MEMO# 32744

September 8, 2020

Comment Letter on European Banking Authority's Draft Technical Standards on Remuneration Under the Investment Firms Review

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September 8, 2020 TO: ICI Global Members SUBJECTS: MiFID, EMIR, AIFMD, UCITS V RE: Comment Letter on European Banking Authority's Draft Technical Standards on Remuneration Under the Investment Firms Review

In early June, the European Banking Authority (EBA) published for consultation two sets of Regulatory Technical Standards related to the remuneration rules under the Investment Firms Directive (IFD) and Investment Firms Regulation (IFR).[1] The EBA also issued a roadmap on investment firms outlining its approach to the numerous mandates it received under the IFD/IFR.[2] The EBA intends to submit the final draft RTS to the European Commission in December 2020 and it is expected that they will be adopted in March 2021 and published in June/July 2021 (the IFD comes into force on June 26, 2021).

On September 4 we submitted the attached comment letter. Below please find a brief summary of the consultations and our recommendations.

Draft RTS on Identification of Material Risk Takers for Remuneration

The IFD requires investment firms to identify all staff whose professional activities have a material impact on the investment firm's risk profile or assets under management. The EBA's draft RTS lay out a common set of criteria that must be applied to identify such staff (referred to as "identified staff" or "material risk takers"). Modeled after the prescriptive approach for identifying material risk takers applied under the CRD IV RTS and the draft CRD V RTS, investment firm staff can qualify as material risk takers by meeting either quantitative or qualitative thresholds.

Qualitative Criteria. The qualitative criteria aim to identify staff in key areas and functions whose impact on the firm's risk profile, in EBA's view, will always be material, as well as staff with the authority to take risks above thresholds defined based on the investment firm's capital figures or assets that it manages. Specifically, all members of the management body or senior management must be identified. In addition, staff with managerial responsibility for certain functions, including money laundering and terrorist financing, economic analysis, outsourcing, and IT/information (where that role relates to the safeguarding of assets or client money, or the execution of client orders or trading activities) are within scope. The EBA specifies that the qualitative criteria are not exhaustive and that firms will need to continue to consider whether other categories of staff, not caught by the qualitative criteria, may nevertheless have a material impact on the firm's risk profile and therefore need to be identified as material risk takers.

Quantitative Criteria. Levels of remuneration are used for identifying staff based on quantitative criteria. The EBA notes that, where individuals are awarded very high total remuneration, this is usually linked to the impact of their professional activities on the investment firm's risk profile or the assets it manages. The quantitative criteria proposed in the draft RTS are set at the same level as those that will apply to banks under the new CRD V proposal, which the EBA proposes for cross-sectoral consistency. The quantitative criteria include, (1) staff earning more than the higher of €500,000 and the average level of pay for the management body and senior management, (2) staff earning more than €750,000, (3) for firms of 1,000 staff or more, staff that are in the top 0.3% of earners, and (4) staff whose remuneration is equal to or greater than the lowest total remuneration of certain staff included under the qualitative criteria. Staff earning up to €750,000 may be excluded if the investment firm determines that the relevant staff member does not in fact have a material impact on risk. Excluding staff earning more than €750,000 requires approval from the local regulator, while exclusions for staff earning more than €1,000,000 requires approval from the EBA, which will be given only in "exceptional circumstances."

For investment firms that are part of a group, the criteria generally need to be applied at both the individual and group consolidated basis.

Draft RTS on Instruments for Investment Firms Remuneration

The IFD requires that 50% of the variable pay of material risk takers be made in "instruments."[3] National competent authorities may approve the use of "alternative arrangements fulfilling the same objectives" if an investment firm does not issue any of the specified instruments. The draft RTS define the (1) Additional Tier 1 and Tier 2 instruments that may be used and (2) categories of instruments that may be used as "alternative arrangements fulfilling the same objectives."

The draft RTS define classes of instruments that can be used as additional Additional Tier 1 instruments and Additional Tier 2 instruments very similarly to how they are defined under the current CRD IV regime. A very limited number of CRD IV institutions use Additional Tier 1 and Tier 2 instruments, and we believe that these provisions are not relevant for most investment firms. The EBA states that no firms currently use any arrangements that it would view as being "alternative arrangements." We therefore understand that these provisions are also of limited relevance to investment firms and do not propose to comment on the text of the draft RTS themselves.

The consultation on the RTS on Instruments includes the assumption that "institutions will have to comply with the RTS with regard to the remuneration awarded for the performance year 2021."

ICI Global Recommendations

We made the following recommendations:

Current position

Our analysis

Proposed amendments

Material risk taker RTS (and, by association, remuneration rules under the IFD generally) apply from June 26, 2021.

Likely to result in firms not having time to review, implement and apply the RTS adequately considering the RTS will not likely be published until June/July 2021.

Apply to first full performance year commencing on or after June 26, 2021.

Unclear what rules should apply during the timing gap to firms that will be subject to the IFD.

There is no basis for applying CRD V to soon-to-be IFD firms during the timing gap given it will not apply when bonuses are awarded/paid out.

Roll-out transitional provisions, most efficient of which will be to require firms to continue applying their existing regimes until the first full performance year commencing on or after June 26, 2021.

Quantitative thresholds replicate CRD IV/V thresholds.

Not appropriate for investment firms and will result in many individuals being inappropriately identified as material risk takers.

Remove CRD IV/V quantitative thresholds that have no legal basis under the IFD.

If the first recommendation is not taken, use quantitative thresholds as indicators only and do not require regulatory approval for exclusion.

If the prior recommendations are declined, eliminate the requirement to demonstrate “exceptional circumstances” for staff members earning EUR 1 million or more as long as they have no material impact on the risk profile of the investment firm or the assets it manages.

Article 6(1)(d) pulls into scope those earning the same or more as staff meeting specified qualitative criteria.

Because the threshold is based on lowest total remuneration of that group and the group can include some more junior qualitative staff, may result in many individuals being wrongly considered as material risk takers.

Carve out from the group those only caught because they are voting members of committees referred to in Articles 5(7) and 5(9).

Eva M. Mykolenko

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[Attachment](#)

endnotes

[1] The draft RTS on identification of material risk takers for remuneration are *available at* https://eba.europa.eu/sites/default/documents/files/document_library/Publications/Consultations/2020/CP%20on%20RTS%20on%20IS%20under%20IFD/884631/EBA-CP-2020-09%20CP%20on%20RTS%20on%20IS%20under%20IFD.pdf and the draft RTS on instruments for investment firms remuneration are *available at* https://eba.europa.eu/sites/default/documents/files/document_library/Publications/Consultations/2020/%20CP%20on%20RTS%20on%20instruments%20for%20IF%20remuneration/884630/EBA-CP-2020-08%20CP%20on%20RTS%20on%20instruments%20for%20IF%20remuneration.pdf.

[2] The roadmap is *available at* https://eba.europa.eu/sites/default/documents/files/document_library/Regulation%20and%20Policy/Investment%20firms/884436/EBA%20Roadmap%20on%20Investment%20Firms.pdf. The roadmap sets out the intentions of the EBA's upcoming workplan to ensure transparency about the EBA's work and expected timelines.

[3] "Instruments" are defined in the IFD as: (1) shares or equivalent ownership interests, subject to the legal structure of the investment firm concerned; (2) share-linked instruments or equivalent non-cash instruments, subject to the legal structure of the investment firm concerned; (3) Additional Tier 1 or Tier 2 instruments or Other Instruments which can be fully converted to Common Equity Tier 1 instruments or written down and that adequately reflect the credit quality of the investment firm as a going concern; and (4) non-cash instruments which reflect the instruments of the portfolios managed.