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**By E-Mail**

14 December 2012

Dear Sirs

***Re: ESMA Consultation Paper (ESMA/2012/570): Guidelines on remuneration policies and practices (MiFID)***

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The City of London Law Society ("CLLS") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

This paper has been prepared by the CLLS Regulatory Law Committee (the "**Committee**"). Members of the Committee advise a wide range of firms across Europe who operate in or use the services provided by the financial markets. European clients include banks, brokers, investment advisers, investment managers, custodians, private equity and other specialist fund managers as well as market infrastructure providers such as the operators of trading, clearing and settlement systems.

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We welcome ESMA's initiative to establish guidelines (the "**Guidelines**") in respect of remuneration policies and practices in the context of the MiFID rules on conflicts of interest and conduct of business, and its decision to consult on the contents of such guidelines.

We have not responded to specific questions raised in the ESMA's paper because, in the main, those questions relate to matters which do not concern us as lawyers and which are likely, in any event, to be addressed in other responses from investment firms and trade organisations. However, we are pleased to have this opportunity to comment on certain aspects of the guidelines that cause us concern or which we consider could be improved significantly from a legal perspective.

## 1. Scope

There is a mismatch between the scope of the Guidelines and much of their content. The Guidelines are stated to apply, broadly, to firms providing both core and ancillary MiFID investment services. The Guidelines are intended principally to address situations where services are provided to retail clients. However, they will also be applicable where services are provided to professional clients "to the extent relevant" – though it is not entirely clear when ESMA considers that it would be relevant to apply the Guidelines in the context of services provided to professional clients.

Further, the guidelines cover all payments or benefits provided, directly or indirectly, to relevant staff. Given that very broad scope, it is surprising that the guidelines focus, almost exclusively, on incentive- or commission-type payments made to sales staff. It is not clear the extent to which ESMA intends for the Guidelines to apply to fund managers, broker/dealers (excluding sales staff), corporate finance firms and others. If such persons are intended to be in scope, then this should be more clearly articulated.

## 2. Territorial Approach

The territorial application of the Guidelines is not clearly articulated. By contrast, the remuneration guidelines issued under the Capital Requirements Directive (the "**CRD guidelines**") are prudential in nature and, accordingly, apply on a home state/consolidated basis like other prudential provisions. ESMA states that the Guidelines are being introduced in order to address conduct of business risks. We assume, therefore, that this means that the Guidelines apply on a host state basis and agree with such a proposition. However, it would be helpful if this could expressly be confirmed in the Guidelines.

However, in the context of firms operating on the basis of a branch passport, this could give rise to some difficult questions. For example, it is not clear on the face of the Guidelines how host-state regulators' duties will dove-tail with those of the home state regulators', including those that would also apply under the CRD guidelines.

## 3. Overlap with AIFMD and CRD Remuneration Guidelines

The interrelationship between (i) the Guidelines, (ii) the CRD guidelines and (iii) the guidelines (the "**AIFMD guidelines**") issued pursuant to the Alternative Investment Fund Managers Directive (the "**AIFMD**") is also not clearly expressed. The consultation paper does not explore the scope of the proposed changes in the context of how they might overlap with the remuneration guidelines issued under the other regimes.

For example, if a fund manager operates a single bonus pool, which relates both to services it provides (i) in its capacity as an AIFM under the AIFMD and (ii) to portfolio management services it provides in its capacity as discretionary investment manager under MiFID, it is not clear which guidelines would apply, which remuneration the different guidelines would apply to and how the different regimes might overlap.

Moreover, application of the proportionality principle should be consistent. Accordingly, it should be expressly confirmed in the Guidelines that where a firm has made a determination as to proportionality under the Guidelines, it should not be expected also to have to consider proportionality under the AIFMD guidelines or CRD guidelines.

#### 4. Application of Guidelines to "Relevant Persons"

The definition of "relevant persons" is not clear. Therefore, it is not clear to whom the Guidelines will apply. For example, it is not clear whether, by including the concept of "*influencing corporate behaviour*", ESMA intends to broaden the potential pool of individuals who are already subject to remuneration guidelines under the CRD.

#### 5. Proportionality

Although proportionality is addressed briefly, at paragraph 34 of the consultation paper, it is not clear how the proportionality principle may be applied to different kinds of firms. For example, it is not clear if ESMA would regard it as appropriate for buy-side asset management and corporate finance firms to form the view that the Guidelines have a proportionate application to their business, in the same manner as with the other remuneration guidelines. This difficulty is exacerbated by the fact that the discussions and examples set out in the consultation paper relate solely to sales incentives and practices.

#### 6. Role of the Compliance Function

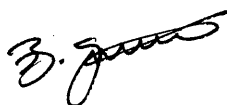
The guidelines contain statements on the duties of compliance functions (paragraphs 30 and 31) which appear to us to be disproportionate. It is not customary for a person performing the compliance function role to be responsible for "ensuring" and "verifying" that compliance is achieved. It would be more proportionate if, instead, the Guidelines referred to the compliance function's normal role of assisting in the formulation of policies, monitoring outcomes and advising senior management as required.

#### 7. Case Studies

Though the use of case studies is, to some extent, helpful, it is questionable whether they should be used so extensively. Where case studies are used in the Guidelines, then they should be limited in their scope and the concepts covered should not be stated in such a way that they could be interpreted as having application across different businesses or sectors.

If ESMA would find it helpful to discuss any of these comments then we would be happy to do so. Please contact me in the first instance by telephone on +44 (0) 20 7295 3233 or by email at [margaret.chamberlain@traverssmith.com](mailto:margaret.chamberlain@traverssmith.com).

Yours faithfully

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**Margaret Chamberlain**

*Chair, CLLS Regulatory Law Committee*

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