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June 3, 2015

Comments on draft guidelines on sound remuneration policies
EBA/CP/2015/03

Dear Sir or Madam,

We thank you for the opportunity to comment on the draft guidelines ("the 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 and would like to share our thoughts with you. The Association of Foreign Banks in Germany represents more than 200 foreign banks, investment firms and investment management companies active in the German market.

We welcome the guidelines and its approach to create a level playing field amongst institutions regarding remuneration policies. However, we think some aspects are not properly dealt with in the current draft.

We will explain our concerns in more detail below in connection with our answers to the questions raised in the Consultation Paper.

If you require further information or wish to discuss any of the issues raised, we would be glad to hear from you.

Kind regards

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Answers to Consultation Paper EBA/CP/2015/03

Q 1: Are the definitions provided sufficiently clear; are additional definitions needed?

The definitions provided are sufficiently clear, however the term "remuneration policy" seems to be used inconsistently throughout the Guidelines. On the one hand the term is used when referring to general remuneration concepts and on the other hand it seems to be used for the actual physical document of institutions containing detailed rules. We would therefore like to ask to define the term "remuneration policy" accordingly.

Q 3: Are the guidelines regarding the shareholders' involvement in setting higher ratios for variable remuneration sufficiently clear?

In paragraph 32 is stated that "the approval of an institution's remuneration policy and, where appropriate, decisions relating to the remuneration of members of the management body (or other identified staff), may be also assigned to the shareholders' meeting." We are of the opinion that the involvement of the shareholders' meeting would not be appropriate since the purpose of a shareholders' meeting is to decide on the most important and relevant issues of the company. This also states the company law. It is not the business of the shareholders' meeting to be involved in the daily and operative business of the company. Since the remuneration system of a company is an operative task with many technical and administrative procedures of some complexity it would not be sufficient to let the shareholders' meeting to decide over an institution's remuneration policy in general or about specific remuneration decisions for the management body or identified staff. The shareholders do get information on the remuneration policy of an institution in the corporate governance report and are therefore duly informed. Additionally, involving the shareholders' meeting in remuneration policy details might lead to an imbalanced remuneration policy within an institution if decisions of the shareholders' meeting are not coherent and consistent.

Question 5: All respondents are welcome to provide their comments on the chapter on proportionality, with particular reference to the change of the approach on 'neutralisations' that was required following the interpretation of the wording of the CRD. In particular institutions that used 'neutralisations' under the previous guidelines for the whole institution or identified staff receiving only a low amount of variable remuneration are asked to provide an estimate of the implementation costs in absolute and relative terms and to point to impediments resulting from their nature, including their legal form, if they were required to apply, for the variable remuneration of identified staff: a) deferral arrangements, b) the pay out in instruments and, c) malus (with respect to the deferred variable remuneration). In addition those institutions are welcome to explain the anticipated changes to the remuneration policy which will need to be made to comply with all requirements. Wherever possible the estimated impact and costs should be quantified, supported by a short explanation of the methodology applied for their estimation and provided separately for the three listed aspects.

In compliance with the guidance on proportionality and the remuneration codes of local regulators across the EU countries proportionality is applied in institutions to both exclude certain entities and certain staff from the full impact of the remuneration code.
Deferral requirements of the Remuneration Code are applied under the proportionality rules, as falling under the "de Minimis" or neutralisation thresholds of the Regulator. The removal of the ability to exclude such individuals from the deferral requirements would lead to increased administrative burden and cost, inequalities of treatment between employees at similar compensation levels and a lessening of the perceived value of variable remuneration to effected employees together with its ability to drive appropriate behaviours. In addition there are a significant number of small institutions in Germany which do not pay out high amounts of bonus or even no bonus at all.

We therefore see the changes to the application of the principle of proportionality introduced in the draft guidelines very critical.

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

In paragraph 44 the role of the remuneration committee is defined by a long list of requirements. However, we see the role of the remuneration committee drawn in paragraph 44 critical and impractical in countries which have a separation between the management body (in Germany this is the so-called “Vorstand”) and the supervisory body (in Germany the supervisory body is the so-called “Aufsichtsrat”)[1]. The functions assigned to the remuneration committee are both operational and control functions. This mix of operational and control functions cannot be mirrored in countries with a two-tier corporate governance system where operational issues lie in the hand of the management body. The guidelines should respect these different corporate governance set-ups and limit the operational tasks of the remuneration committee.

Furthermore, the guidelines intend in paragraph 63 sentence 2 to extend the application of the remuneration requirements of Article 92(2), 93 and 94 of CRD IV to group entities which are in the scope of e.g. AIFMD and UCITS. However, the remuneration requirements of AIFMD and CRD IV differ considerably in terms of the bonus cap for staff members whose professional activities have a material impact on the group’s risk profile. The introduction of a bonus cap for entities regulated by AIFMD or UCITS Directive should not be introduced by CRD-guidelines but should be properly discussed and regulated in the respective directive.

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

Paragraph 139 states that for “remuneration packages to compensate the beneficiary or buy the beneficiary out from a contract in previous employment, all requirements for variable remuneration apply, including deferral, retention, pay out in instruments and claw back arrangements.” This paragraph is inconsistent with Article 94(1) lit. e) CRD IV which rules that such payments are guaranteed variable remuneration and not variable remuneration and

[1] While the “Aufsichtsrat” is elected by the shareholders’ meeting the „Vorstand” is appointed by the “Aufsichtsrat”.

therefore this guarantee should be reflected in the requirements such remuneration packages have to fulfil.

We further believe that "buy-outs" (replacement awards to compensate employees for loss of deferred awards from their former employer) should continue to be excluded from the calculation of the ratio between fix and variable remuneration: the wording of this paragraph should be tightened to ensure this is clear to Competent Authorities. Institutions will often replace on an "as closely as possible" basis and ensure that the employee is never better off than they would have been (meaning no payments are accelerated, shares are offered for shares, retention periods are respected, etc). These amounts do not form part of awarded compensation for performance at the new employer and should therefore be excluded from the calculation of the ratio (as they are at present).

Q 13: Are the requirements on remuneration policies in section 15 appropriate and sufficiently clear?

Paragraph 206 states that the variable remuneration for control functions should exclusively follow from control objectives. This approach does not take into account the principle of proportionality but is based only on the wording of Article 92 (2) lit. e) CRD IV. However, the principle of proportionality should be considered in this respect as Article 92 (2) CRD IV states that institutions comply with the principles in Article 92 lit. a) – lit. g) CRD IV in a manner and to the extent that is appropriate to their size, internal organisation and the nature, scope and complexity of their activities. This is not reflected in the guidelines so far.

Q 16: Are the provisions on the award of variable remuneration in instruments appropriate and sufficiently clear? Listed institutions are asked to provide an estimate of the impact and costs that would be created due to the requirement that under Article 94(1)(l)(i) CRD only shares (and no share linked instruments) should be used in parallel, where possible, to instruments as set out in the RTS on instruments. Wherever possible the estimated impact and costs should be quantified and supported by a short explanation of the methodology applied for their estimation.

The provisions on the award of variable remuneration in instruments are clear and in the most part appropriate.

We find, however, that paragraph 255, concerning the non-payment of dividends and interest on instruments which have been awarded as variable remuneration under deferral arrangements to staff, is not appropriate. Whilst we are in full agreement that such interest or dividend payments should not be greater or more advantageous than those paid to shareholders, where the dividend or coupon is in line with the dividend/coupon that would be paid to share/bondholders, we believe that employees should be entitled to this payment. We do not see any reason why awarding such interest or dividend payments would be contrary to the principles of sound remuneration or would contravene the principle of encouraging institutions and employees to have sound and effective risk-management measures in place. The removal of the payment of dividend and interest payments in respect of deferred compensation awards to identified staff would place them at significant financial disadvantage

compared to non-identified staff when running global programmes. It would also increase administrative burden and cost in creating non dividend/interest paying sub plans.