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CRD V, UCITS V and MiFID II remuneration developments

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Proposed amendments to remuneration provisions of CRDIV and CRR – CRD V and CRR II

The European Commission has published proposed amendments to CRDIV and the Capital Requirements Regulation (“CRR”), including proposed changes to the remuneration provisions.

The proposals will need to go through the ordinary legislative procedure to become binding EU law, which takes, on average, 18 months and can take longer for complex legislative proposals. CRD V will then need to be implemented by EU member states. So it is likely that these rules will not take effect until 2019/20 at the earliest and may be subject to amendments during that process.

Executive Summary

In short, if introduced, the proposed amendments will:

- apply the bonus cap to all CRD V firms;
- apply the deferral and non-cash rules to all CRD V firms with over EUR 5 billion of assets;
- not allow any material risk takers to be exempt from the bonus cap for de minimum reasons (i.e. where their pay is less than a certain amount);
- only allow material risk takers to be exempt from the deferral and non-cash rules if their variable pay is less than EUR 50,000 and represents less than ¼ of their total pay;
- require each trading desk to have a remuneration policy;
- allow listed firms to use share linked instruments instead of listed shares (to ease the administrative burden);
- clarify some of the remuneration disclosure requirements and the method of

disclosure.

Detailed overview

The Commission proposes to do the following (please click here to see the CRD IV remuneration provisions and here to see the CRR provisions amended to show the proposals):

- Subject to a limited carve out on the deferral and non-cash instrument rules (summarised below) the Commission has tried to clarify that all the remuneration rules apply to all firms subject to CRD IV (including the bonus cap) by removing the provision that the remuneration rules can be applied "*to the extent*" appropriate.

  Comment: The Commission is trying to address the arguments made previously that the words "to the extent" allowed the bonus cap to be disapplied. By removing those words it is aiming to subject all firms who are subject to CRD V to the bonus cap. In the UK, Proportionality Level 3 firms (which have less than £15bn of assets) are able to disapply the bonus cap so if introduced this will extend the bonus cap to a lot more firms.

  It remains to be seen if this will make it through the legislative process, and if it does, how the UK implements it is likely to be subject to the Brexit negotiations.

- Exempt small and non-complex firms and staff who receive low variable remuneration from the rules on deferring 40% - 60% of variable remuneration over 3 to 5 years and paying out at least 50% of variable remuneration in non-cash instruments. Specifically, the following will be exempt:

- Firms with assets with an average value equal to or less than EUR 5 billion over the four-year period immediately preceding the current financial year (although member state regulators may decide that firms whose total asset value is below this threshold are not subject to the derogation because of "*the nature and scope of their activities, their internal organisation or, if applicable, the characteristics of the group to which they belong*.")

  Comment: In the UK, Proportionality Level 3 firms (which have less than £15bn of assets) are able to disapply the rules on deferral and non-cash instruments so if introduced, this will extend the deferral and non-cash rules to a lot more firms.

- Staff whose annual variable remuneration does not exceed EUR 50,000 and does not represent more than 1/4 of the staff member's annual total remuneration (although member state regulators may decide that staff members whose annual variable remuneration is below these thresholds are not subject to the derogation because of national market specificities in terms of remuneration practices or because of the nature of the responsibilities and job profile of those staff members).

  Comment: In the UK, individuals who earn less than £500,000 and have variable pay of less than 1/3 total pay are able to disapply the rules on deferral

and non-cash instruments, so if introduced, this will extend the deferral and non-cash rules to many more staff.

- Allow listed firms to use share linked instruments instead of listed shares (to ease the administrative burden)

- Require each trading desk to have a "*clear annual business plan including a well-defined remuneration policy based on sound criteria used for performance measurement*".

- Clarify some of the remuneration disclosure requirements (as shown in the mark up linked above) and the method of disclosure (as shown in the mark up linked above).

Please find links to the published documents below:

- Legislative proposal for review of Capital Requirements Directive

- Legislative proposal for a review of Capital Requirements Regulation and annex

Accompanying documents:

- Q&A memo on the proposals

- Factsheet

- Impact assessment of the capital requirements review (Executive Summary and Full text)

Legislative review of proportionality in AIFMD and UCITS V

The European Commission has said that it will assess the application of proportionality to the remuneration rules in the Alternative Investment Fund Managers Directive (AIFMD) and the Undertakings for Collective Investment in Transferable Securities Directive (UCITS V) in relation to aligning remuneration regimes and reducing reporting burdens. This suggests that similar changes to those referred to above in CRD V may be proposed which would result in the deferral and non-cash instrument rules applying to more firms.

Please see the outcome of the European Commission's Call for Evidence which refers to this assessment (as well as the CRDIV and CRR amendments referred to above).

FCA UCITS V remuneration guidance

The FCA has confirmed it will not be issuing any guidance on the application of the UCITS V Remuneration Code SYSC 19E. Instead it says UCITS management companies may find it useful to consider the principles in the FCA's existing AIFMD remuneration guidance to understand its expectations for their remuneration policies and practices.

This means that firms will have to take a view on:

- proportionality based on the AIFMD AUM thresholds and guidance. This is likely to make many UCITS managers subject to the rules on deferral, payment in non-cash and performance adjustment; and

- which regimes are equally as effective for delegation purposes based on the FCA's guidance on AIFMD. In particular firms will have to decide whether the BIPRU Remuneration Code for CRD III firms is equally as effective despite the fact that the ESMA Guidelines on remuneration under UCITS V are silent on CRD III (they only specifically refer to CRD IV as equally as effective).

PRA MiFID II Consultation Paper

On Friday, the PRA published their second consultation paper on the Implementation of MiFID II (CP43/16) which sets out changes to the PRA's Rulebook in respect of remuneration (amongst other things).

The remuneration changes proposed are not extensive. Broadly, they require in-scope firms to establish a remuneration policy for staff who provide services to clients which encourages responsible business conduct, fair treatment of clients and avoids conflict of interest in the relationship with clients.

The PRA states that "in the interests of a coherent approach to corporate governance, these MiFID II requirements are aligned, as far as possible, to requirements under CRD IV".

The deadline for responding to the consultation is 27 February 2017.

If you have any queries on the above please contact Alex Beidas, Juliette Graham or your usual Linklaters contact.