

FIA EPTA response to the [EBA Consultation](#) on its Guidelines on internal governance for investment firms (EBA/CP/2020/27)

The FIA European Principal Traders Association (FIA EPTA) appreciates the opportunity to provide feedback to the European Banking Authority (EBA) Consultation on its Guidelines on internal governance for investment firms

FIA EPTA represents 30 independent European Principal Trading Firms (PTFs) which deal on own account, using their own money for their own risk, to provide liquidity and immediate risk-transfer in exchange-traded and centrally-cleared markets for a wide range of financial instruments, including shares, options, futures, bonds and ETFs.

Our members are independent market makers and providers of liquidity and risk transfer on trading venues and end-investors across Europe. Market making and liquidity provision (also referred to as principal trading or dealing on own account) is a distinct activity that is undertaken by non-systemic investment firms rather than banks, in a highly dispersed and varied ecosystem of independent Principal Trading Firms. These firms operate in an innovative and competitive fashion leading to a vibrant, dynamic and diverse ecosystem which massively reduces interconnectedness and increases substitutability. This fundamentally reduces systemic risk whilst improving market quality and lowering costs for retail and institutional investors alike.

FIA EPTA members appreciate the EBAs consideration of our comments and suggested solutions and stand ready to provide any further input as required.

Question 2: Is title 2 sufficiently clear, is there other criteria to add or delete?

FIA EPTA members note that the Draft EBA Guidelines on Internal Governance are very similar to those currently in effect and applicable to CRD V and MiFID firms, with relatively few changes. As the purpose and intention of Directive (EU) 2019/2034 (“IFD”) is to put in place a prudential regulatory framework that is more appropriate for investment firms, FIA EPTA members would urge the EBA to take a similar approach in considering the appropriate governance that should be required of investment firms, which we note are generally smaller and, on balance, as non-systemic Class 2 investment firms pose no risk to the stability of the financial system.

As a starting point in terms of the EBA’s expectations for CRR firms, FIA EPTA members also note that under paragraph 41 of the CP 2020/20 applicable to institutions under CRD “Nonsignificant credit institutions, including when they are within the scope of prudential consolidation of a credit institution that is

significant in a sub-consolidated or consolidated situation, are not obliged to establish risk or remuneration committees”.

We note that in the same CP (section 14), “significant” is set out to mean “*institutions referred to in Article 131 of Directive 2013/36/EU (global systemically important credit institutions (G-SIIs) and other systemically important credit institutions (O-SIIs)), and, as appropriate, other credit institutions determined by the competent authority or national law, based on an assessment of the credit institutions’ size and internal organisation, and the nature, scope and complexity of their activities.*”

FIA EPTA members note that the concept of significant firms used in CRR and related guidelines includes mostly global systematically important or similar credit institutions. We are concerned that this concept, although without using the same terminology **has effectively been carried over into the IFD as firms with a balance sheet above EUR 100m**. While the cut-off of EUR 100m may well be appropriate for many other provisions in IFD, in the context specifically of governance requirements this is resulting, in non-systemic investment firms being subject to a level of internal governance requirements that much larger financial institutions are not subject to. In the context of corporate governance, it is disproportionate to carry over the provisions required under CRR and related guidelines that applied only to significant CRR firms to all IFD firms with a balance sheet above EUR 100m. We strongly believe the provisions should not be automatically carried forward for non-SNI firms under IFR.

FIA EPTA members consider that the requirement to have separate governance committees is at-odds with the proportionality objective of IFD and we ask that the proposed guidelines be significantly amended to enable firms that are treated as significant under IFR/IFD (but which are in no way comparable to G-SII or O-SII firms under CRR) to implement proportionate structures.

Related to the above point, there is one aspect of the draft Guidelines relating to director independence where FIA EPTA members believe the draft guidelines are not consistent with what is required in IFD regarding the composition of the management body and of committees and we believe this should be revised to more closely reflect the Level 1 text.

In particular, Articles 28 and 33 of IFD require investment firms of a certain size to create risk and remuneration committees comprised of “*members of the management body who do not perform any executive function in the investment firm concerned*”. FIA EPTA members understand this requirement to mean that the Level 1 text expects those firms that must have risk and remuneration committees to ensure the committee members are non-executive directors of the investment firm itself, but who may be executives of the regulated investment firm’s broader group or other non-executive directors that may not meet, for one reason or another, domestic or EBA and ESMA definitions of independence.

However, the draft EBA Guidelines require the management body or committees to include “independent” directors in a number of sections. This is a different requirement than simply that the directors not be executive directors of the investment firm and we consider that this is not supported by the Level 1 text.

For example, paragraph 51 states, “*Where committees have to be set up in accordance with Directive 2019/2034/EU or national law, they should be composed as a general principle of **at least three members and have at least one independent member**, taking into account the criteria set out in Title I of these guidelines and the Joint EBA and ESMA guidelines on the assessment of suitability of members of the management body and key function holders.*” Similarly, paragraph 53 states, “*The risk committee **should be***

chaired, where possible, by an independent member. [...]” and paragraph 49 requires that **all committees** be chaired by a non-executive director (which goes beyond IFD which only imposes such a requirement on risk and remuneration committees).

Notwithstanding the above comment, we believe further clarity is needed regarding paragraph 37 of the draft guidelines which states, “*the management body in its supervisory function should include **independent members** as provided for in Section 9.3 of the joint ESMA and EBA guidelines on the assessment of the suitability of members of the management body and key function holders under Directive 2013/36/EU and Directive 2014/65/EU.*”

It is unclear if the reference to Section 9.3 of the joint ESMA and EBA guidelines on suitability is a reference to the independence criteria included therein (paragraph 91) or to the categories of firms that are required to have independent directors (paragraph 89, which states in part, “*However, competent authorities may not require any independent directors within non-significant CRD-institutions that are investment firms.*”).

If the former, then we believe paragraph 37 exceeds the requirements of the Level 1 text.

If the latter, FIA EPTA members note two points: firstly, that the draft EBA guidelines should make it clear that the reference is to the scope of application of the requirement to have independent directors; and secondly, that the references therein to CRD firms (and non-significant CRD-institutions that are investment firms) does not provide sufficient clarity once investment firms become subject to IFD. As mentioned above, the concept of significant firms in CRR applicable mostly to Other Systemically Important Institutions (O-SIIs) has been inappropriately translated into IFR to firms with balance sheet above EUR 100m. FIA EPTA members believe that the requirement to have independent directors is not supported by the Level 1 text and is significantly disproportionate and hence should be removed.

FIA EPTA members note that the above-mentioned paragraphs 37, 49, 51 and 53 of the draft guidelines are not supported by the Level 1 text, which includes no requirements for independent directors. In addition, we believe that requiring all investment firms to have independent directors would be inherently disproportionate when considered in light of CRD V requirements, which would have exempted non-significant CRD investment firms from the requirement generally. For both of the foregoing reasons, FIA EPTA members would strongly urge the EBA to revise these provisions to make them consistent with the requirements of IFD as well as proportionate in the light of the governance requirements that would have applied under CRD and MiFID.

For the reasons noted above, FIA EPTA members would urge the EBA to consider modifications to make these guidelines consistent with the Level 1 text. Moreover, however, we also urge the EBA to use this opportunity to more appropriately tailor the guidelines to non-systemic investment firms, particularly in light of their risk profile and relatively smaller size, compared to CRD firms.