



European Securities and
Markets Authority

Reply form for the Guidelines on sound remuneration policies under the UCITS Directive and AIFMD



Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the Consultation Paper “Guidelines on sound remuneration policies under the UCITS Directive and AIFMD”, published on the ESMA website.

Instructions

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, ESMA will only be able to consider responses which follow the instructions described below:

- use this form and send your responses in Word format (pdf documents will not be considered except for annexes);
- do not remove the tags of type < ESMA_QUESTION_UCITS_V_AIMFD_REM_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses are most helpful:

- if they respond to the question stated;
- contain a clear rationale, including on any related costs and benefits; and
- describe any alternatives that ESMA should consider

Naming protocol

In order to facilitate the handling of stakeholders responses please save your document using the following format:

ESMA_UCITS_V_AIMFD_REM_NAMEOFCOMPANY_NAMEOFDOCUMENT.

E.g. if the respondent were XXXX, the name of the reply form would be:

ESMA_UCITS_V_AIMFD_REM_XXXX_REPLYFORM or

ESMA_UCITS_V_AIMFD_REM_XXXX_ANNEX1

To help you navigate this document more easily, bookmarks are available in “Navigation Pane” for Word 2010 and in “Document Map” for Word 2007.

Deadline

Responses must reach us by **23 October 2015**.

All contributions should be submitted online at www.esma.europa.eu under the heading ‘Your input/Consultations’.



Publication of responses

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that a confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the headings 'Legal notice' and 'Data protection'.



General information about respondent

Name of the company / organisation	Nordic Financial Unions
Activity	Choose an item.
Are you representing an association?	<input checked="" type="checkbox"/>
Country/Region	Sweden

Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_UCITS_V_AIFMD_REM_1>

Nordic Financial Unions (NFU) supports sustainable and sound remuneration policies in the finance sector. However the development of remuneration guidelines on European level should not be done without taking into account the social partners' absolute right to negotiate, conclude and enforce collective agreements.

The Nordic model of collective bargaining presupposes that it is the social partners who are best placed to set wages and working conditions for employees. In the Nordic Area, it is the social partners and trade unions that work with wage formation, through collective bargaining by the partners. The state does not participate in wage formation but creates the preconditions for the partners to do their job. Wage formation through collective agreements in free negotiations between the social partners is a fundamental cornerstone of the Nordic model.

In both UCITS V and AIFMD the rights of social partners and the stance of collective agreements are recognised. UCITS V recital 10 reads:

The provisions on remuneration should be without prejudice to the full exercise of fundamental rights guaranteed by the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights of the European Union (the Charter), to general principles of national contract and labour law, applicable legislation regarding shareholders' rights and involvement and the general responsibilities of the administrative and supervisory bodies of the companies concerned, as well as to the right, where applicable, of the social partners to conclude and enforce collective agreements, in accordance with national law and practice.

AIFMD recital 28 reads:

The provisions on remuneration should be without prejudice to the full exercise of fundamental rights guaranteed by the Treaties, in particular Article 153(5) TFEU, general principles of national contract and labour law, applicable legislation regarding shareholders' rights and involvement and the general responsibilities of the administrative and supervisory bodies of the institution concerned, as well as the right, where applicable, of social partners to conclude and enforce collective agreements, in accordance with national laws and traditions.

It is therefore regrettable that ESMA has failed to include the role of collective agreements in both its draft guidelines concerning UCITS V and in its remuneration guidelines for AIFMD. An explicit reference to UCITS V recital 10 and AIFMD recital 28 must therefore be included in the respective Guidelines.

It is also important to stress that by far the greatest part of the employees in the financial sector do not receive excessively large bonuses or other kinds of variable remuneration which give rise to systemic issues. Also, it is not unusual that variable remuneration in a bank is only used for staff at or above the "identified staff" level.

As a basic principle, NFU supports for remuneration policies the absolute primacy of collective agreements. It must thus be made clear that any legal provisions regarding remuneration do not apply to remuneration policies and provisions agreed in a collective agreement. Both fixed and certain types of variable remuneration can be regulated through collective agreements which is why it is crucial that the provisions on pay by ESMA do not interfere with the rights and responsibilities of social partners to conclude and enforce collective agreements.

NFU overall finds that the consultation is lacking of questions regarding the different parts of the draft UCITS V guidelines and whether the respondents find them appropriate and sufficiently clear. Besides the abovementioned comments, NFU will therefore here below react on some of the parts in the proposed guidelines under Annex IV.

- 6 Guidelines on how to identify the categories of staff covered by these guidelines

NFU urges ESMA to be cautious on what categories of staff should be covered. It is important to stress that by far the greatest part of the employees in the financial sector do not receive excessively large bonuses or other kinds of variable remuneration which give rise to systemic issues.

With an example from bank regulation; the CEBS remuneration guidelines caused problems due to the very broad interpretation of who is a “risk taker” where far too many have employees have been defined as such. As a basic principle, the possibility for collective bargaining should not be hampered by the inclusion of too vast a number of employees, including those in middle management functions which are not immediately concerned by risk taking. This is an issue of proportionality, especially in small or medium sized institutions.

- 11.2 Remuneration Committee

NFU finds that a reference to employee representatives in the remuneration committee is missing in the proposed guidelines. Under UCITS V, art. 14 b (4, para 3), it reads that

“If employee representation on the management body is provided for by national law, the remuneration committee shall include one or more employee representatives. When preparing its decisions, the remuneration committee shall take into account the long-term interest of investors and other stakeholders and the public interest.”

Employee representatives are an asset in a company’s governance functions as they have shop floor experience, knowledge and expertise about the company. Employees are interested in the long-term performance of the company and thus contribute to sustainable business models and sound remuneration policies. NFU therefore urges ESMA to add to “11.2.2 The Composition of the Remuneration Committee” that the remuneration committee shall include one or more employee representatives.

- 13.2.2.2 and 13.2.4 Performance Measurement

NFU means that if sales targets and performance measurement systems exist, they must be fair and balanced, and established in dialogue with employees. One of the most apparent problems facing Nordic finance employees is the pressure put on them by performance measurement systems and other factors. It is therefore important that the employees are given the time and resources to carry out their duties towards the customer in a sound and professional manner. The quality of their advice should not be compromised by their work pressure caused by performance measurement.

The measurement of employees does not have to be directly connected to a financial gain, such as commissions for selling a specific product, but can instead have an impact on future salary negotiations and

the employee's position at the company. However, if the performance is connected to pay, NFU appreciates that the proposed Guidelines (13.2.2.2) state that the "Performance criteria should include achievable objectives and measures on which the staff member has some direct influence."

NFU is pleased to see that the proposed guidelines (para 117) promote qualitative measurements of staff as the measurement of for example investor satisfaction, team work and creativity does not cause the same pressure as quantitative sales targets and alike.

- 13.4 Pay out Process

Regarding the ex post risk adjustments, NFU means that it in principle, to reduce or reverse any compensation should not be a tool to handle risks by a company. Risks should be dealt with beforehand. Furthermore, the responsibility to ensure that the internal policies and legal requirements are followed should not be moved from the employer side to the individual employee.

An employee that has followed the company's official or unofficial routines, rules, instructions or practices and thereby have failed to comply with legal requirements should not suffer from any sanctions, rather the employer needs to change its structure to handle future risks. The responsibility should be on the employer if routines, instructions, corporate culture, praxis, training, supervision or control are inadequate.
<ESMA_COMMENT_UCITS_V_AIMFD_REM_1>

Q1: In this consultation paper ESMA proposes an approach on proportionality which is in line with the AIFMD Remuneration Guidelines and allows for the disapplication of certain requirements on an exceptional basis and taking into account specific facts. Notwithstanding this, ESMA is interested in assessing the impact from a general perspective and more precisely in terms of costs and administrative burden that a different approach would have on management companies. For this reason, management companies are invited to provide ESMA with information and data on the following aspects:

1. All management companies (i.e. those that hold a separate AIFMD licence and those that do not) are invited to provide details on the following:
 - a. compliance impacts and costs (one-off and ongoing costs, encompassing technological/ IT costs and human resources), and
 - b. difficulties in applying in any circumstances the remuneration principles that could otherwise be disappplied according to the provisions under Section 7.1 of the draft UCITS Remuneration Guidelines (Annex IV to this consultation paper).
2. Management companies that also hold an AIFMD licence and benefit from the disapplication of certain of the remuneration rules under the AIFMD Remuneration Guidelines are asked to provide an estimate of the compliance costs in absolute and relative terms and to identify 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 (in particular, a minimum deferral period of three years);
 - b. retention;
 - c. the pay out in instruments; and
 - d. malus (with respect to the deferred variable remuneration).

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, if possible, for the four listed aspects.

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Q2: Do you agree with the proposal to set out a definition of “performance fees” and with the proposed definition? If not, please explain the reasons why and provide an alternative definition supported by a justification.

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Q3: Do you see any overlap between the proposed definition of ‘supervisory function’ in the UCITS Remuneration Guidelines and the definition of ‘management body’ in the UCTS V Level 1 text? If yes,



please provide details and suggest how the definition of ‘supervisory function’ should be amended in the UCITS V Guidelines.

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Q4: Please explain how services subject to different sectoral remuneration principles are performed in practice. E.g. is there a common trading desk/an investment firm providing portfolio management services to UCITS, AIFs and/or individual portfolios of investments? Please provide details on how these services are operated.

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Q5: Do you consider that the proposed ‘pro rata’ approach would raise any operational difficulties? If yes, please explain why and provide an alternative solution.

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Q6: Do you favour also the proposed alternative approach according to which management companies could decide to voluntarily opt for the sectoral remuneration rules which are deemed more effective in terms of avoiding excessive risk taking and ensuring risk alignment and apply them to all the staff performing services subject to different sectoral remuneration rules? Please explain the reasons behind your answer.

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Q7: Do you agree that the performance of ancillary services under Article 6(3) of the UCITS Directive or under Article 6(4) of the AIFMD by personnel of a management company or an AIFM should be subject to the remuneration principles under the UCITS Directive or AIFMD, as applicable? Or do you consider that that MiFID ancillary services do not represent portfolio/risk management types of activities (Annex I of the AIFMD) nor investment management activities (Annex II of the UCITS Directive) and should not be covered by the rules under Article 14b of the UCITS Directive and Annex II of the AIFMD which specifically refer to the UCITS/AIFs that a UCITS/AIFM manages? Please explain the reasons of your response.

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Q8: Do you agree with the proposal to look at individual entities for the purpose of the payment in instruments of at least 50% of the variable remuneration or consider that it would risk favouring the asset managers with a bigger portfolio of UCITS assets under management? Should you disagree, please propose an alternative approach and provide an appropriate justification.

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Q9: Do you consider that there is any specific need to include some transitional provisions relating to the date of application of the UCITS Remuneration Guidelines? If yes, please provide details on which sections of the guidelines would deserve any transitional provisions and explain the reasons why, also highlighting the additional costs implied by the proposed date of application. Please be as precise as possible in your answer in order for ESMA to assess the merit of your needs.

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Q10: Do you agree with the assessment of costs and benefits above for the proposal on proportionality? If not, please explain why and provide any available quantitative data on the one-off and ongoing costs that the proposal would imply.

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Q11: Do you agree with the assessment of costs and benefits above for the proposal on the application of different sectoral rules to staff? If not, please explain why and provide any available quantitative data on the one-off and ongoing costs that the proposal would imply.

<ESMA_QUESTION_UCITS_V_AIMFD_REM_11>
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