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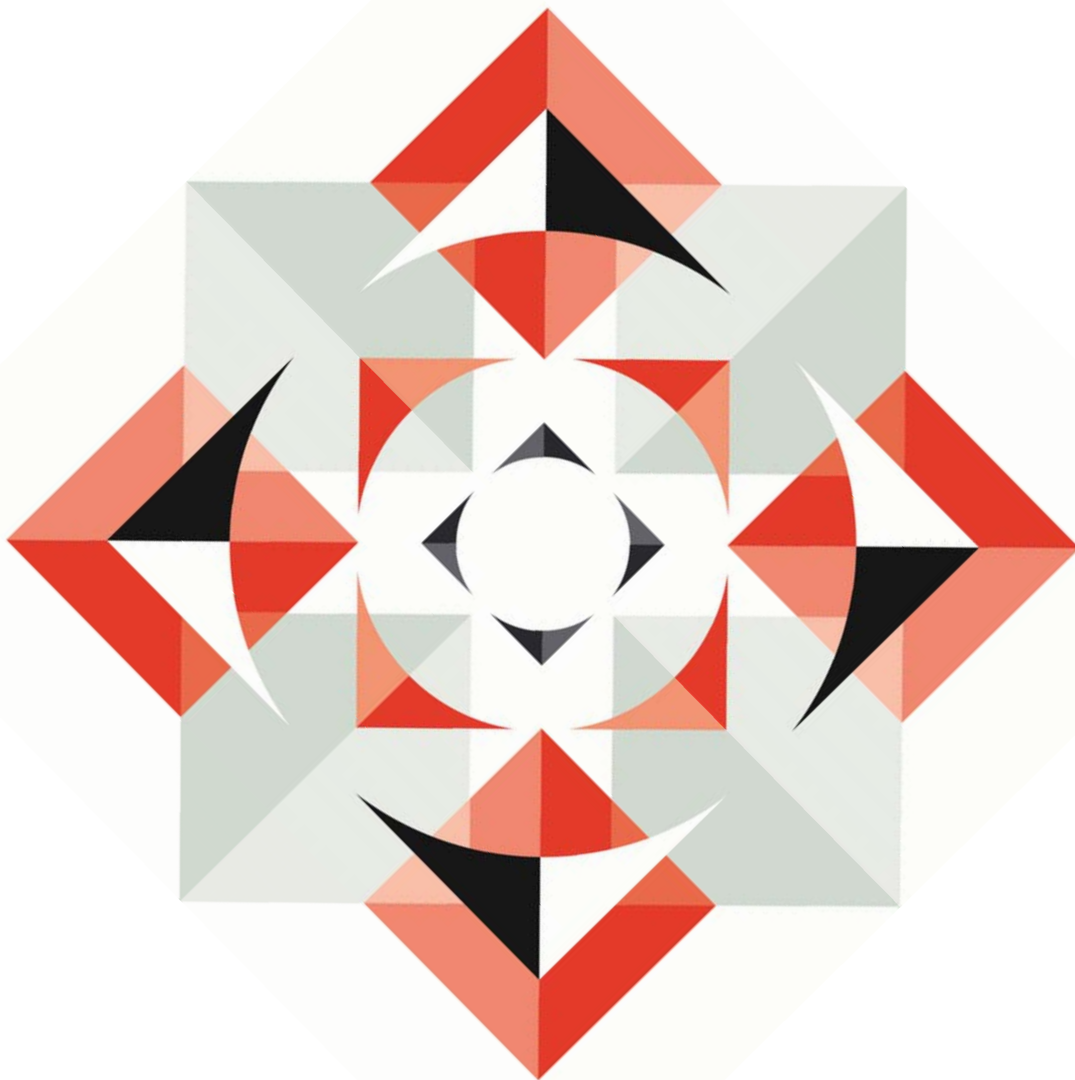
Remuneration code

For banks, building societies and investment firms



Inside

What is the Remuneration Code?
Which firms are caught by the New Code?
Are firms established outside of the EU caught by the New Code?
Which individuals are subject to the New Code?
Remuneration structure
Confirmation of compliance
Approach to proportionality
Breaches of the New Code

Introduction

The financial services industry has been the focus of wide-ranging reform over the past few years as a result of both UK Government and European initiatives. In January 2014, a package of reforms implementing the fourth set of amendments to the EU Capital Requirements Directive ("CRD4") took effect. The remuneration requirements of CRD4 build on the remuneration requirements of the third amendment to the Capital Requirement Directive ("CRD3") which aimed to align remuneration principles in banks, building societies and investment firms across the EU. In particular, CRD3 imposed restrictions affecting the structure and timing of bonus payments including, for example, deferring entitlement to bonuses already earned by individuals. CRD4 goes a step further and imposes restrictions on the quantum of variable remuneration underthe so-called "bonus cap". In June 2015 the Prudential Regulation Authority ("PRA") and the Financial Conduct Authority ("FCA") issued new Remuneration Codes taking into account the requirements of "CRD4" and other developments.

What is the Remuneration Code?

The Remuneration Code was originally issued in August 2009 (see www.fsa.gov.uk/pubs/policy/ps09_15.pdf) as part of the FSA's regulatory response to the banking crisis. It applied with effect from 1 January 2010 to the UK's largest banks, building societies and broker dealers (approximately 26 firms in total) and required those firms to ensure that their remuneration policies, practices and procedures were consistent with and promoted effective risk management. With effect from 1 January 2011 the original Remuneration Code was substantially revised, and the number of firms within its scope significantly extended, to take account of the requirements of CRD3. The Remuneration Code was revised again with effect from 1 January 2014 to take into account the requirements of CRD4.

From 1 July 2015 there are five Remuneration Codes:

> The CRR Remuneration Code which applies to "CRR firms", that is, banks building societies and PRA-designated investment firms;

> The IFPRU Remuneration Code (http://fshandbook.info/FS/html/handbook/SYSC/19A) which applies to IFPRU investment firms and relevant overseas firms;

> The AIFM Remuneration Code (http://fshandbook.info/FS/html/handbook/SYSC/19B) which applies to alternative investment fund managers

> The BIPRU Remuneration Code (http://fshandbook.info/FS/html/FCA/SYSC/19C) which applies to BIPRU investment firms regulated by the FCA. The BIPRU Remuneration Code is the same as the 2011 Remuneration Code referred to above; and

> The Dual-regulated firms Remuneration Code http://fshandbook.info/FS/html/handbook/SYSC/19D which applies to CRR firms.

This note focuses on the CRR Remuneration Code, the Dual-Regulated firms Remuneration Code and the IFPRU Remuneration Code (collectively referred to as the "New Codes").

Many of the requirements under the New Code are the same as, or similar to, requirements under the 2011 and 2014 Remuneration Codes. However, there are some changes and also some important extensions which will apply for performance periods beginning on or after 1 January 2016 as explained below.

Which firms are caught by the New Code?

The CRR Remuneration Code and the Dual-regulated firms Remuneration Code both apply to CRR firms. This is because CRR firms are subject to regulation by the PRA for prudential purposes and by the FCA for conduct purposes. The IFPRU Remuneration Code applies to FCA-regulated IFPRU investment firms.

IFPRU investment firms include those firms that deal on their own account as well as firms that underwrite financial instruments and/or place financial instruments (whether on a with or without firm commitment basis). Firms that safe keep and administer financial instruments for the account of clients, including custodianship and cash/collateral management, are also classified as IFPRU investment firms. CRD4 does not apply to FCA-regulated BIPRU investment firms and such firms are only subject to the BIPRU Remuneration Code. In broad terms, BIPRU firms are firms which are only regulated to carry on one or more of the following investment activities/services:

(a) reception and transmission of orders;

(b) execution of orders on behalf of clients;

(c) discretionary portfolio management; and

(d) investment advice provided that they do not safeguard and administer assets or hold client money or assets and place themselves in debt with clients.

The New Codes and the BIPRU Code are currently applied proportionately according to the firm's size and internal organisation and the nature, scale and complexity of its activities. As part of this approach, firms are categorised into three levels under the New Codes with differing minimum expectations for each group.

However, this is likely to change. On 21 December 2015 the European Banking Authority (EBA) published its final guidelines on sound remuneration policies for performance periods beginning on or after 1 January 2017 ("Guidelines") and its opinion on the application of the proportionality principle to the remuneration requirements under CRD4 which will significantly restrict the use of the proportionality principle (see further "Approach to Proportionality" below).

Are firms established outside of the EEA caught by the New Code?

Yes. UK groups are required to apply the New Codes globally to all their regulated and unregulated entities whilst UK subsidiaries of non-EEA groups must apply the New Codes to all entities within their subgroup including those based outside the UK. The New Codes apply to UK branches of non EEA firms. UK branches of firms whose home state is within the EEA are not required to apply the New Code since they are subject to their home state's equivalent rules.

Which individuals are subject to the New Code?

The New Codes potentially apply to all staff (including employees, secondees from non UK group companies who are working in the UK and consultants). Firms are required to apply certain requirements under the New Codes (e.g. restrictions on guaranteed bonuses and ensuring the termination payments are not a reward for failure or misconduct) on a firm-wide basis. It is also considered best practice for all firms to defer a proportion of discretionary variable pay. That said, the implications of the New Codes depend on whether the staff are material risk takers (also referred to as Code Staff) and/or whether the staff satisfy the "De Minimis Concession" (see below). In addition, for performance periods beginning on or after 1 January 2016 "Senior managers" under the Senior Managers Regime are subject to more stringent deferral and clawback rules. Senior managers are individuals who are carrying out a designated senior management function and in broad terms are the most senior and influential individuals in the business. In 2013 the EBA concerned by the different approaches taken by the different EU national regulators to identify Code Staff, reviewed the position. The EBA published a final draft Regulatory Technical Standard ("RTS") in the form of a Delegated Regulation in December 2013. This means that from 26 June 2014 individuals working in firms within the scope of CRD4 will beidentified as Code Staff or material risktakers if they satisfy one or more of the following criteria:

> Qualitative criteria relating to the role and decision making power of the staff member e.g. a member of the firm's management body or senior management;

> Internal criteria developed by each firm to identify material risk-takers based on the firm's specific risk profile; and

> Quantitative criteria based on the individual's remuneration.

The quantitative criteria will apply to individuals who: (a) were awarded total remuneration of EUR 500,000 or more in the preceding financial year; and/or (b) are within the top 0.3% of staff who have been awarded the highest total remuneration in the preceding financial year and/or (c) in the preceding financial year were awarded remuneration at least equal to the lowest total remuneration awarded to senior management or other risk-takers.

There is a facility for firms to demonstrate that a particular staff member who is only caught under the quantitative criteria is not a material risk taker. However, applying this facility is not straightforward. If the individual is awarded total remuneration of at least EUR 750,000 or is within the 0.3% of highest earners, the firm will require prior approval from the PRA/FCA if it wishes to demonstrate that the individual is not a material risk-taker.

To exclude an individual who is awarded total annual remuneration of EUR 1,000,000 or more, the PRA/FCA will also need to seek prior approval from the EBA. In practice, the RTS criteria have meant that many more individuals are treated as Code Staff including, in particular, individuals with a total annual remuneration of at least EUR 750,000.

For completeness, under the BIPRU Code, Code Staff are identified as those individuals whose activities during any part of the performance year potentially have a material impact on the risk profile of the firm. Code Staff include those individuals who perform a significant influence function, senior managers, risktakers, individuals engaged in control functions and any individual whose total remuneration and pension provision takes them into the same remuneration bracket as senior managers. A non-exhaustive list of examples of risk-takers for the purposes of the BIPRU Code is set out in the table above.

If an individual who is Code Staff satisfies the De Minimis Concession some of the requirements of the New Codes may be relaxed provided that the individual's treatment remains consistent with the general principle of ensuring remuneration policies are consistent with and promote effective risk management.

An individual will satisfy the De Minimis Concession for a performance year if:

> His total remuneration for that performance year is not more than £500,000; and

> His variable remuneration for that performance year is not more than 33% of his total remuneration.

There are special rules for assessing whether the De Minimis Concession applies where an individual is only Code Staff for part of the performance year.

Remuneration structure

The main principles of the New Codes relating to the structure of remuneration are set out below. Ratio of fixed pay to variable pay Each firm must set appropriate ratios between fixed pay and variable pay to ensure that fixed pay is a sufficiently high proportion of total remuneration to allow for the possibility of paying no variable pay.

"**Variable pay**" is defined as remuneration which reflects "a sustainable and risk adjusted performance as well as performance in excess of that required to fulfil the employee's job description as part of the terms of employment." This includes not only discretionary and guaranteed bonuses but also long term cash and equity incentive plans.

"**Fixed pay**" is defined as remuneration

which "primarily reflect[s] relevant professional experience and organisational responsibility as set out in an employee's job description as part of the terms of employment." This includes salary and benefits. Under CRD4, variable pay in respect of services and performance of Code Staff on or after 1 January 2014 should generally not exceed 100% of fixed pay. Firms are able to increase the cap to 200% of fixed pay if at least 66% of the firm's shareholders agree (or at least 75% of shareholders if less than 50% of the total shares or ownership rights are represented).

The New Codes set out the procedures firms should follow to obtain a shareholder resolution to increase the cap on variable pay. In the PRA's and FCA's view the 75%, 66% and 50% are references to the percentages of the share or ownership voting rights represented, not the firm's whole issued share capital or ownership rights or the number of individual shareholders or owners. The PRA and FCA expect firms to seek a resolution of the shareholders or owners of the ultimate EEA parent. For UK-headquartered banking groups or subsidiaries of EEA-headquartered groups, this requires a resolution of the shareholders of the ultimate EEA parent. In the case of UK subsidiaries of non-EEA firms, the PRA and FCA currently accept a resolution of the immediate non-EEA parent company. Branches of non-EEA firms require a vote by the shareholders of the non-EEA firm.

In addition up to 25% of variable pay will benefit from a discount if it is paid in equity or debt instruments which are deferred for at least five years. On 27 March 2014, the EBA published finalised guidance on how the applicable discount rate should be calculated. The calculation should take into account the following three factors: (a) the national average inflation rate; (b) the average interest rate of EU Government Bonds; and (c) an incentive factor linked to the length of the deferral period. The incentive factor for a five year deferral period is 10% increasing by 4% for each additional year of deferral.

For most firms the bonus cap first took

effect for the 2015 bonus round. In an attempt to minimise the impact of the cap, many firms in 2014 sought to increase fixed pay by increasing basic pay and/or using cash or share role based allowances. From 1 January 2015 role based allowances are treated as variable pay unless they satisfy certain conditions. Those conditions are set out in an EBA opinion published on 15 October 2014 (and subsequently confirmed in its Guidelines). To come within the definition of fixed pay the allowances must relate to the individual's role and responsibilities rather than the individual's performance. The EBA consider that this means role based allowances must be non-discretionary, pre-determined, transparent, permanent, non-revocable, not dependent on performance and not provide an incentive incentive to take risks In its Guidelines, the EBA has also indicated that, when deciding whether remuneration is fixed or variable, the way in which it is paid should also be taken into account. In other words, paying remuneration in shares or other instruments rather than cash may result in that remuneration being treated as variable pay depending on the terms of the share or other instrument awarded.

Discretionary variable pay

The amount of the discretionary variable pay pool should be based on profit, adjusted for current and future risks, and take into account the cost and quantity of the capital and liquidity required. All PRA– authorised firms, when determining the size of their annual bonus pools, should deduct a prudential valuation adjustment figure from fair value accounting profit. The PRA and FCA make it clear that Earnings Per Share and Total Shareholder Return (two common performance measures) are not properly adjustment for longer term risk and firms should take this into account when developing risk adjustment methods. Firms must ensure that performance related bonuses are assessed in a multiyear framework taking into account the performance of the individual, the relevant business unit and the overall results of the firm. In assessing the individual's performance, both financial and non financial metrics (such as compliance with effective risk

management policies and regulatory requirements), should be considered. At least 40% of variable pay awarded to Code Staff who do not satisfy the De Minimis Concession in a Level One or Level Two firm must be deferred over a period (of at least three to seven years depending on the seniority of the relevant individual) taking into account the business cycle, the nature of the business, its risks and the activities of the individual in question. Where the variable pay is of a particularly high amount (the PRA and FCA indicate that generally £500,000 is a particularly high amount but in appropriate circumstances the threshold may be lower) or where the variable pay is paid to an executive director of a Level One firm, at least 60% must be deferred. In relation to the length of deferral periods, for performance periods beginning on or after 1 January 2016, PRA-regulated firms (including those that are dual-regulated) must defer variable pay as follows:

- **Senior managers** who retain the greatest influence over the strategic direction of the business will be subject to the seven-year deferral requirement with no vesting until three years after award and vesting no faster than on a pro-rata basis thereafter;
- **Risk managers** (excluding those covered by the Senior Manager Regime) who have responsibility for managing or supervising risk- taking or significant risk functions will be subject to the five-year deferral requirement with vesting no faster than on a pro-rata basis.

(This includes members of the management body, risk managers and their direct reports, heads of material business units and their direct reports, heads of function and managers of material risk-takers);

- **All other material risk takers** – deferral for a minimum three-year period with vesting no faster than ona pro-rata basis.

(This includes individuals exposing the firm to credit risk or trading book/market risk, individuals approving the introduction of new products, individuals who are members of the local risk committee and material risk-takers identified solely under the quantitative criteria if subject to managerial oversight).

IFPRU firms are able to retain the three to five year deferral period for all Code staff who are

not Senior managers Senior managers will be subject to the same minimum seven-year deferral rule as set out above.

For Code Staff who do not satisfy the De Minimis Concession in a Level One or Level Two firm 50% of both that part of the variable pay which is immediately payable and that part which is deferred should be paid on a net of tax basis in the form of shares, equivalent ownership interests or, where possible, capital instruments which adequately reflect the credit quality of the firm as a going concern and are appropriate for use as variable pay. A Delegated Regulation setting out the type of instruments which are appropriate for these purposes came into force on 9 June 2014 http://eurlex.europa.eu/legalcontent/EN/TXT/PDF/?uri=OJ:JOL_2014_148_R_0006&from=EN.

Any shares, ownership instruments or other non-cash instruments should also be subject to a retention policy to ensure that the incentives are aligned with the longer term interests of the firm.

Currently y a six month retention period on a net of tax basis is generally appropriate (although please that in its Guidelines, the EBA has stated that a retention period of 12 months should be used unless the individual concerned is a member of senior management with a deferral period of 5 years, in which case a 6 month retention period will be acceptable).

The combined effect of the deferral requirement and the requirement to pay 50% of the variable pay in a non-cash form for an individual paying a 47% combined income tax and NIC rate is that the individual will receive approximately 15.9% (or 10.6%) of his variable pay as an immediate cash payment.

Guaranteed variable pay

Firms must not award, pay or provide an incentive guaranteed variable pay to any member of staff unless:

> It is exceptional

> It occurs in the context of hiring new staff

> The firm has a strong and sound

> capital base, and It is limited to the first year of service

To demonstrate that guaranteed variable pay is exceptional the firm must consider whether the variable pay is exceptional both on commercial grounds and prudential grounds. Firms should also consider the number of staff to whom they offer guarantees – it is difficult to demonstrate that a bonus is exceptional where a high number of new hires are awarded a guarantee. For PRA regulated firms guaranteed bonuses should not be the "norm" but rather should be "rare and infrequent". Currently there is no need to demonstrate that guaranteed variable pay which is buying out rights that the staff member will forfeit on leaving his former employment is exceptional. The position may change - in its Guidelines, the EBA seemed to suggest that buy out bonuses should also be exceptional. However, the buy-out should not be more generous (either in terms of amount or vesting) than the awards that the staff member will forfeit.

The PRA and FCA apply this requirement strictly - an award of a lower amount but with a shorter vesting schedule will breach this requirement. The buy-out award should also align with the long-term interests of the new employer and should be subject to appropriate retention, deferral and performance adjustment provisions.

Note that the rules on buy outs may change for awards to Code Staff. In a consultation issued on 13 January 2016 the PRA has proposed that buy outs made by proportionality level one and level two firms for Code Staff should be managed through the employment contract between the new firm and the staff member to allow for **malus** (that is, arrangements under which unvested deferred variable pay is reduced prior to vesting) or **clawback** (that is, contractual arrangements requiring the staff member to repay vested awards) if the former firm determines that the staff member was guilty of misconduct or risk management failings. The new firm would be able to apply for a waiver to disapply malus or clawback if it has reason to believe that the former firm's decision was manifestly unfair or unreasonable.

Guaranteed variable pay should not be for a period beyond the first year of employment even if the employee has moved into a new role with a business unit where there is less certainty around the future, potential performance of the unit. Similarly, the circumstances in which a firm is able to award a guaranteed retention bonus are limited to exceptional cases where the firm is undergoing a restructuring and a strong case can be made for the retention of key staff members on prudential grounds. Where a firm intends to award a retention bonus to Code Staff it must notify the PRA or FCA (as appropriate) in advance and seek individual if the individual does not meet the De Minimis Concession.

Non-executive directors and variable pay

With effect from 1 July 2015 firms are prohibited from awarding or paying variable pay to non-executive directors in respect of activity carried out in their roles as non-executives.

Performance adjustment Where financial performance is subdued or negative firms must ensure that variable pay is "considerably contracted" including reducing payouts of amounts previously earned. Firms must ensure that any variable pay (including both the non-deferred and deferred element) awarded to Code Staff who do not satisfy the De Minimis Concession is only paid or vests if it is sustainable according to the financial situation of the firm and justified on the basis of the performance of the firm, business unit and individual. In addition variable pay should be subject to performance adjustment where the staff member participated in, or was responsible for, conduct which resulted in significant losses to the firm and/or failed to meet appropriate standards of fitness and propriety.

CRD3 and CRD4 envisage that both malus and clawback arrangements could be used to make performance adjustments Under the New Codes, firms are required to apply malus to deferred variable pay (including any element to be paid in non cash instruments in the event of poor performance including:

> Staff member misbehaviour or material error

> The firm and/or relevant business unit suffering a material downturn in its financial performance

> The firm and/or relevant business unit

suffering a material failure of risk management

The PRA has indicated that performance adjustment should not be limited to the staff directly culpable for misfeasance. It should also apply to those staff who could reasonably have been expected to be aware of the failure or misconduct at the time but failed to take adequate steps to promptly address it and those staff who, by virtue of their role or seniority, could be deemed indirectly responsible or accountable for the failure or misconduct.

With effect from 1 January 2015 level one and level two proportionality firms regulated by the PRA have been required to ensure that deferred and undeferred variable pay awarded on or after 1 January 2015 to material risk-takers is subject to clawback arrangements for a minimum period of 7 years from the date of award where either:

> There is reasonable evidence of the MRT's misbehaviour or material error; and/or

> The firm or relevant business unit suffers a material failure of risk management.

The PRA confirms that, in implementing these requirements, the principle of proportionality will apply. In particular where there has been a material failure of risk management, firms should take into account the seniority of the employee and their proximity to the failure.

If a firm fails to implement clawback arrangements on an award of variable remuneration, that award will be void. Note that the FCA I introduced the same clawback provisions for variable pay awarded for performance periods beginning on or after 1 January 2016. In addition, for variable pay awarded for performance periods beginning on or after 1 January 2016 firms in proportionality levels one and two will be required to extend the clawback period from seven years to ten years for Senior managers where at the end of the seven year period there is an outstanding internal or regulatory investigation which may lead to the application of clawback (but for the expiration of the seven year period).

Pension policy

A firm's pension policy must be in line with its business strategy, objectives, values and long term interests. Pension contributions which are discretionary (i.e. in the nature of a bonus) should be held for 5 years in the form of shares/ equivalent ownership interests.

Termination payments

Payments on termination of employment should not reward failure or misconduct but rather should reflect the performance achieved over time. It is best practice not to accelerate vesting of any outstanding bonus payments or long term incentive awards.

Hedging strategies

Code Staff should undertake that they will not engage in personal investment strategies that undermine risk alignment, such as hedging or remuneration related insurance strategies. In its Guidelines, the EBA suggested that firms should implement arrangements to ensure Code Staff are complying with this provision including conducting spot checks.

Confirmation of compliance

Firms operating a website must explain on their website how they comply with the New Codes.

Approach to proportionality

The effect of the proportionality principle is that not all firms have to give effect to the remuneration requirements in the same way and to the same extent. Proportionality operates both ways.

Some firms will need to apply more sophisticated policies or practices in fulfilling the requirements whilst other firms will be able to meet the requirements in a simpler or less burdensome way. As stated above, firms are categorised into three levels (formerly four tiers) as a starting point to help firms understand the general expectations of the PRA and FCA. Firms that are part of a group containing one or more entities caught by the New Codes will generally fall into the highest proportionality level of those entities, although a firm can apply for individual guidance from the PRA and FCA to vary its proportionality level.

The table below shows for each level how the PRA and FCA generally expect the New Codes to be applied to the firm and individuals. Note however, that there is a degree of flexibility in how the PRA and FCA apply the boundaries between the levels having regard to a firm's specific risk characteristics. In addition, each firm remains responsible for assessing its own characteristics to develop and implement remuneration policies and practices which appropriately minimise risk-taking and incentivise staff.

The PRA has confirmed that all firms in proportionality level one or level two are required to implement the cap on variable pay. However generally firms in level three (including banks and building societies) are currently able to disapply the cap. The FCA has confirmed that all FCAregulated investment firms in proportionality level three should also normally be able to disapply the cap.

However, those firms should record their rationale for disapplying the cap. The PRA and FCA may ask a firm to justify their decision and, if they considers it appropriate, issue individual guidance requiring that firm to apply the cap.

However, the position is likely to change. Under the EBA's Guidelines and opinion on proportionality, the EBA has indicated that the principle of proportionality does not apply to the cap. The EBA considers the cap should be applied to all material risktakers in firms subject to CRD IV and their subsidiaries, even if those subsidiaries are not themselves subject to CRD IV.

In addition, in a reversal of the view taken in the guidelines issued by CEBS in December 2010 and subsequently adopted by the PRA and FCA in their approach to proportionality, the EBA considers that the proportionality principle does not allow a firm to disapply any of the CRD IV requirements in their entirety. The EBA supported by the European Commission) consider that CRD IV sets out the *minimum* thresholds with which *all* firms caught by CRD IV should comply. That said, the EBA has proposed that CRD4 is amended to introduce two specific exemptions:

> First, a "small and non-complex" firm which is not a subsidiary of a significant firm should be exempt from the

requirements on deferral and payment in non-cash instruments.

> Second, staff who receive "low levels" of variable pay should be exempt from the requirements on deferral and payment in non–cash instruments, irrespective of the size and activities of their firm.

Whilst on their face these exemptions seem broadly in line with the PRA and FCA's current approach, much will depend on how the terms "small and non-complex" and "low levels" are defined and interpreted. In addition, it seems that proportionality small and non-complex firms will not benefit from the first exemption if they are a subsidiary of a significant firm.

A further point to note is that, unlike the PRA and FCA's current approach which simply looks at the total assets of a firm to determine its proportionality level, the EBA have indicated that a range of factors should be taken into account to determine whether a firm is small and non-complex.

The Guidelines are based on the so-called "comply or explain" principle. This means national regulators have two months from the date when the guidelines are translated into the EU official languages to confirm that they intend to comply with them or, if they do not intend to comply, to give their explanation for failing to do so.

We are currently waiting for the response from the UK regulators. The FCA announced on 21 December 2015 that, in conjunction with the PRA and HM Treasury, it would review the changes proposed by the guidelines and their application to the UK market and in due course consult on any necessary changes to the UK rules. Whilst the opposition of the UK Government and the regulators to the cap is public knowledge – not least because of the UK's failed attempt to challenge its legal validity in 2013 - we think it unlikely that the UK regulators will refuse to comply.

For completeness, although on its face the BIPRU Remuneration Code contains a number of onerous requirements on how bonuses and other variable pay should be structured to promote effective risk management, the FCA has stated that it may not be necessary for BIPRU firms to apply the remuneration principles at all. The FCA has also indicated that, in any event, it will normally be appropriate for BIPRU firms to disapply the remuneration principles relating to deferral, payment in shares or other ownership interests and performance adjustment. Accordingly many BIPRU firms (unless they are also subject to the AIFM Remuneration Code) are currently likely to be subject to minimal regulation in relation to the structure of their remuneration.

Breaches of the New Code

Under the Financial Services Act 2010 the PRA and FCA have power to:

> Prohibit a firm from remunerating its staff in a specified way; and

> Make rules to render a contractual term void if it contravenes such a prohibition.

Under the New Codes contractual terms for Code Staff (who do not satisfy the De Minimis Concession) which breach the rules on guaranteed variable pay and deferral of discretionary variable pay and clawback of variable pay are void if the individual works for a proportionality level one firm or a credit institution or a PRA-designated investment firm which forms part of a group containing a proportionality level one firm.

Where a payment or other property is paid or transferred to an individual in pursuance of a void term, the firm is obliged to take reasonable steps to recover the payment or property from the individual. The firm is restricted from paying further variable pay to that individual in respect of the same performance year, unless it has a legal opinion stating that the award complies with the New Codes. Any payment made in breach of this restriction is also void and should be recovered.

The New Codes contains wide antiavoidance provisions requiring all firms to ensure that variable remuneration is not paid through vehicles or using methods that facilitate avoidance of the New Codes. For example, the practice of effectively awarding staff an immediate bonus by giving them non-recourse loans pledged against share/share equivalent awards which are still subject to retention or deferral is viewed as a breach of the New Codes.

Sanctions which are available to the PRA and FCA for breach of the New Codes include private warnings (which may include restricting how a firm structures its variable remuneration in the future), fines and public censure or, ultimately, variation or cancellation of a firm's authorisation.

How can we help?

We have a specialist team of employment and reward lawyers who are able to review and advise on your remuneration plans, policies and practices and contracts for individual staff members to ensure that they are compliant with the New Codes and advise where necessary on amending those plans, policies and contracts.

If you require any further information please contact:

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