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Alert Memo

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European Banking Authority Publishes Guidelines for Data Collection on EEA Remuneration Practices

On July 27, 2012, the European Banking Authority ("**EBA**") published two sets of guidelines which, when implemented by national competent authorities ("**National Authorities**"), will advise affected institutions how to submit data regarding high earners and remuneration benchmarking to their National Authorities as required by the amended EU Capital Requirements Directive ("**CRD III**").[1] The National Authorities must implement these rules by September 30, 2012.[2] Affected institutions must then file the first reports by December 31, 2012, covering remuneration data for 2010 and 2011. Upon receipt of data from the National Authorities, in turn, the EBA will publicly disclose the data on an aggregate Member State by Member State basis. This public disclosure is likely to raise significant political discussion and media coverage throughout Europe.

The EBA has issued these guidelines in order to provide templates for the National Authorities and thus to ensure consistency of the data collection. The EBA guidelines solely relate to the CRD III requirements for remuneration disclosure on an aggregate Member State basis. These requirements are in addition to the institution level disclosure required by other provisions of CRD III which have been in effect since January 1, 2011, as well as the Pillar 3 disclosure requirements for remuneration required by the Basel Committee. [3]

This Memorandum summarizes the main features of the two sets of guidelines published and highlights some of the issues they may raise.

[1] On 30 September 2010, the Council of the European Union published a revised text of the Capital Requirements Directive (CRD III), which contains new requirements governing the remuneration of certain personnel of both credit institutions and investment firms subject to the Directive. In general, CRD III sought to develop risk-based remuneration policies and practices aligned with the long term interests of the institution aimed at avoiding short-term incentives that could lead to excessive risk-taking. For further information regarding the CRD III and its regulation of remuneration in financial institutions, please see Cleary Gottlieb's earlier Alert Memo, available at http://www.cgsh.com/new_eu_regulation_of_remuneration_in_financial_institutions/.

[2] On August 1, 2012, the United Kingdom ("**UK**") Financial Services Authority ("**FSA**") issued a consultation paper "cp 12/18" to propose and consult on remuneration data reporting requirements available under http://www.fsa.gov.uk/static/pubs/cp/cp12-18.pdf.

[3] The remuneration-related requirements of CRD III will be incorporated with some revisions in a new amendment of the Capital Requirements Directive (CRD IV) which is scheduled to become effective in January 2013. It is expected that CRD IV will slightly alter the data collection requirement with regard to institution level public disclosure, i.e. financial institutions will additionally have to publicly disclose the number of individuals being remunerated EUR 1 million or more per financial year, broken down into pay bands of EUR 500.000.

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I. Guidelines on the Data Collection Regarding High Earners

a. Introduction

CRD III requires National Authorities to collect information on the number of individuals per institution earning total remuneration of at least 1 million Euros[4] (the "**High Earners**"), including their business area and the main elements of their compensation, and forward this information to the EBA. The EBA will publish this information on an aggregate home Member State basis in a common reporting format.

b. Scope of Application

The Guidelines on the Data Collection Exercise Regarding High Earners (the "**High Earners Guidelines**") apply to all European Economic Area ("**EEA**") based institutions subject to CRD III, which are (i) credit institutions as defined under Article 4 (1) of Directive 2006/48/EC as well as (ii) investment firms as defined under Directive 2006/49/EC.[5] The top-most regulated entity in the EEA must report data for itself, as well as for all of its subsidiaries and branches throughout the EEA, to its National Authority. The lower level regulated entities of EEA parents do not have to report independently to their National Authorities.

Since CRD III only requires disclosure on aggregate Member State level for High Earners, **data from non-EEA branches and non-EEA subsidiaries of EEA parents are excluded from the reporting duties**.[6] However, consistent with the application of CRD III, EEA branches and subsidiaries of non-EEA institutions will be required to provide this information.

c. Information to be Submitted

The High Earners Guidelines provide a template for the information required by the EBA.[7] The information to be submitted includes the total number of High Earners broken

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[4] In order to determine the High Earners, EBA will annually provide a conversion rate table, based on the public exchange rate used by the European Commission for financial programming and budget. This should simplify the determination of High Earners where remuneration is awarded in a currency other than EUR.

[5] The EBA guidelines generally apply to all credit institutions and investment firms subject to Directive 2004/39/EC on Markets in Financial Instruments ("MiFID") to which CRD III rules apply, except for investment firms that are referred to in Article 20 (2) and (3) of Directive 2006/49/EC, unless they are included in the consolidation scope of another institution subject to this data collection.

[6] Note that this exercise differs from the normal consolidation scope as set out in the CRD and from the remuneration benchmarking guidelines discussed below.

[7] For your convenience, the template for High Earner data collection is attached to this memo, see Annex I.A full copy of the High Earners Guidelines is available at http://www.eba.europa.eu/cebs/media/Publications/Standards%20and%20Guidelines/2012/EBA-GL-2012-05---GL-5-on-remuneration-data-collection-exercise-_1.pdf.

down by business area ("investment banking", "retail banking", "asset management" and "all other") as well as their total fixed remuneration, their total variable remuneration and the portion of total discretionary pension benefits and total variable deferred compensation they have received in the specified year.[8] However, National Authorities may deem it appropriate to include additional information in their respective data collection processes.[9]

Although only the top-most regulated entity in the EEA must submit the data to its National Authority, separate templates must be submitted for each Member State where the group or institution is operating. In other words, the template has to be filled in as many times as the number of Member States in which the group or institution is active (regardless of whether it is via branches or via subsidiaries) and for which High Earners have to be reported.

High Earners should be reported under the Member State in which their professional activities are undertaken, regardless of which entity they are employed by. High Earners who carry out professional activities in more than one Member State should be reported under the Member State where they mainly undertake their professional activities. High Earners who carry out professional activities in and outside the EEA should be reported under a Member State if they mainly undertake their professional activities within the EEA, presumably including remuneration for services outside the EEA.

d. Effective Dates

Affected institutions will be required to submit their first sets of information on High Earners to their National Authorities at the latest by December 31, 2012. One set of information will be required for each of the previous two complete fiscal years that ended before the rules come into effect, in other words for 2010 and 2011. Starting in 2013, the institutions will have to submit the relevant data to their National Authorities annually by the end of June. The latter will then submit this information to the EBA by the end of August.

e. Public Disclosure by the EBA

The EBA will disclose the information on an aggregate home Member State basis. Specific data of individual financial institutions will not be made publically available by the EBA. The EBA's intent for the disclosure is to review the structure of remuneration schemes and assess whether they manage to align employee's incentives with the long-term objectives

[8] Unless where otherwise provided, terms used in the EBA guidelines shall have the same meaning as within the Guidelines on Remuneration Policies and Practices as set forth by the Committee of European Banking Supervisors ("**CEBS**") on December 10th, 2010 (the "**CEBS Guidelines**"). Under the CEBS Guidelines, variable remuneration is considered to include all "additional payments or benefits depending on performance, or, in certain cases, other contractual criteria."

[9] The FSA consultation paper implementing these guidelines proposes to gather, on a voluntary basis, additional data on gender and race and ethnicity.

of the company.[10] The EBA also points out that it will reveal "year-to-year evolutions in the number of individuals earning at least 1 million Euros within the whole EEA and within the different separate Member States … [and] point to differences in the numbers depending on where groups are headquartered and on where such staff members undertake their professional activities." For example, the data will permit comparisons of average pay of High Earners in investment banking in France versus pay of High Earners in investment banking in Germany. We suspect that this information will add fuel to the political debate and media scrutiny regarding the appropriate regulatory efforts to maintain a level playing field for financial institutions regarding compensation.

II. Guidelines on Remuneration Benchmarking Exercise

a. Introduction

The objective of the Guidelines on the Remuneration Benchmarking Exercise (the "**Remuneration Benchmarking Guidelines**") is to ensure consistency of the data collected for remuneration benchmarking purposes as set forth by CRD III. In order to allow for remuneration benchmarking at the level of the EEA, the national competent authorities will forward the data to the EBA who will in turn publish it on an aggregate Member State basis.

b. Scope of Application

In contrast to the High Earners Guidelines, a more limited set of financial institutions will be subject to the remuneration data collection for the purpose of the benchmarking exercise. The Remuneration Benchmarking Guidelines state that National Authorities should select the institutions to participate in the exercise according to one of the following criteria:

- Either the institutions should represent 60% of the total banking and investment services sector of the Member State concerned, as expressed in terms of aggregated total assets of such institutions as of the end of the year; or

- The 20 largest institutions in the banking and investment services sector of the Member State concerned, as expressed in terms of their total assets as of the end of the year.

However, these are the minimum criteria and the Remuneration Benchmarking Guidelines permit the National Authorities to include in their exercise any other institution they deem significant or relevant for obtaining a representative and diverse sample of institutions in terms of size, business models and risk profiles. Unlike the High Earner

[10] For further details, see the Impact Assessment accompanying CRD III by the Commission of the European Communities which is available at http://ec.europa.eu/internal_market/bank/docs/regcapital/com2009/impact_assesment_en.pdf.

Guidelines, data from non-EEA branches and subsidiaries of EEA institutions will be included.

The FSA, for example, has chosen to impose the guidelines within its jurisdiction on all UK headquartered institutions as well as subsidiaries and branches of non-EEA headquartered institutions based in the UK who have total assets equal to or greater than 50 million British Pounds on the accounting reference date immediately before the firm's last complete financial year.[11] While the asset-based approach will most likely be common throughout the Member States, please note that National Authorities in other Member States may also deem different criteria to be appropriate.

c. Information to be Submitted

The Remuneration Benchmarking Guidelines provide for two different templates[12] to be submitted, one for all staff and one for "identified staff"[13]. The EBA rejected comments that the template for all staff went beyond the requirements of CRD III, taking the view that there is no limitation by the CRD III provisions with regard to the collection of data for all staff and not only material risk takers.

The template for the remuneration of all staff asks for data concerning the total number of staff broken down by business area ("investment banking", "retail banking", "asset management" and "all other") as well as their total remuneration and their total variable remuneration broken down by business area. The template also requires the total net profit in the specified year.

A second template requires additional information about fixed and variable remuneration for "identified staff" broken down by business area. The chart is further broken

[11] See 3.10 of consultation paper 12/18, published under http://www.fsa.gov.uk/static/pubs/cp/cp12-18.pdf.

[12] For your convenience, we have attached the templates to this memo, see Annex II. A full copy of the Remuneration Benchmarking Guidelines is available at http://www.eba.europa.eu/cebs/media/Publications/Standards%20and%20Guidelines/2012/EBA-GL-2012-04---GL-4-on-remuneration-benchmarking-exercise-.pdf.

[13] "Identified staff" is meant to correspond with the definition of identified staff as set out in the CEBS Guidelines. According to paragraph 16 of the CEBS Guidelines the following categories of staff, unless it is demonstrated that they have no material impact on the institution's risk profile, must be included as identified staff: (1) executive members of the credit institution or investment firms' corporate bodies, depending on the local legal structure of the institution (2) senior management responsible for day-to-day management, (3) staff responsible for independent control functions and (4) other risk takers as well as (5) other employees/persons, whose total remuneration takes them into the same remuneration bracket as senior managers and risk takers. Please see the CEBS Guidelines for examples for all the categories listed above. (http://www.eba.europa.eu/cebs/media/Publications/Standards%20and%20Guidelines/2010/Remuneration/Guidelines.pdf). However, please note that the FSA is using a slightly different definition in the consultation paper 12/18 mentioned above, stating that "identified staff" shall be all staff who have a material impact on the firm's risk profile, including a person who performs a significant influence function for the firm, a senior manager and risk takers.

down into sub-categories, including, but not limited to, the amount of total variable remuneration in cash as opposed to the total variable income in shares and share-linked instruments and in other instruments, the amount of variable remuneration deferred in the specific year as well as the number of recipients of severance payments and the amounts of those payments and the number of recipients of discretionary pension benefits and the total amount of those benefits.[14]

While it can be expected that National Authorities will use the templates provided by the EBA in order to comply with the Remuneration Benchmarking Guidelines, some may propose to collect additional information as well.[15]

d. Effective Dates

The cut-off dates for submitting the information to the competent authorities are in line with the ones for the High Earners Guidelines. Any institution that is in scope of the Remuneration Benchmarking Guidelines will be required to submit its first sets of information on remuneration to its National Authority no later than December 31, 2012: one set of information for 2010 and one for 2011. Starting in 2013, the subject institutions will have to submit the relevant data to their National Authorities annually by the end of June.[16] The latter will then submit this information to the EBA by the end of August.

e. Public Disclosure by the EBA

The EBA will use the data received to perform benchmarking at the EEA level and thus reveal both year-to-year evolutions in compensation at an EEA-wide level and differences in compensation depending on where institutions or groups are headquartered in the EEA.

While the numbers published by the EBA will be aggregates based not only on a subset of financial institutions but moreover on a subset chosen according to what may be different criteria proposed by each Member State's National Authority, they are likely to garner much attention, especially given the introduction of information for all employees (not just identified staff or Higher Earners) by business area. For example, the data will permit

[14] Please note that, as mentioned above, all definitions are meant to correspond with the definitions as set out in the CEBS Guidelines.

[15] For the FSA approach, see footnote 9.

[16] Note that the FSA is taking a different approach to the cut-off dates for reporting remuneration benchmarking information, according to paragraph 3.22 of consultation paper 12/18, subject institutions in the UK will be required to submit the information on remuneration for the benchmarking exercise annually within two months after the firm's accounting reference date. As this approach is not in line with the Remuneration Benchmarking Guidelines, it remains to be seen whether the FSA will be able to go through with this approach or whether it will be adjusted according to EBA's approach.

comparisons of average financial institution staff pay in France versus average financial institution staff pay in Germany. Moreover, when read with the High Earners data, comparison between staff pay versus High Earner pay in each Member State will be possible, although the data is not truly comparable due to different reporting entities and the inclusion in the staff data of non-EEA branches and subsidiaries of EEA institutions.

III. Issues

The first sets of data for both guidelines should be submitted by December 31, 2012. The short period available to collect the data according to the templates given out by the EBA will likely prove challenging for the institutions in scope of the guidelines, especially in regard to the benchmarking exercise as the institutions in scope must first be determined by the National Authorities. Moreover, the guidelines have a retroactive component which requires subject institutions to produce the required data for the years of 2010 and 2011.

The disclosure of remuneration data for all EEA Member States may prove to have a significant impact in the media. It is likely that there will be a strong public opinion about differences in remuneration schemes in EEA Member States as this has been a very sensitive topic ever since the start of the financial crisis. The public disclosure by the EBA will enable the public and media to compare not only the average compensation for High Earners on a Member State by Member State basis but will also allow for comparison between different business areas. Moreover, the disparity between the average compensation for High Earners and the average compensation for the remaining staff in a given business area will likely be a highly sensitive topic for political discussion and media coverage.

Please feel free to call any of your regular contacts at the firm or any of the partners and counsel listed under Employee Benefits in the Practices section of our website if you have any questions.

ANNEX I - Information on the remuneration of high earners

Name of the institution/group:				
Member state to which the data relate:				
Performance year for which remuneration is awarded (Year N):				
Business areas:	**Investment banking[1]**	**Retail banking[2]**	**Asset management[3]**	**All Other[4]**
Total number[5] of individuals	#	#	#	#
Of which: Number of "Identified Staff"[6]	#	#	#	#
Total fixed[7] remuneration	€ mn	€ mn	€ mn	€ mn
Total variable[8] remuneration	€ mn	€ mn	€ mn	€ mn
Of which: Total discretionary pension benefits[9]	€ mn	€ mn	€ mn	€ mn
Of which: Total variable remuneration deferred in Year N[10]	€ mn	€ mn	€ mn	€ mn

Footnote: Staff reported in the column "all other" consist of ... [to be completed as per footnote 6 below]

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1. Incl. corporate finance advice services, private equity, capital markets, trading and sales.
2. Incl. total lending activity (to individuals and enterprises).
3. Incl. portfolio management, managing of UCITS and other forms of asset management.
4. This column should include high earners that cannot be allocated to one of the designated business areas. In this case, institutions should add a footnote (see end of the table) explaining in which areas these high earners work.
5. The numbers of staff provided should be expressed in full time equivalents (FTEs) and be based on year-end numbers.
6. Identified staff according to paragraph 16 of the CEBS Guidelines on Remuneration Policies and Practices.
7. Fixed remuneration according to paragraph 11 of the CEBS Guidelines on Remuneration Policies and Practices.
8. Variable remuneration according to paragraph 11 of the CEBS Guidelines on Remuneration Policies and Practices. This includes deferred and non-deferred variable remuneration. This also includes discretionary pension benefits, amounts regarding guaranteed variable remuneration and severance payments.
9. Discretionary pension benefits according to section 3.1.2 of the CEBS Guidelines on Remuneration Policies and Practices.
10. Deferred remuneration according to section 4.1.1 of CEBS Guidelines on Remuneration Policies and Practices.

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ANNEX II – Template 1: Information on the remuneration of all staff

Name of the institution/group:				
Performance year for which the remuneration is awarded (Year N):				
Business areas:	**Investment banking[1]**	**Retail banking[2]**	**Asset management[3]**	**All other[4]**
Total number of staff[5]	#	#	#	#
Total net profit in year N[6]	mn			
Total remuneration[7]	mn	mn	mn	mn
Of which: Total variable remuneration[8]	mn	mn	mn	mn

Footnote 4: Staff reported in the column "all other" consist of ... [to be completed as per footnote 4 below]

1. Incl. corporate finance advice services, private equity, capital markets, trading and sales.
2. Incl. total lending activity (to individuals and enterprises).
3. Incl. portfolio management, managing of UCITS and other forms of asset management.
4. This column should include staff that cannot be allocated to one of the designated business areas. In this case, institutions should add a footnote (see end of the table) explaining in which areas this staff work.
5. The numbers of staff provided should be expressed in full time equivalents (FTEs) and be based on year-end numbers.
6. Net profits should be based on the accounting system used for regulatory reporting. For groups, it is the profit (or loss) of the whole group (i.e. the amount attributable to the equity holders of the parent and to the minority interest).
7. Total remuneration according to paragraph 11 of the CEBS Guidelines on Remuneration Policies and Practices. The amounts of remuneration provided should be gross numbers, including all costs for the institutions, except mandatory contributions by the institutions to social security and comparable schemes.
8. Variable remuneration according to paragraph 11 of the CEBS Guidelines on Remuneration Policies and Practices. This includes deferred and non-deferred variable remuneration. This also includes discretionary pension benefits, amounts regarding guaranteed variable remuneration and severance payments.

ANNEX II - Template 2 : Information on the remuneration of identified staff

Name of the institution/group:				
Performance year for which the remuneration is awarded (Year N):				
Business areas:	Investment banking[10]	Retail banking[11]	Asset management[12]	All other[13]
Number of identified staff[14]	#	#	#	#
Number of identified staff in senior management positions[15]	#			
Number of identified staff in control functions	#			
Total fixed remuneration[16]	mn	mn	mn	mn
Total variable remuneration[17]	mn	mn	mn	mn
Total variable in cash	mn	mn	mn	mn
Total variable in shares and share-linked instruments	mn	mn	mn	mn
Total variable in other types instruments[18]	mn	mn	mn	mn
Total amount of variable remuneration deferred in Year N[19]	mn	mn	mn	mn
Total deferred variable in cash	mn	mn	mn	mn
Total deferred variable in shares and share-linked instruments	mn	mn	mn	mn
Total deferred variable in other types of instruments[20]	mn	mn	mn	mn

10. Incl. corporate finance advice services, private equity, capital markets, trading and sales.
11. Incl. total lending activity (to individuals and enterprises).
12. Incl. portfolio management, managing of UCITS and other forms of asset management.
13. This column should include staff that cannot be allocated to one of the designated business areas. In this case, institutions should add a footnote (see end of the table) explaining in which areas these staff work.
14. Identified staff according to paragraph 16 of the CEBS Guidelines on Remuneration Policies and Practices.
15. This is equivalent to the first and second category of Identified Staff as explained in paragraph 16 of the CEBS Guidelines on Remuneration Policies and Practices.
16. Fixed remuneration according to paragraph 11 of the CEBS Guidelines on Remuneration Policies and Practices.
17. Variable remuneration according to paragraph 11 of the CEBS Guidelines on Remuneration Policies and Practices. This includes deferred and no-deferred remuneration. This also includes discretionary pension benefits, amounts regarding guaranteed variable remuneration and severance payments.
18. Different types of instruments defined in section 4.4.2 of the CEBS Guidelines on Remuneration Policies and Practices.
19. Deferred remuneration according to section 4.4.1 of the CEBS Guidelines on Remuneration Policies and Practices.
20. Different types of instruments defined in section 4.4.2 of the CEBS Guidelines on Remuneration Policies and Practices.

Template 2 (continued)

Amount of explicit ex post performance adjustment[21] applied in Year N for remuneration awarded in previous years.	mn	mn	mn	mn
Number of recipients of guaranteed variable remuneration[22]	#	#	#	#
Total amount of guaranteed variable remuneration	mn	mn	mn	mn
Number of recipients of severance payments	#	#	#	#
Total amount of severance payments paid in year N	mn	mn	mn	mn
Number of recipients of discretionary pension benefits	#	#	#	#
Total amount of discretionary pension benefits[23]	mn	mn	mn	mn

Footnote: Staff reported in the column "all other" consist of ... [to be completed as per footnote 12 below]

21. Explicit ex post performance adjustment according to paragraphs 134 to 139 of the CEBS Guidelines on Remuneration Policies and Practices.
22. Guaranteed variable remuneration according to section 3.2.1 of the CEBS Guidelines on Remuneration Policies and Practices.
23. Discretionary pension benefits according to section 3.1.2.of the CEBS Guidelines on Remuneration Policies and Practices.

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