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David McIntosh QC (Hon)
Chairman

23 May 2011

Ms Lindsey Dawkes
The Financial Services Authority
25 The North Colonnade
London
E14 5HS
remuneration@fsa.gov.uk

By Email only

Dear Ms Dawkes

Re: CLLS Regulatory Law Committee response to FSA Consultation Guidance on the Remuneration Code

The City of London Law Society ("**CLLS**") represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world.

This response to the Financial Services Authority's ("**FSA**") Guidance Consultation on the Remuneration Code (SYSC 19A) (the "**Guidance**") has been prepared by the CLLS Regulatory Law Committee (the "**Committee**"). Members of the Committee advise, often on complex, multi jurisdictional legal issues, a wide range of firms across and outside Europe who operate in or use the services provided by the financial markets. These include clients on all sides of the market as well as market infrastructure providers, and in our individual capacity we may be private clients of investment firms.

General Comments

Generally, we welcome the Guidance as a means of assisting firms in finalising their policies and procedures in relation to the FSA's Remuneration Code (the "**Code**"). We do, however, have concerns in respect of two aspects of the guidance.

Guaranteed Variable Remuneration

We urge the FSA to reconsider its guidance on the application of the restriction on guaranteed variable remuneration to non-Code Staff, and to Code Staff who satisfy both the

conditions in SYSC 19A.3.34R (the "de minimis exclusion"). The draft guidance goes further than is necessary properly to implement CRD3 and is too prescriptive. There is insufficient differentiation between the four categories identified in the FSA's table and the draft guidance renders the de minimis exclusion all but meaningless.

Whilst we agree with the guidance in SYSC 19A.2.3G that firms should consider applying the restriction on a firm-wide basis, it should bite on a particular award to a member of non-Code Staff, or Code Staff qualifying for the "de minimis exclusion", only to the extent that the particular award or a series of similar awards is inconsistent with sound and effective risk management. This should be capable of being assessed by each firm on a periodic basis in a manner proportionate to its size, internal organisation and the nature, scope and complexity of its business. In many firms, particularly those whose business does not involve them putting their own capital at risk, awards to these categories of staff may not have any impact on the firm's risk profile.

Staff in categories 3 and 4 are by definition not capable of having a material impact on the firm's risk profile. Staff in category 3 (non-Code Staff not qualifying for the de minimis exclusion) could be modestly paid but have greater than 33% of their total remuneration in variable pay. Staff in category 4 (non-Code Staff who do qualify for the de minimis exclusion) is likely to include all of the firm's middle-office, back-office, administrative and support staff, including receptionists for example.

The draft guidance, if adopted, would leave many firms in an invidious position for the following reason. Whilst, in our experience, most firms have designed and implemented their remuneration policies and practices having had full and careful regard to the rules and guidance which came into effect on 1 January 2011, some of them have made hiring and retention decisions in H1 2011 consistent with their own policies, but which would be called into question by the new draft guidance. In particular, many firms have had regard to the guidance in SYSC 19A.2.3G and reached conclusions about its proportionate application to their own business.

We have the following specific suggestions which would help to conform the draft guidance to the position which many firms have reasonably adopted in light of the FSA's rules and earlier guidance:

- in category 3 (non-Code Staff not qualifying for the de minimis exclusion), the reference to the use of sign-on awards in "a low percentage of new hires" should be deleted;
- in category 3, the sentence which begins "As above..." suggests that retention awards to staff in this category are acceptable only in the event of a restructuring - that sentence should be deleted;
- in category 3, but especially in category 4, the FSA should not impose an obligation to document all awards - it may be proportionate for firms to do this in some cases but not all;
- in category 3 and 4, numbers of awards alone should not call into question compliance with the general requirement. There would need to be a more sophisticated assessment of the impact on these practices on the firm's risk profile.

We see these changes as the minimum necessary as, in our view, the restriction on guaranteed variable remuneration for non-Code Staff is not consistent with the proportionality overlay at all and the guidance on categories 3 and 4 should therefore be deleted in its entirety.

Overseas Code Staff

The FAQ guidance states that for Code Staff who are based abroad the Remuneration Code will apply in relation to their entire remuneration, rather than in relation to the proportion which is earned in connection with their work for the UK firm. This will be the case unless the firm can conclude that the individual is not a material risk-taker in relation to the UK firm within the scope of the Code.

This position is not required in order properly to implement CRD3. It is disproportionate to the regulatory risk and creates perverse disincentives to effective corporate governance.

In cases where a firm concludes that overseas-based staff do have a material impact on risk, it makes the UK anti-competitive because a firm deciding where to establish its EU headquarters will not wish to make the whole remuneration of senior management subject to disclosure.

We continue to believe that the correct approach would be to accept that the member of staff is Code Staff but to recognise that only part of his or her remuneration is "paid, provided or awarded in connection with employment by [the] firm" (SYSC 19A.2.5R).

We would be delighted to discuss any of the above observations and suggestions with you. You may contact me on +44 (0)20 7295 3233 or by email at margaret.chamberlain@traverssmith.com.

Yours sincerely

Margaret Chamberlain
Chair, CLLS Regulatory Law Committee

THE CITY OF LONDON LAW SOCIETY
REGULATORY LAW COMMITTEE

Individuals and firms represented on this Committee are as follows:

Margaret Chamberlain (Travers Smith LLP) (Chair)
Chris Bates (Clifford Chance LLP)
David Berman (Macfarlanes LLP)
Peter Bevan (Linklaters LLP)
Patrick Buckingham (Herbert Smith LLP)
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