not be a blanket prohibition on rewarding disproportionately hard work and/or the achievement of high sales volumes.

Please see also our remarks in answer to Q5.

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Once again, we hope that you will find our comments helpful in your continued efforts to craft detailed rules for the application of the MiFID.

We are of course available to discuss any of the foregoing matters in further detail.