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February 2, 2017

European Banking Authority  
Floor 46, One Canada Square  
London, E14 5AA, UNITED KINGDOM

Re: Discussion Paper: *Designing a new prudential regime for investment firms*

Dear Sir or Madam,

ICI Global<sup>1</sup> appreciates the opportunity to provide input on the European Banking Authority (“EBA”) discussion paper on the design of new prudential requirements for European Union investment firms (“Discussion Paper”).<sup>2</sup> ICI Global and its members seek to promote a strong and resilient financial system that operates on a foundation of sound regulation. Toward that end, we regularly engage with policymakers on significant financial regulatory policy initiatives. This initiative will affect ICI Global members that manage regulated funds throughout the EU<sup>3</sup> and raises issues more generally regarding prudential regulation and asset management activities.

The Discussion Paper responds to a European Commission (“Commission”) Call for Advice requiring the EBA to specify “the appropriate design and calibration of all aspects of a new prudential regime specifically tailored to the needs of different business models of firms and the risks that their operations present.”<sup>4</sup> Consistent with the Commission’s

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<sup>1</sup> ICI Global carries out the international work of the Investment Company Institute, serving a fund membership that includes regulated funds publicly offered to investors in jurisdictions worldwide, with combined assets of US\$20.2 trillion. ICI Global seeks to advance the common interests and promote public understanding of regulated investment funds, their managers, and investors. Its policy agenda focuses on issues of significance to funds in the areas of financial stability, cross-border regulation, market structure, and pension provision. ICI Global has offices in London, Hong Kong, and Washington, DC.

<sup>2</sup> EBA, Discussion Paper, *Designing a new prudential regime for investment firms*, EBA/DP/2016/02 (4 November 2016), available at <https://www.eba.europa.eu/documents/10180/1647446/Discussion+Paper+on+a+new+prudential+regime+for+Investment+Firms+%28EBA-DP-2016-02%29.pdf>.

<sup>3</sup> We use the term “regulated funds” to refer to investment funds that are organized or formed in jurisdictions worldwide and substantively regulated to make them eligible for sale to retail investors (*e.g.*, funds domiciled in the European Union and qualified under the UCITS Directive (“UCITS”)).

<sup>4</sup> Discussion Paper at 5.

articulation of the mission, the Discussion Paper envisions (1) an approach that better captures the risks of investment firms and (2) harmonized requirements that are reasonably simple, proportionate, and more relevant to the nature of an investment business. Both descriptions encouragingly suggest an appreciation of, and intent to be responsive to, the broadly diverse universe of entities that are considered to be “investment firms.”

Our comments focus on the implications of the Discussion Paper for investment firms that are asset managers, and in particular those that manage regulated funds such as UCITS (“asset managers”). Overall, we view the proposal as having the potential to bring positive change to the existing prudential framework for investment firms which, as the EBA has observed, has a number of significant flaws.<sup>5</sup> Our optimism is tempered, however, by the absence of essential details in the Discussion Paper without which we and other stakeholders cannot assess with any precision the impact of the proposal. Certain aspects of the proposal likewise concern us because they appear too rooted in banking and do not appropriately reflect the business and operations of asset managers.

Following the summary of our comments below, we first offer some general observations regarding this initiative. We then address briefly issues related to the EBA’s proposed framework for categorizing investment firms. The remainder of our letter highlights key points the EBA should bear in mind with regard to a prudential regime that would apply to asset managers. In addition to general considerations, we discuss capital requirements, liquidity requirements, macro-prudential supervision, and remuneration.

### **Summary of Comments**

- ICI Global supports the development of a prudential regime for investment firms that is not based on the bank-oriented Capital Requirements Directive/Capital Requirements Regulation.
- The experience and expertise of capital markets regulators is essential to sound financial policymaking outside the banking sector. We therefore urge the EBA (and later, the European Commission) to include the European Securities and Markets Authority and its constituent capital markets regulators—and those entities to engage—as full partners as this initiative moves forward.
- Under the EBA’s proposed classification scheme, asset managers (including managers of regulated funds) most likely would fall into Class 2—the class described as “not systemic and bank-like.” We take strong exception to a suggestion in the Discussion Paper, however, that size could equate to “systemic” status in the case of an asset manager. The EBA instead should focus on the activities in which an asset manager engages, as the Financial Stability Board recently has done.

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<sup>5</sup> These include complexity, lack of risk sensitivity, and inconsistent implementation across jurisdictions. See EBA, *Report on Investment Firms: Response to the Commission’s Call for Advice of December 2014*, EBA/Op/2015/20 (December 2015) (“2015 EBA Report”) at 5-6, available at <https://www.eba.europa.eu/documents/10180/983359/EBA-Op-2015-20+Report+on+investment+firms.pdf>. Moreover, the current regime is derived from bank regulatory concepts that are not suitable for investment firms, such as ensuring stability of banks.

- Consistent with the EBA’s recommendation, any prudential requirements should be calibrated to address the specific risks posed by a firm. For an asset manager (such as a manager of regulated funds), this means risks to the firm’s balance sheet and not market or other risks associated with regulated fund or other client assets. Those risks belong to clients, who knowingly bear them.
- Any prudential regime that would apply to asset managers should take into account the risk-mitigating effects of existing regulation and professional indemnity insurance. In the case of managers of regulated funds, existing laws such as the UCITS Directive already apply prudential requirements calibrated to address the specific risks posed by the activities in which these entities engage. We believe the EBA should conclude that those requirements are sufficient. Should the EBA decline to follow this recommendation, however, we offer additional comments on prudential requirements in the asset manager context.
  - *Capital requirements.* ICI Global cautions against reflexive use of capital requirements for addressing all types of risks in the financial sector. Given the fundamental differences between banks/credit institutions and asset managers, the purpose to be served by any capital requirements that would apply to asset managers must be well explained and appropriately reflect risk differences. Although the EBA seems to intend to incorporate such differentiation, the Discussion Paper does not provide enough detail to assess the precise impact of the proposed approach—*i.e.*, a capital floor (for wind-down) with “add-ons” based on “k factors” designed to serve as “observable proxies” for a firm’s particular risks.
  - Two of the proposed k factors—assets under management and assets under advice—raise specific concerns because they incorrectly suggest that an asset manager’s size is a reliable indicator of the risks it poses to customers or markets. Such an approach departs from the idea of a regime calibrated based on an investment firm’s activities—which, in our view, is the appropriate place to focus.
  - *Liquidity requirements.* For asset managers, any liquidity requirements should *not* be intended to address liquidity management of managed assets/customer accounts, and minimum requirements therefore should be sufficient.
  - *Macro-prudential supervision.* We urge the EBA to hold off on any further consideration of the use of macro-prudential tools for investment firms until the Commission completes its pending, comprehensive review of the EU macroprudential framework.
  - *Remuneration.* ICI Global strongly believes that remuneration requirements need to take into account the nature of a firm’s business and activities and should not follow a one-size-fits-all approach. A comprehensive and strict framework for remuneration for fund managers—with requirements specifically adjusted to the distinct nature of the regulated fund sector—is already in place under UCITS V. Departing from this existing framework and applying CRD-style remuneration requirements, including any bonus cap, to regulated fund managers would be inappropriate.

- Developing an appropriate prudential regime for investment firms is an enormously complex task that will take time. Our view is that the quality of the end product is more important than speed. We strongly recommend an additional consultation once the EBA, working with ESMA, provides the specific details stakeholders need to evaluate fully the calibration of the proposal.

### General Observations

ICI Global supports the development of a prudential regime for investment firms that is not based on the bank-oriented Capital Requirements Directive/Capital Requirements Regulation (“CRD/CRR”). We are hopeful that this endeavor will promote several worthy goals that the EBA has articulated in the Discussion Paper—goals that aim to address shortcomings of the current framework. Among these goals are:

- *To “simplify the existing categorisation of investment firms.”*<sup>6</sup> Among other benefits, we believe this effort could help foster greater uniformity across jurisdictions.
- *To “be more proportionate and reduce the complexity compared to the existing framework while at the same time increasing the risk sensitivity.”*<sup>7</sup> It is encouraging that the Discussion Paper notes that the population of investment firms covered is “large and extremely diverse” and therefore proportionality and relevance to the nature of the investment business are key considerations.<sup>8</sup>
- *To better reflect the differences between investment firms and banks (or other credit institutions).* Most investment firms do not present the same risks as credit institutions, and any prudential regime for investment firms needs to take this into account. Certainly this is true of asset managers, which operate on an agency basis on behalf of clients such as regulated funds.<sup>9</sup>

ICI Global agrees with the EBA’s view that, to achieve the goals outlined above, developing a regime specifically tailored for investment firms rather than amending the CRD/CRR for investment firms is the correct approach.<sup>10</sup> For the same reasons, we agree

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<sup>6</sup> Discussion Paper at 9.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See, e.g., Financial Stability Board, Policy Recommendations to Address Structural Vulnerabilities from Asset Management Activities (12 January 2017) at 8, available at <http://www.fsb.org/wp-content/uploads/FSB-Policy-Recommendations-on-Asset-Management-Structural-Vulnerabilities.pdf> (“It is also important to acknowledge that asset managers and their funds pose very different structural issues from banks and insurance companies. In contrast to banks and insurance companies, which act as *principals* in the intermediation of funds, asset managers usually act as *agents* on behalf of their clients and are subject to fiduciary duties to act in the best interests of investors.”) (Emphasis in original).

<sup>10</sup> See Discussion Paper at 58-60.

with the EBA’s observation that investment firms would benefit from having a rulebook “separate from the one applied to credit institutions.”<sup>11</sup>

While ICI Global largely supports the goals highlighted above, we also recognize the enormous complexity of the task before the EBA (and, later, the Commission)—how to simplify the existing system yet still acknowledge the wide range of investment firms and the different types of risks they pose. Doing justice to the task at hand will take time, and our view is that the quality of the end product is more important than speed.

To be successful, this endeavor will require intensive and ongoing participation by the European Securities and Markets Authority (“ESMA”) and its constituent capital markets regulators.<sup>12</sup> For sound financial policymaking outside of the banking sector, reliance on the experience and expertise of capital markets regulators is essential. We urge the EBA and the Commission to include ESMA and its constituent capital markets regulators—and those entities to engage—as full partners as this initiative moves forward.

On a related note, we understand that the EBA plans to submit its opinion and a final report to the Commission by the end of June 2017, without a further consultation on the details of how the new regime would be calibrated. This is so even though the Discussion Paper describes the EBA’s work on the proposal as being “at an early stage.”<sup>13</sup> We disagree with this course of action, given the many unanswered questions, and the challenges involved in trying to “get it right.” We strongly recommend an additional consultation once the EBA, together with ESMA, provides the specific details stakeholders need to evaluate fully the calibration of the proposal.

### **Proposed Categorisation of Investment Firms**

In its December 2015 report, the EBA recommended developing a new approach to categorise investment firms into three classes for prudential regulation based on systemic importance: (1) “systemic and bank-like” investment firms (Class 1); (2) other investment firms that are “not systemic and bank-like” (Class 2); and (3) “very small and non-interconnected” investment firms (Class 3).<sup>14</sup> Managers of regulated funds most likely would fall into Class 2—the class described as “not systemic and bank-like.”

We note that in the Discussion Paper, the EBA posits that an investment firm could be “systemic,” even if it is not “bank-like.”<sup>15</sup> To support this proposition, the EBA points to “an *extremely large* portfolio manager” as its sole example.<sup>16</sup> We take strong exception to the suggestion that size (presumably based on the amount of assets under management) equates to “systemic” status in the case of an asset manager. There are fundamental problems with

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<sup>11</sup> *Id.* at 9.

<sup>12</sup> Such participation is contemplated by the CRR, from which this initiative flows. See Discussion Paper at 7 (citing Articles 493(2), 498(2), and 508(2) and (3) of Regulation (EU) No 575/2013).

<sup>13</sup> Discussion Paper at 5.

<sup>14</sup> 2015 EBA Report, *supra* note 5, at 7, 23-24.

<sup>15</sup> Discussion Paper at 12.

<sup>16</sup> *Id.* at 32 (emphasis added).

assessing the systemic importance of asset managers based solely on size, and these problems have been well documented, including in connection with work led by the Financial Stability Board (“FSB”).<sup>17</sup>

More recently, the FSB has shifted the focus of this work, with the development and implementation of policy recommendations regarding asset management activities taking center stage.<sup>18</sup> We take this as a welcome sign that the FSB has moved away from equating size with risk and, instead, is focusing on the activities in which an asset manager engages. We urge the EBA to do the same, consistent with what generally seems to be the intent of the proposal outlined in the Discussion Paper.

### **Considerations Regarding a Prudential Regime for Asset Managers**

As the EBA continues to work on the proposed prudential regime for investment firms, there are a number of key points for the EBA to bear in mind with respect to asset managers (in particular, those that manage regulated funds).

First and foremost, as the EBA recommends, any prudential requirements should be calibrated to address the specific risks posed by the firm. In the case of an asset manager, this means risks to the firm’s balance sheet—a balance sheet that generally tends to be small and straightforward. It does not mean the market, credit, or other risks associated with the assets that an asset manager manages on behalf of its clients, which may include regulated funds or other collective investment vehicles. The manager acts in an agency capacity pursuant to contract. In other words, the clients, and not the asset manager, own the managed assets and knowingly bear the associated risks.

What are the main risks to an asset manager’s balance sheet? Generally speaking, these would be operational risks. Asset managers are well accustomed to employing measures to manage and mitigate these risks. Managers of regulated funds act as fiduciaries and are required to have robust policies, procedures, and systems to monitor and mitigate operational risk, covering not only their own operations but those of their significant service providers.<sup>19</sup> Fiduciary obligations and regulatory requirements reinforce the strong market incentive to control risk. Just like all financial firms or other organizations striving to succeed in a competitive business, asset managers have every reason to guard against risks

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<sup>17</sup> See, e.g., Letter from Paul Schott Stevens, President & CEO, Investment Company Institute, to Secretariat of the FSB, dated May 29, 2015, at 43-45 (responding to the FSB’s second consultation on proposed assessment methodologies for identifying non-bank non-insurer global systemically important financial institutions) (“ICI May 2015 Letter”); Response from European Fund and Asset Management Association to Secretariat of the FSB, dated May 29, 2015, at 31 (same); Response from The Investment Association to Secretariat of the FSB, dated May 29, 2015, at 2 (same). These and other responses discussing the problems of assessing the systemic importance of asset managers based on size are available at <http://www.fsb.org/2015/06/public-responses-to-march-2015-consultative-document-assessment-methodologies-for-identifying-nbni-g-sifis/>.

<sup>18</sup> See FSB, Policy Recommendations to Address Structural Vulnerabilities from Asset Management Activities (12 January 2016), available at <http://www.fsb.org/wp-content/uploads/FSB-Policy-Recommendations-on-Asset-Management-Structural-Vulnerabilities.pdf>. Previously, the focus had been on designing assessment methodologies for identifying individual asset managers or investment funds as global systemically important financial institutions, using size (assets under management) as an initial screen.

<sup>19</sup> In the case of UCITS, any outsourced function remains the responsibility of the outsourcing manager.

that could damage their reputation or hamper their ability to provide, in a reliable manner, the services that customers pay them to provide.

Professional indemnity insurance also can play an important role in mitigating operational risks; for example, in covering losses arising from deficiencies in internal controls, errors, system failures, or external events. Professional indemnity insurance offers several benefits over other potential approaches to supplementing controls on operational risks, such as capital requirements (discussed below). These benefits include transference of operational risk to third parties, market monitoring, and risk-sensitive costs. The unique features of professional indemnity insurance can provide a more efficient way to address what are likely to be idiosyncratic risks. In practice, regulated funds and their managers often procure insurance coverage to cover such risks. Any prudential regime that would apply to asset managers must take into account the risk-mitigating effects of both existing regulation and professional indemnity insurance.

Equally as important, the regime should avoid imposing requirements designed to address risks *not* posed by the firm. For example, in discussing the rationale for prudential standards for investment firms, the Discussion Paper refers back to the EBA's December 2015 report, which suggested that a prudential regime can help to "avoid the failure of investment firms resulting in a material impact on the stability of the financial system."<sup>20</sup> This objective is not relevant with respect to asset managers—in particular, managers of regulated funds—because, as we have explained on previous occasions, they do not pose risks of disorderly failure.<sup>21</sup>

In contrast to banks, certain characteristics of asset managers facilitate orderly exits from the business (*e.g.*, through sale to another firm or winding down of the manager). These characteristics include, for example: (1) the agency business model under which asset managers operate; (2) their relatively simple balance sheets; (3) requirements for separate custody of fund or other client assets (which also reduces risks to customers); and (4) substitutability of asset managers. Even in periods of market stress, were an asset manager to determine to leave the business, other firms can be expected to step in to manage those assets. All of these factors help to make asset manager business transitions a generally smooth and straightforward process, without raising concerns about significant negative spillover effects on the broader financial markets.

Further, in the case of managers of regulated funds, existing laws such as the UCITS Directive already apply prudential requirements, including capital requirements, that have been calibrated to address the specific risks posed by the activities in which these entities engage. In such circumstances, those requirements should suffice.

Should the EBA decline to follow this recommendation, however, we offer below additional comments on prudential requirements in the asset manager context.

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<sup>20</sup> Discussion Paper at 16.

<sup>21</sup> See, *e.g.*, ICI May 2015 Letter, *supra* note 17, at 44-45.

### Capital requirements

ICI Global cautions against reflexive use of capital requirements—long recognized as a tool of banking regulators—for addressing all types of risks in the financial sector. Given the fundamental differences between banks/credit institutions and asset managers, the purpose to be served by any capital requirements that would apply to asset managers (or other investment firms, for that matter) must be well explained and appropriately reflect risk differences.

To its credit, the EBA seems to intend to incorporate such differentiation. But it is unclear how (or how well) the proposed approach will achieve this result. The Discussion Paper describes a system that would start with a capital floor (the amount needed to facilitate a firm’s wind-down). The proposal contemplates various “add-ons” to that amount based on a range of factors (“k factors”) designed to serve as “observable proxies” for the particular risks that a firm poses to customers and to markets. The k factors also would be scalable. Without further detail, however, there is no way of knowing what its precise impact will be in practice, either collectively or for any given firm.

Moreover, we have specific concerns with two of the proposed k factors: assets under management and assets under advice. As discussed earlier in this letter, we are troubled by the suggestion that the size of an asset manager, based on assets under management (or assets under advice), is a reliable indicator of the risks the firm poses to customers or markets. The proposed approach seems to ignore the agency model under which an asset manager, including a manager of regulated funds, typically provides services to customers, and the fact that the manager does not hold custody of regulated fund assets.<sup>22</sup> Using either of these measures as an “observable proxy” for setting capital requirements could lead to unduly high capital levels, especially for large asset managers. Large managers, in fact, are likely to have robust controls for operational risk and appropriate insurance coverage. For these reasons, the EBA’s observation that “the higher the amount of [AUM], the higher the [capital] requirement should be in absolute numbers”<sup>23</sup> strikes us as overly simplistic. Such an approach departs from the idea of a regime calibrated based on an investment firm’s activities—which, in our view, is the appropriate place to focus.

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<sup>22</sup> UCITS, for example, must appoint a depositary—an entity regulated and supervised by Member State regulators under the UCITS Directive requirements—that is independent of the regulated fund and fund manager. The depositary must be a national central bank, a credit institution, or other entity that is authorized to provide depositary services; it is subject to prudential regulation and to capital adequacy requirements under the Capital Requirements Directive. The depositary acts “both as a supervisor (the “legal conscience”) of [the] UCITS fund . . . and as a custodian over the fund assets.” See Press Release, European Commission, UCITS—Improved Requirements for Depositaries and Fund Managers—Frequently Asked Questions (3 July 2012), available at [http://europa.eu/rapid/press-release\\_MEMO-12-515\\_en.htm](http://europa.eu/rapid/press-release_MEMO-12-515_en.htm). Its responsibilities include safeguarding fund assets, monitoring the fund’s cash flows and performing certain oversight functions. In carrying out its responsibilities, the depositary “shall act honestly, fairly, professionally, independently and solely in the interest of the UCITS and the investors of the UCITS.” Directive 2014/91/EU (amending Directive 2009/65/EC), Article 25, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02009L0065-20140917&from=EN>.

<sup>23</sup> Discussion Paper at 21.



### Liquidity requirements

The EBA proposes to establish a minimum set of liquidity standards for investment firms, which would serve as “the basis on which to build for any individual firms that may require more than the minimum.”<sup>24</sup> The Discussion Paper describes the purpose of liquidity management as aiming “to ensure that an investment firm is able to meet its liabilities as they fall due, for a given time horizon.”<sup>25</sup> As discussed above, asset managers typically have small and straightforward balance sheets. In addition, it is important to remember that for asset managers, any such liquidity requirements would *not* be intended to address liquidity management of managed assets/customer accounts.<sup>26</sup> For these reasons, the minimum level generally should be sufficient for asset managers and a “liquidity buffer” would be unnecessary.

The Discussion Paper suggests that “it could be helpful to set down best practice liquidity management as qualitative requirements for investment firms.”<sup>27</sup> Any best practices or guidance on liquidity management should make clear that it applies only to the investment firm and does not extend to liquidity management of the firm’s managed assets.

### Macro-prudential supervision

The Discussion Paper includes commentary on “a macro-prudential perspective for investment firms” that gives us pause.<sup>28</sup> It begins by referencing work by the European Systemic Risk Board (“ESRB”) dating from 2013.<sup>29</sup> This brings to mind concerns we have voiced previously with a more recent ESRB strategy paper focused on extending macro-prudential supervision beyond banking to the investment sector.<sup>30</sup> Issued in July 2016, this deeply flawed paper made suggestions that reflected a lack of appreciation for the fundamental differences between banking and non-bank activities such as asset management. We view the ESRB strategy paper as one of several examples in which bank-dominated

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 40.

<sup>26</sup> Regulated funds already must adhere to regulatory requirements concerning liquidity management. UCITS, for example, must have a documented risk management policy covering, among other things, how the UCITS will manage liquidity to meet redemptions. *See generally* UCITS Directive, Recital 5 and Article 1 (objective to invest in transferable securities and other liquid assets), Article 50 (eligible assets) and Article 51 (risk management).

<sup>27</sup> Discussion Paper at 46.

<sup>28</sup> *Id.* at 54-55.

<sup>29</sup> ESRB, Recommendation on intermediate objectives and instruments of macro-prudential policy ESRB/2013/1 (4 April 2013) at 3, available at [http://www.esrb.europa.eu/pub/pdf/recommendations/2013/ESRB\\_2013\\_1.en.pdf](http://www.esrb.europa.eu/pub/pdf/recommendations/2013/ESRB_2013_1.en.pdf) (outlining objectives that “should act as operational specifications to the ultimate objective of macro-prudential policy, which is to contribute to the safeguard of the financial system as a whole.”).

<sup>30</sup> *See* Letter from Dan Waters, Managing Director, ICI Global, to Commissioner Dombrovskis, DG FISMA, European Commission, dated 28 October, 2016 at 2-3, available at [https://www.iciglobal.org/pdf/16\\_icig\\_eu\\_macroprudential\\_framework.pdf](https://www.iciglobal.org/pdf/16_icig_eu_macroprudential_framework.pdf) (commenting on ESRB, Macroprudential policy beyond banking: an ESRB strategy paper, July 2016, available at [https://www.esrb.europa.eu/pub/pdf/reports/20160718\\_strategy\\_paper\\_beyond\\_banking.en.pdf](https://www.esrb.europa.eu/pub/pdf/reports/20160718_strategy_paper_beyond_banking.en.pdf)).

regulatory bodies seem inclined to “export” bank-oriented policies to the asset management sector.

In the Discussion Paper, the EBA acknowledges that the macro-prudential tools used in the CRD/CRR are not necessarily appropriate for investment firms, but rather that “newly designed macro-prudential tools would most likely be required.”<sup>31</sup> We urge the EBA to hold off on any further consideration of this issue while the Commission is considering “whether the existing EU macroprudential framework is functioning optimally.”<sup>32</sup> The Commission sought public comment in a number of areas, including narrowing the scope of macroprudential instruments, refining the scope of existing instruments, and the role and organizational structure of the ESRB. The Commission has indicated that its “comprehensive review” is intended to result in a “more effective, efficient and flexible [macroprudential] framework for the EU.”<sup>33</sup> In light of this work by the Commission, any further consideration at this time by the EBA of “a macro-prudential perspective for investment firms” would be premature.

### Remuneration

The Discussion Paper correctly observes that “[m]ost investment firms commonly have different risk profiles, business models, and pay structures compared to credit institutions.” It goes on to state that “[a] remuneration regime for investment firms should differentiate the regulatory requirements for the different categories of investment firms” and suggests that only ‘systemic and bank-like’ investment firms should remain within the scope of the current CRD/CRR remuneration requirements.<sup>34</sup> The Discussion Paper requests comments on a prudential remuneration framework for Class 2 investment firms “that should mainly aim to counteract against related operational risks and would aim at the protection of consumers.”<sup>35</sup>

ICI Global strongly believes that, as with other areas of regulation, remuneration requirements need to take into account the nature of a firm’s business and activities and should not follow a one-size-fits-all approach. We are heartened to see that the Discussion Paper appears to acknowledge this important principle.

As the EBA (together with ESMA) considers the appropriate form(s) of remuneration requirements for investment firms, we wish again to stress two fundamental points. First, sector-specific remuneration requirements already are in place for regulated fund managers. Indeed, UCITS V, as adopted by the Commission, appropriately covers fund managers with requirements specifically adjusted to the distinct nature of the regulated fund sector. As a result, there is in Europe a comprehensive and strict framework for remuneration for fund

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<sup>31</sup> Discussion Paper at 55.

<sup>32</sup> See European Commission, CONSULTATION DOCUMENT, Review of the EU Macro-prudential Policy Framework, 1 August 2016, available at [http://ec.europa.eu/finance/consultations/2016/macprudential-framework/docs/consultation-document\\_en.pdf](http://ec.europa.eu/finance/consultations/2016/macprudential-framework/docs/consultation-document_en.pdf).

<sup>33</sup> *Id.*

<sup>34</sup> Discussion Paper at 57.

<sup>35</sup> *Id.* at 58.

managers. Thus, in our view, the EBA's final report should recommend that the Commission adhere to this existing framework as regards regulated fund managers.

Second, departing from this existing framework and applying CRD-style remuneration requirements, including any bonus cap, to regulated fund managers would be inappropriate. As we have previously explained, UCITS manager staff act in an agency capacity and do not have the ability to engage in institution-threatening risk-taking. Moreover, UCITS managers are significantly constrained by the investment restrictions and other requirements of the UCITS Directive and are therefore not capable of the "excessive risk-taking" that is meant to be caught by the CRD IV rules. Further, subjecting firms to multiple remuneration directives would create unnecessary complexity and confusion, with the likelihood of duplicative or conflicting requirements, if not both.<sup>36</sup>

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We appreciate the opportunity to comment on the Discussion Paper. If you have any questions regarding our comments or would like additional information, please contact me at +44 207-961-0830 or [dan.waters@iciglobal.org](mailto:dan.waters@iciglobal.org); Susan Olson, Chief Counsel, at +1 (202) 326-5813 or [solson@iciglobal.org](mailto:solson@iciglobal.org); or Patrice Berge-Vincent, Managing Director, Europe, at +44 207-961-0833 or [patrice@iciglobal.org](mailto:patrice@iciglobal.org).

Sincerely,

/s/ Dan Waters

Dan Waters  
Managing Director  
ICI Global

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<sup>36</sup> For additional information regarding our views, *see, e.g.*, ICI Global response to European Commission, *Public consultation on impacts of maximum remuneration ratio under Capital Requirements Directive 2013/36/EU (CRD IV) and overall efficiency of CRD IV remuneration rules* (January 14, 2016), available at <https://www.iciglobal.org/pdf/29662.pdf>.