LEWIS SILKIN

Ius Laboris UK Global HR Lawyers
LEWIS SILKIN

Remuneration Codes – for banks, building societies and designated investment firms

Inside

This Inbrief provides an overview of the Remuneration Codes issued by the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA) – we refer to these collectively as "the UK Regulators".

Since the 2007/08 financial crisis, the financial services industry has been the focus of wide-ranging reform because of both UK and European initiatives. For banks, building societies and designated investment firms the latest reforms, implementing the fifth set of amendments to the EU Capital Requirements Directive (CRD V), took effect for performance periods beginning after 28 December 2020.

These reforms build on the requirements of the third and fourth sets of amendments to the Capital Requirement Directive (CRD III and CRD IV), which aimed to align remuneration principles in banks, building societies and investment firms across the EU. CRD III placed restrictions affecting the structure and timing of bonus payments, while CRD IV went a step further by imposing restrictions on the quantum of variable pay under the "bonus cap" (which has since been removed by the UK Regulators). CRD V ensured these rules apply to all firms apart from those which are small and non-complex.

What are the Remuneration Codes?

The Financial Services Authority (as it then was, now the FCA) issued the first Remuneration Code in August 2009 as part of its 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, this Code was substantially revised and the number of firms within its scope significantly extended, to take account of the requirements of CRD III. It was revised again with effect from 1 January 2014 in the light of CRD IV. Several other remuneration codes were also issued, detailing the remuneration requirements for firms in different financial services sectors.

This Inbrief focuses on the PRA's Remuneration Code, which regulates the position of firms covered by the Capital Requirements Regulation (CRR) from a prudential perspective, and the FCA's Remuneration Code which regulates the position of CRR firms from a conduct perspective. Both the Codes were amended to take account of CRD V. However, in light of Brexit, in 2023 the UK Regulators amended the Codes again to remove the bonus cap and introduce more flexibility for small CRR firms and small third country CRR firms.

The requirements of the Codes are supplemented by a variety of guidance, supervisory statements and opinions from both the UK Regulators and the European Banking Authority (EBA). Of particular importance is the PRA's Supervisory Statement 2/17 (last updated with effect from 8 December 2023) and the EBA's guidelines on sound remuneration policies issued in December 2015 (Guidelines). Firms are required to comply with all aspects of the Guidelines unless the UK Regulators mandate a different approach. It is worth noting that the EBA replaced the Guidelines with a more stringent version in July 2021 (2021 Guidelines). The 2021 Guidelines do not specifically apply to the UK, and so UK firms are not required to comply with them. However, the UK Regulators have indicated that they will consider whether to update their expectations in light of the 2021 Guidelines in due course.

Which firms are caught by the Codes?

The Codes apply to CRR firms (banks, building societies and PRA designated investment firms). These include firms outside the European Economic Area (EEA) that carry on activities from a UK establishment, and which would be a CRR firm if they were based in the UK. Firms in a group containing one or more CRR firms are also subject to the Codes.

The general principle of the Codes is that firms must ensure that their remuneration policies and practices are consistent with and promote sound and effective risk management. In addition, firms must ensure that their remuneration policies and practices are gender neutral – based on equal pay for women and men for work of equal value.

The Codes are applied proportionately according to the firm's size and internal organisation and the nature, scale and complexity of its activities. Traditionally, the UK Regulators have allowed those firms that pose the least systemic risk to disapply certain requirements of the Codes.

This was not possible while CRD V applied to the UK as all CRR firms (other than the smallest and least complex firms) had to apply the remuneration requirements in full. Post-Brexit, the UK Regulators have amended the rules to allow small CRR firms and third country CRR firms (collectively Small CRR Firms) to disapply certain remuneration requirements for performance years beginning on or after 8 December 2023 (although such firms should notify the UK Regulators if there is any significant change to their remuneration structures going forward). A Small CRR Firm is broadly a firm with average total assets of less than £4 billion although there are additional rules for determining whether a firm is small if it is a member of a group and for small third country CRR firms.

Firms subject to the Codes must explain how they comply with the Codes on their website.

Which individuals are subject to the Codes?

The Codes apply to all staff, including employees, secondees from non-UK group companies who are working in the UK, and consultants. Certain requirements under the Codes must be applied on a firm-wide basis (e.g. ensuring termination payments are not a reward for failure or misconduct), while others are applied only to "material risk-takers".

Conversely, employees whose total annual variable pay for the relevant performance year is £44,000 or below and does not represent more than one third of the employee's total annual remuneration for that year (De Minimis Concession) are not subject to certain requirements, irrespective of the size, structure and activities of the firm for which they work.

Who is a material risk taker?

An individual is a material risk-taker if their professional activities have a material impact on the firm's risk profile, including:

- All members of the management body and senior management.
- Staff members with managerial responsibility over the firm's control functions or material business units.
- Staff members who are entitled to significant total remuneration in the preceding financial year where:
  - the staff member's total remuneration was at least £440,000 and at least equal to the average remuneration awarded to members of the firm's management body and senior management; and
  - the staff member performs their professional activity within a material business unit and the activity is of a kind that has a significant impact on the relevant business unit's risk profile.
- Staff members whose activities are deemed to have a material impact on the firm's risk profile under the following qualitative and quantitative criteria:
  - The *qualitative* criteria include staff members who have managerial responsibility for: legal affairs; accounting policies and procedures; finance (including taxation and budgeting); performing economic analysis; human resources; information technology and security; the development or implementation of the remuneration policy; managing outsourcing arrangements of a function where a defect or failure in the performance of that function would materially impair the performance and/or compliance of the firm; and prevention of money laundering and terrorist financing. It also includes staff members who have managerial responsibility for certain risk functions.
  - The *quantitative* criteria apply to staff members who were awarded in or for the preceding performance year total remuneration of at least £660,000 or, in the case of firms with over 1,000 staff, a staff member whose earnings are within the 0.3% of the highest earner in or for the preceding performance year. Firms may apply to the UK Regulators for a waiver if the firm considers that a particular individual who is only caught under the quantitative criteria is not actually a material risk-taker.

Even more stringent requirements are applied if the individual is:

- A "Senior Manager" performing a designated senior management function. Senior Managers are, in broad terms, the most high-level and influential individuals in the business.
- "Higher paid". A material risk-taker is higher paid for a performance year if:
  - their total remuneration for that performance year exceeds £500,000; and

- their variable pay for that performance year exceeds 33% of their total remuneration.

Remuneration structure

The main principles of the Codes relating to different remuneration structures are set out below.

Ratio of fixed pay to variable pay

This requires each firm to set an appropriate ratio 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.

The Guidelines indicate how to determine whether pay is fixed or variable.

Under CRD V, variable pay in respect of services and performance of material risk-takers should generally not exceed the bonus cap - generally 100% of fixed pay but up to 200% of fixed pay with shareholder approval.

Both the introduction of the bonus cap and the extension of the bonus cap to all CRR firms was controversial. The UK Regulators consider that the bonus cap resulted in a substantial increase in fixed pay which in turn has meant an increase in the fixed costs of firms and reduced flexibility (as fixed pay is a contractual entitlement and not subject to deferral or performance adjustment).

Accordingly, in a bid to boost competitiveness and increase flexibility, the UK Regulators removed the bonus cap with effect from 31 October 2023.

Even though the bonus cap has been removed, firms must still apply a ratio of fixed pay to variable pay albeit that the firm could set different ratios for different roles taking account of the potential for excessive risk taking in that role. Before setting a higher ratio than 200%, firms will need to consider several issues including whether shareholder approval is necessary; whether any element of fixed pay should be reduced in return for higher variable pay (and if so whether employee consent is needed to such a reduction); the approach of their competitors and how to minimise any discrimination or gender pay gap risks.

Discretionary variable pay

The amount of the discretionary variable pay pool should be based on profit, adjusted for current and future risks, and firms should consider the cost and quantity of the capital and liquidity required. When determining the size of their annual bonus pools, firms should deduct a prudential valuation adjustment figure from fair value accounting profit. The UK Regulators make it clear that Earnings Per Share and Total Shareholder Return (two common performance measures) are not properly adjusted 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 multi-year framework considering the performance of the individual, the relevant business unit, and the overall results of the firm. The performance-assessment process must be clearly explained to the relevant individuals.

In assessing an individual's performance, both financial and non-financial metrics (such as compliance with effective risk-management policies and regulatory requirements) should be considered.

Firms should have a firm-wide deferral policy. Generally, the proportion of variable pay which is deferred should increase with the ratio of variable pay to fixed remuneration and the amount of variable pay.

For material risk-takers, at least 40% of variable pay awarded to them should be deferred over a period of at least four to seven years, depending on the seniority and remuneration of the relevant individual. Account should be taken of the business cycle, the nature of the business, its risks, and the activities of the individual in question in determining the length of deferral.

Where the variable pay is of a particularly high amount or is paid to an executive director of a firm that is significant in its size, internal organisation and the nature, scope and complexity of its activities, at least 60% must be deferred. The UK Regulators indicate that generally £500,000 is a particularly high amount, but in appropriate circumstances the threshold may be lower.

The length of the deferral periods depends on the role, responsibilities and remuneration of the material risk-taker as follows:

- Senior Managers who are higher paid (see above). These are subject to a seven-year deferral requirement, with no vesting until three years after award and vesting no faster than on a pro-rata basis thereafter.

- Those who are either higher paid but not Senior Managers, or Senior Managers who are not higher paid. These are subject to a five-year deferral requirement, with vesting no faster than on a pro-rata basis.
- All other material risk-takers. These are subject to deferral for a minimum four-year period, with vesting no faster than on a pro-rata basis.

Generally, at least 50% of both the upfront and deferred components of variable pay of material risk-takers should be paid on a net-of-tax basis in the form of shares, equivalent ownership interests, or share-linked instruments or equivalent non-cash instruments.

It is not necessary to ensure that the upfront and deferred components of variable pay have the same split of cash and instruments. Both the UK Regulators and the EBA have indicated that the deferred portion of variable pay should contain a higher proportion of instruments. In other words, more than 50% of the deferred portion of variable pay should be in instruments.

Any shares, ownership instruments or other non-cash instruments should also be subject to a retention policy, generally of twelve months, to ensure that the incentives are aligned with the longer-term interests of the firm. If the individual's variable pay is subject to a deferral period of five years, a six-month retention period may be acceptable unless the individual is a Senior Manager.

Guaranteed variable pay

Firms must not award or pay guaranteed variable pay, or provide it as an incentive, 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 it 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".

Under the Codes, firms must also ensure that all guaranteed variable pay is subject to deferral and performance adjustment.

Buy-out awards

A buy-out award is one that buys out a staff member's rights which will be reduced or forfeited on them leaving their former firm. This is treated as guaranteed remuneration. Unlike a guaranteed bonus, the UK Regulators do not require buy-out bouses to be exceptional. This is different from the position taken by the EBA in its Guidelines.

The buy-out award should not be more generous (either in terms of amount or vesting) than the awards that the staff member will forfeit. The UK Regulators apply this requirement strictly: an award of a lower amount but with a shorter vesting schedule will be in breach. The buy-out award should also align with the long-term interests of the employer and be subject to appropriate retention, deferral and performance-adjustment provisions.

Firms must ensure that buy-outs for individuals who were material risk-takers in their previous firms are subject to terms which give the new firm a contractual right to reduce the buy-out if it receives a reduction notice from the former firm. The new firm must reduce the buy-out by the amount specified in the reduction notice.

The previous firm will only be able to issue a reduction notice if it has determined, acting fairly and reasonably, that the individual has committed misconduct or made a material error or there have been risk-management failings. The new firm is expected to act solely as the executor of the previous firm's decision, without any exercise of discretion. In practice, however, the new firm should at least check that the staff member is aware of the reduction notice.

Retention awards

Retention awards are not guaranteed variable pay but should nonetheless not be common practice and should be limited to rare and infrequent occurrences. A retention bonus may be appropriate in the case of restructuring; change of control; finalisation of a specific project or a winding down.

In accordance with the Guidelines, retention awards should be subject to the requirements relating to deferral, payment in instruments and performance adjustment. Retention awards should not be granted to compensate for the lack of performance-related pay due to insufficient performance or the firm's financial situation.

Where a firm intends to grant retention awards to material risk-takers, it must notify the appropriate UK Regulator and explain why the award is justified.

Non-executive directors and variable pay

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

Performance adjustment refers to the downward adjustment of variable pay. This may be in accordance with:

- a malus arrangement, under which unvested, deferred variable pay is reduced; or
- a clawback arrangement, under which the staff member is required to repay amounts they have received.

Firms which under the principle of proportionality are not required to defer variable pay (see below) will not be able to apply a malus arrangement. Such firms are still required to apply a clawback arrangement.

Where financial performance is subdued or negative, firms must ensure that variable pay is "considerably contracted", including reducing pay-outs of amounts previously earned.

Firms must ensure that any variable pay awarded to material risk-takers (including both the non-deferred and deferred element) is only paid or vested if it is sustainable according to the financial situation of the firm and justified based on 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. The Guidelines list additional circumstances in which performance adjustment should be considered, including the imposition of regulatory sanctions on the firm and any significant increases in the firm's or business unit's economic or regulatory capital base.

The PRA has indicated that performance adjustment should not be limited to the staff directly culpable for misfeasance. It should also apply to:

- 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
- staff who, by virtue of their role or seniority, could be deemed indirectly responsible or accountable for the failure or misconduct.

Under the 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) to higher-paid material risk-takers when:

- there is reasonable evidence of the staff member's misbehaviour or material error;
- the firm and/or relevant business unit suffers a material downturn in its financial performance; and/or
- the firm and/or relevant business unit suffers a material failure of risk management.

Clawback should be applied to higher-paid material risk-takers where either:

- there is reasonable evidence of the material risk-taker's misbehaviour or material error; and/or
- the firm or relevant business unit suffers a material failure of risk management. The firm must take account of all relevant factors, including the proximity of the staff member to the failure of the risk management in question and their level of responsibility.

The period for which clawback arrangements should apply depends on whether the material risk-taker is higher paid and/or is a Senior Manager.

In the case of a higher-paid material risk-taker, both the deferred and non-deferred portion of variable pay should be subject to clawback for a period of at least seven years from the date of award. In the case of higher-paid material risk-takers who are Senior Managers, firms are required to extend the clawback period from seven to ten years if at the end of the seven-year period there is an outstanding internal or regulatory investigation which may otherwise have resulted in the application of clawback, but for the expiration of that period.

For material risk-takers who are not higher paid, the deferred portion of variable pay awarded to an individual who is a member of the management body or senior management of a firm must be subject to clawback arrangements for a minimum period of six years. Otherwise, the deferred portion of variable pay should be subject to clawback for at least five years. The non-deferred portion of variable pay for material risk-takers who are not higher paid must be subject to clawback arrangements for at least one year.

There several legal and practical difficulties with implementing performance-adjustment mechanisms, particularly for existing awards, so firms should seek advice on such arrangements.

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 five years in the form of shares/equivalent ownership interests.

Termination payments

Payments on termination of employment should not reward failure or misconduct but should reflect the performance achieved over time.

Severance pay should not be awarded where either of the following applies:

- A staff member voluntarily resigns to take up a position in a different legal entity (unless required by national law).
- There is an obvious failure which allows the employer to summarily dismiss the staff member.

In addition, where a firm does award severance pay, it must be able to demonstrate the reasons for the settlement, the appropriateness of the amount of the payment and the criteria used to determine that amount. When determining the amount of a severance payment, the firm should consider performance achieved over time and assess (where relevant) the severity of any firm or individual failure.

Termination payments are variable pay. However, there is currently no need to take certain termination payments into account for the purposes of the pay-out process rules (i.e. the application of deferral, payment in non-cash instruments and performance adjustment). These include:

- Termination payments that are mandatory under national labour law or following a decision of a court.
- Termination payments that are subject to a contractual non-competition clause and paid out in future periods up to the amount of the fixed pay which would have been paid for the non-competition period, if staff were still employed.
- Termination payments where the firm has demonstrated the reasons and the appropriateness of the amount, where either:
  - the firm and staff member agree on a settlement in the case of an employment law dispute to avoid litigation; or
  - in broad terms, the staff member is being made redundant.

The EBA has confirmed that discretionary pension benefits are not severance payments even if the staff member retires.

It is best practice not to accelerate the vesting of any outstanding bonus payments or long-term incentive awards.

Hedging strategies

Material risk-takers should undertake that they will not engage in personal-investment strategies that undermine risk strategies, such as hedging or remuneration-related insurance strategies. The Guidelines suggest that firms should implement arrangements to ensure material risk-takers are complying with this provision, including by conducting spot checks.

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 while others will be able to meet the requirements in a simpler or less burdensome way.

There are two ways in which proportionality principle is applied: at a firm-level and at an individual-level.

Firm level

Small CRR Firms do not have to comply with the rules regarding paying variable pay in non-cash instruments; deferring variable pay and applying malus and clawback to variable pay. Such firms are also not subject to the rules on buy-out awards. All other CRR firms should comply with the CRD V requirements in full – other than the bonus cap - unless a different approach is required by the UK Regulators.

In addition, for the purposes of regulatory reporting and expectations regarding remuneration committees the UK Regulators divide CRR firms into three proportionality levels (depending on their average total assets) with different minimum expectations for each level.

Individual-level

Employees whose remuneration satisfies the De Minimis Concession are not subject to the requirements regarding paying variable pay in non-cash instruments or on a deferred basis. Conversely, as noted above, highly paid material risk-takers or material risk-takers who are members of a management body or hold a senior management function are subject to more stringent deferral and clawback requirements than material risk-takers who do not meet these conditions.

Breaches of the Codes

Under the Financial Services Act 2010, the UK Regulators have power to:

- prohibit a firm from remunerating its staff in a specified way; and
- render a contractual term void if it contravenes such a prohibition.

Under the Codes, contractual terms for higher paid material risk-takers (see above) are void in certain circumstances if they breach the rules on guaranteed variable pay, buy-out awards, deferral of discretionary variable pay or clawback of variable pay. Such terms will be void if the material risk-taker works for a firm that has relevant total assets exceeding £50 billion or is a credit institution or PRA-designated investment firm which forms part of a group that has relevant total assets exceeding £50 billion. Relevant total assets are the arithmetic means of the firm's total assets as set out in its balance sheet on the last three accounting reference dates.

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 it 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 Codes. Any payment made in breach of this restriction is also void and should be recovered.

The Codes contain wide anti-avoidance provisions, requiring all firms to ensure that variable pay is not paid through vehicles or using methods that facilitate avoidance of the Codes. One example of a device that is viewed as a breach of the Codes is 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.

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

How we can help

We have a specialist team of employment, reward and regulatory lawyers able to review and advise on your remuneration plans, policies and practices and contracts for individual staff members. We can ensure they are compliant with the Codes and advise where necessary on how they should be amended.

For further information on this subject please contact:

Victoria Goode
Consultant Partner

+44 (0)20 7074 8317
victoria.goode@lewissilkin.com

Wendy Saunders
Legal Director

+44 (0)20 7074 8284
wendy.saunders@lewissilkin.com

LEWIS SILKIN

Arbor – 255 Blackfriars Road London SE1 9AX

DX 182 Chancery Lane
T +44 (0)20 7074 8000 | F +44 (0)20 7864 1200

www.lewissilkin.com

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