

MEMO# 32466

May 19, 2020

EBA Publishes Draft Regulatory Technical Standards on Contractual Recognition of BRRD Resolution Stays

[32466]

May 19, 2020 TO: ICI Members

ICI Global Members

Derivatives Markets Advisory Committee

ICI Global Regulated Funds Committee

ICI Global Trading & Markets Committee SUBJECTS: Derivatives

International/Global

Investment Advisers

Trading and Markets RE: EBA Publishes Draft Regulatory Technical Standards on Contractual Recognition of BRRD Resolution Stays

As we previously reported to you, last June the EU adopted final amendments to moratorium powers under the European Bank Recovery and Resolution Directive (BRRD).^[1] The amendments include a provision on cross-border recognition of resolution stays for contracts subject to third-country laws. EU member states must require EU banks to include, in financial contracts governed by third-country law, terms by which the parties recognize that the contract may be subject to the exercise of moratorium powers by resolution authorities, as if the contract were governed by the law of the relevant member state. The amendments to BRRD require the European Banking Authority (EBA) to develop draft regulatory technical standards (RTS) to determine the contents of this requirement. EBA recently issued the draft RTS, which are summarized briefly below.^[2]

Comments on the draft RTS are due by August 15, 2020. At this time, ICI Global does not plan to comment. If you have comments or concerns, however, please contact Sarah Bessin (sarah.bessin@ici.org) no later than June 5, 2020.

The draft RTS include a list of mandatory components that would be applicable to EU banks entering into financial contracts under third-country law. Under BRRD, EU member states are required to implement the amendments to BRRD into national law by December 28, 2020. The draft RTS are intended to ensure that the parties to the contract recognize that the contract may be subject to the exercise of moratorium powers by resolution authorities under BRRD. These mandatory provisions would include acknowledgment by the parties that:

- The contract may be subject to the exercise of stay powers, including a description of the powers;
- They are bound by the powers under BRRD to suspend or restrict certain rights and obligations;
- No other contractual term impairs the enforceability of the provisions; and
- Such contractual term is subject to the law of a Member State.

The EBA notes that the draft RTS are intended to align with the FSB's Principles for Cross-border Effectiveness of Resolution Actions.^[3]

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endnotes

[1] For a summary of the amendments to BRRD, *please see* ICI Memorandum No. 31833 (July 2, 2019), *available at* https://www.ici.org/my_ici/memorandum/memo31833.

[2] See <https://eba.europa.eu/eba-consults-technical-standards-contractual-recognition-stay-powers-under-brrd>.

[3] See Financial Stability Board, Principles for Cross-border Effectiveness of Resolution Actions (November 3, 2015), *available at* <https://www.fsb.org/wp-content/uploads/Principles-for-Cross-border-Effectiveness-of-Resolution-Actions.pdf>.