GIBRALTAR FINANCIAL SERVICES COMMISSION

Capital Requirements Directive V / Investment Firms Directive / Bank Recovery and Resolution Directive II

Questions and Answers

Version 1

Capital Requirements Directive V / Investment Firms Directive / Bank Recovery and Resolution Directive II

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GIBRALTAR FINANCIAL
SERVICES COMMISSION

Introduction

In this question and answer paper we set out some of the most frequently asked questions and provide answers and references to assist firms in ensuring compliance with the Capital Requirements Directive V (CRD V) Investment Firm's Directive (IFD) and Bank Recovery and Resolution Directive II (BRRD II).

This document is a quick aid for common questions received by the GFSC and will reference other relevant documentation. It is not a standalone document and should be read in the context of the CRD V, IFD, BRRD 2 and supporting Regulations and technical advice issued. Firms should note that the Capital Requirements Regulations 2 (CRR II) and Investment Firms Regulations (IFR) are particularly important for understanding the new legislative requirements.

This document will be updated as we work through the implementation of the various stages of these requirements.

Key Words

CRD V	Capital Requirements Directive V
CRR 2	Capital Requirements Regulations 2
IFD	Investment Firm's Directive
IFR	Investment Firms Regulations
GDPR	General Data Protection Regulation
MiFID II	Markets in Financial Instruments Directive II
ESAs	European Supervisory Authorities
GFSC	Gibraltar Financial Services Commission

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BREXIT

As we are exiting the EU, should we continue to implement the IFD/ CRD V requirements?

Gibraltar is required to transpose and implement EU Directives and Regulations agreed before Brexit and which will be in force before the end of the Brexit transition period (31 December 2020). CRD V is therefore due to be transposed in December 2020.

As the IFD transposition deadline is June 2021 (after the current Brexit transition period of December 2020) this Directive will not automatically apply in the UK or Gibraltar. HM Treasury have indicated that they intend to take powers to enable the introduction of an updated prudential regime for investment firms in the UK. Gibraltar will similarly work to implement this international initiative.

CRD V and IFD are also closely related to the final implementation of Basel III, which are International standards which all global jurisdictions should meet.

What is happening to the existing non-legislative EU material in Gibraltar post-exit?

Under the European Union (Withdrawal) Act 2019 (EUWA), the application of any EU Directives, or any "direct EU legislation" within the meaning of Section 6 of the EUWA will be retained under Gibraltar law, as it applied immediately before Brexit day. The broad range of non-legislative material produced by the ESAs has not been incorporated into Gibraltar law under the EUWA. However, given that the EU-derived law to which the non-legislative material relates has been retained; we consider that the EU non-legislative material will remain relevant post-exit day to the GFSC and regulated firms in compliance with their regulatory requirements.

We will need to consider onshoring EU guidelines in due course.

How do we treat any non-legislative EU material issued post-Brexit?

The GFSC may adopt helpful and relevant non-legislative material produced by the ESAs post-exit, including where pre-exit material is updated. Where we consider it appropriate to do so, we will set out our expectations to firms

How do we interpret non-legislative EU material?

As a result of the withdrawal from the EU, EU non-legislative materials may include references which no longer have their intended effect (for example, references to legislation that may have been amended during the withdrawal process and may therefore no longer be correct). In these situations, we expect regulated firms to sensibly and purposively interpret EU non-binding material, taking into account the withdrawal from the EU, the provisions of the Act and amendments made to relevant legislation in the withdrawal process.

Changes to Remuneration Principles – CRDV

Do the remuneration rules apply to all institutions and identified staff?

CRD V continues the proportionality principle that aims to reduce the burden of the remuneration rules for smaller institutions and certain staff members. These rules will apply to all institutions and identified staff except:

- Small and non-complex firms whose assets' value is on average equal to or less than EUR 5 billion over the four-year period immediately preceding the current financial year; and
- Staff members whose annual variable remuneration does not exceed EUR 50,000 and does not represent more than one fourth of the member's total remuneration.

How do the changes to remuneration rules impact "identified staff"?

Under CRD V, firms will now be required to list staff who must be considered "identified staff" or "material risk takers", along with the functions that they perform. This definition includes staff that receive remuneration of EUR 500,000 or more, or remuneration which is higher than the average remuneration that is awarded to senior management.

Are there any changes to the extended deferral periods?

CRD V adjusts the deferral period providing for a minimum of four years (rather than 3 under CRD IV). In the case of senior management, the minimum deferral period is five years.

Are there any changes to the bonus cap?

This will continue to apply as it has done in the past. The bonus cap will remain at 100% of an individual's basic salary, or up to 200% of salary with shareholder approval.

Will any changes need to be made to remuneration policies and procedures?

Remuneration policies and practices must now be gender neutral, in order to reflect equal pay for male and female employees who perform equal work. The EBA are set to issue guidance on gender neutral policies in future.

Will listed firms be permitted to use share-linked instruments in remuneration?

While under CRD IV listed institutions were required to use shares, following the introduction of CRD V both listed and un-listed firms will be permitted to use share-linked instruments in remuneration.

How do the changes to remuneration rules apply to subsidiaries?

CRD V provides that the remuneration principles will not apply on a consolidated basis to subsidiaries that are subject to other specific EU remuneration requirements. This is however subject to exceptions including where the subsidiary's staff have been identified as material risk takers under the group structure as a whole, through the direct material impact of their activities on the group.

Changes to Remuneration Principles – IFD

Do the IFD remuneration rules apply to all investment firms and identified staff?

Systemically important Class 1 investment firms are required to adhere to the rules set out under CRD V. The requirements also do not apply to investment firms that are classified as small and non-interconnected (i.e. Class 3), unless included within a group subject to consolidated supervision. This means that the IFD remuneration rules solely apply to firms classified under Class 2.

In the case of the requirements on pay-out and deferral, these can also be disregarded under those cases which satisfy the following criteria:

- The value of the investment firm's on- and off-balance sheet assets is on average equal to or less than EUR 100 million over the four-year period immediately preceding the given financial year (Unclear if this is on a solo or consolidated basis); and
- The individual's annual variable remuneration does not exceed EUR 50,000 and does not represent more than one fourth of the individual's total annual remuneration.

As with CRD, remuneration requirements apply to all staff whose professional activities have a material impact on the investment firm's risk profile.

Will any changes need to be made to remuneration policies and procedures?

Remuneration policies and practices must now be gender neutral, in order to reflect equal pay for male and female employees who perform equal work. They must also adequately set out appropriate rations between the fixed and variable component of total remuneration of their material risk takers. Remuneration policies and practices should also be consistent with and promote sound and effective risk management, and must be reviewed at least annually.

Are investment firms able to provide guaranteed bonuses?

Investment firms must not award guaranteed bonuses other than for new staff in their first year subject to the investment firm having a strong capital base.

Will a “bonus-cap” still be applied?

The IFD does not impose a mandatory “bonus cap”, but firms are required to implement policies which set out appropriate ratios between the fixed and the variable component of total remuneration with the ability to pay no variable remuneration in appropriate cases.

Are there any changes to the deferral period?

At least 40% of the variable remuneration has to be deferred over a three to five year period. In the case of a variable remuneration of a particularly high amount, at least 60% of the amount should be deferred. Note that the “high amount” has not been defined, but the current thinking is that the UK are looking to apply 500k applied under BIPRU.

In what forms can variable remuneration be paid out?

At least 50% of any variable remuneration has to be paid out in one or more of the following instruments:

shares or equivalent ownership interests;

- Share-linked instruments or equivalent non-cash instruments;
- Additional Tier 1 instruments and Tier 2 instruments (i.e., certain long term subordinated debt instruments used for regulatory capital purposes);
- Other instruments which can be fully converted to Common Equity Tier 1 instruments;
- Non-cash instruments which reflect the instruments of portfolios managed.

Member states can also place restrictions and ban certain instruments as appropriate.

Are investment firms required to set up a Remuneration Committee?

Those firms who have on- and off-balance sheet assets of over €100 million must established a gender-balanced remuneration committee composed of individuals who do not perform executive roles within the firm.

Are there any new disclosure and reporting obligations?

Firms will be required to publicly disclose detailed information on their remuneration policies and procedures, including information related to gender neutrality and the gender pay gap. Firms will also be required to report to the FSC on the number of staff that receive remuneration of €1 million or more in a single financial year.

Other

When different Directives have slightly different requirements such as IDD and the GDPR – what takes priority?

The more onerous requirements would apply.

Will there be any changes as a result of COVID- 19?

The Basel Committee, European Banking Authority and UK regulators are all committed to implementing the legislation this year as per published timeframes. Nonetheless, the relevant International and European regulators have acknowledged that it is important for banks and supervisors to be able to commit their full resources to respond to the impact of COVID-19. Therefore revised implementation timelines have been issued.

CRD V and IFD preparedness

What are firms expected to do?

Review the new requirements including underlying requirements to understand how best to meet them.