THE BANK OF NEW YORK MELLON

The Bank of New York Mellon - Brussels Branch

Dear Sirs:

CEBS Consultation Paper (CP42): Guidelines on Remuneration Policies in Financial Institutions

The Bank of New York Mellon Corporation ("BNY Mellon") would like to begin by thanking you for the opportunity to respond to this consultation.

BNY Mellon is a global company, headquartered in the US, operating through multiple entities in jurisdictions around the globe including a number of regulated subsidiaries and branches in the EEA.

We have outlined below a number of the key comments and concerns we have in relation to the proposed guidelines and we would welcome the opportunity to discuss further with CEBS any of our responses.

- **Which Staff:**

We believe that the CEBS guidance should make it clear that firms and/or Supervisors should be able to set a minimum threshold of remuneration, below which the staff-specific remuneration principles will not apply to any and all Identified Staff, not just 'Other risk takers'.

Additionally, the guidance should make it clear that if an individual (regardless of their position) does not have the ability to have a material impact on the risk profile of the institution as a whole, they should not be considered 'Identified Staff', even if they are amongst the senior most staff at the local level.

This section notes that while it is primarily the responsibility of the institutions to identify the members of staff whose professional activities have a material impact on the institution's risk profile, guidance or criteria may be provided by supervisors.

Allowing supervisors to set guidelines or criteria in this regard without clearer definition and oversight from an EU body allows for divergence of approach across the EEA, which may cause difficulties for companies trying to adopt a group wide approach across the EEA and make compliance cumbersome. In particular we feel that CEBS should provide further clarity and definition around what is considered to be 'material risk', including any metrics that could or should be used, such as impact to revenue/capital/profit etc.

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- **Geographic scope/Group application:**

Groups such as BNY Mellon with headquarters outside of the EEA, will likely have non-EEA based employees performing roles that may be deemed to be senior management for European based entities. This will however, constitute only a part of their role and very often the minority of their duties. We believe that these employees should be considered as falling outside the scope of CRD III, in particularly as an example, where an employee qualifies as a Named Executive Officer in the meaning of the Dodd-Frank Act in the US, they should be considered as exempt from the payout rules provided by CRD III. We suggest that CEBS set up a list of non-EEA jurisdictions who, while not subject directly to CRD III, have adhered to FSB principles and for whom application of their legislation is equivalent to application of CRD III.

Supervisors should be allowed to consider the group policies that subsidiaries wish to adopt, and if the local supervisor deems that the policy does not promote excessive risk taking and is appropriate for that particular institution's risk profile, they should have the power to permit the subsidiary to adopt the group policy rather than having to have a stand-alone policy.

- **Proportionality:**

We believe the type of activity performed by the institution should be the primary criterion for the application of proportionality. As mentioned in the draft guidelines, investment management firms that exclusively make investment decisions with client's money, according to predefined strategies, do not incur the same type of risk as other institutions. Likewise, financial institutions that exclusively serve the financial markets as custodian, administrator and trustee cannot be seen as taking substantial risk positions in the market. Their risk is primarily of an operational nature. Factors and considerations such as these should be paramount when firms and Supervisors are considering the application of the Proportionality principle.

- **Implementation:**

The process of implementing CRD III into national legislation of the Member States will necessarily lead to rules that will be known by the middle of December 2010 at best. CRD III requires application for payments in 2011. To the extent that the rules imply a substantial change in the employment conditions of Identified Staff, application of the payout rules on the variable compensation paid in 2011 for plan year 2010 means that they should be applied retroactively. This is in contradiction with legislation and principles of fairness in most EU member states. Should CEBS not consider transitional measures that allow institutions to implement the payout rules without the risk of a breach in the trust proper to an employment relationship?

- **Discretionary Pension Benefits:**

In countries where it is possible to grant benefits flexibly or where so-called "cafeteria plans" exist; a specification would be helpful that Identified Staff do not benefit from discretionary pension benefits, as long as they maximize the retirement provisions within the limits of what is allowed for other employees in the company plan or cafeteria plan. The obligation to invest in shares or in share-linked instruments should also imply that the pension benefit is exempt from local pension legislation that often prohibits the pension liability to be overly dependent on employer shares. Furthermore, the deferral obligation should be waved in cases of disability retirement or the survival pension for next of kin of the beneficiary.

- **Severance Payments:**

It would be helpful to specify that severance payments are not considered to be a reward for failure if they are in line with what the company contractually provides for the same or an equivalent category of personnel, or if they are what the company can reasonably expect to be liable for based on the local employment provisions of the Member State.

- **Risk Alignment Process – Time horizon:**

Having staff remunerated over a multi - year accrual basis can be viewed as more prudent as the assessment of the performance can take into account risks that have materialised over the course of the period. However, if the accrual period is too long, good staff could be adversely impacted by the weaker performance of subsequent hires.

- **Performance Measurement – Qualitative/Quantitative measure**

Quantitative measures of staff activity need to have an explicit risk adjustment included to allow performance measurement to be in line with the firm's target capital ratio (capital required for activities is measured against revenue stream of such activities), however, a firm may choose to reduce capital by paying higher dividend payments, and as such, some absolute monetary returns would give a higher return on capital employed.

- **Risk adjustment in the award process**

With regard to the statement, 'The whole of the institution's equity should be fully allocated and charged'; Firms may be prudent and retain excess capital, and as the guidance suggests that capital should be employed, there could be a possibility that firms shift excess capital to a holding company and if this was outside of the EEA, it may be counter to local regulators interests, and against the general principal of holding excess capital above minimum requirements

- **Ratio between fixed and variable remuneration**

We agree with the approach not to fix the ratio – which would be unnecessarily prescriptive and uneconomic - and to allow firms to set their own ratios given their circumstances, the businesses they operate and the relevant staff. Firms should, however, still have the opportunity to justify, to their supervisors, circumstances where there is an unusually high leverage between fixed and variable remuneration at the point awards are recommended; although there is little practical explanation of what the guidance means by "high ratio."

- **Non-deferred and deferred remuneration**

We are concerned that the Guidelines require more prescription than is in CRD3 as to the length of the deferral, no vesting within the first 12 months and only vesting at yearly intervals rather than firms determining their own schedule of pro-rated vesting. No vesting within the first 12 months of deferral could result in significant administration costs to firms that already have deferral plans in place, due to the need to administer a large number of different deferral dates.

- **Cash v Instruments**:

Retention periods: In our opinion, requiring an additional vesting period over and above the initial vesting period for deferred instruments is unnecessarily restrictive and goes beyond the requirements of CRD3, particularly in relation to non-executive staff. Few staff members deem that the outcomes of their decision and performance can affect their firm's stock price; therefore, it is unlikely that, for many staff, the additional vesting period will effectively reduce incentives towards excessive risk taking. Identified staff will be subject to minimal retention periods on their equity instruments, effectively subjecting 50% of their variable remuneration to risk factors over which they have essentially little or no control. In addition, the total deferral and retention period needed to satisfy the requirements is in excess of a normal employee's life-cycle at a firm. The provision for a retention period beyond the initial vesting period should, therefore, be limited to executives.

Minimum portion of instruments and their distribution over time: Firms should consider their own risk profile and determine whether: equity should be used up front; an appropriate level of retention should be applied; equity should be used as the deferred element of the variable pay (again with appropriate levels of deferral and/or retention to meet requirements and align properly with risk. Firms should also be able to choose to pay the cash proportion up front and defer the non-cash proportion of variable pay, rather than automatically defer both cash and equities. We fail to understand the benefit or reasoning behind the requirement in point (o) of Annex V, Point 23.

We thank you for the consideration you will give to the above.

For and on behalf of The Bank of New York Mellon,

Marc Buyst,
Managing Director
Human Resources

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