

EBA FINAL draft regulatory technical standards

on criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile under Article 94(2) of Directive 2013/36/EU



EBA FINAL draft regulatory technical standards on criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile under Article 94(2) of Directive 2013/36/EU

Table of contents

1.	Executive summary	3
2.	Background and rationale	5
3.	EBA FINAL draft regulatory technical standards on criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile	8
4.	Accompanying documents	16
4.1	Cost–benefit analysis/impact assessment	16
4.2	Views of the Banking Stakeholder Group (BSG)	31
4.3	Feedback on the public consultation and on the opinion of the BSG	33

1. Executive summary

Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC ⁽¹⁾ (CRD) sets out requirements concerning remuneration, which apply from 1 January 2014. Article 94(2) thereof mandates the EBA to prepare draft regulatory technical standards (RTS) in this area.

The EBA has developed these draft RTS on the basis of the directive, taking into account the responses to the public consultation and the opinion of the Banking Stakeholders Group (BSG) and submitted them to the European Commission for adoption. The final text will be published in the Official Journal of the European Union.

The draft RTS set out criteria for the identification of categories of staff who have a material impact on the institution's risk profile ('Identified Staff') in accordance with the requirements of Article 92(2) of the CRD.

Competent authorities must ensure that institutions comply with the specific provisions within the CRD regarding remuneration policies and variable remuneration for Identified Staff in addition to the general requirements regarding appropriate remuneration policies. The objectives of the draft RTS are to harmonise the criteria for the identification of staff whose professional activities have a material impact on the institution's risk profile in order to ensure a consistent approach to the identification of such staff across the EU.

The identification criteria are a combination of qualitative and appropriate quantitative criteria:

The **qualitative criteria** identify staff within the management body, senior management and other staff with key functions or managerial responsibilities over other identified staff within institutions. In addition, the draft RTS contain criteria based on the authority of staff to commit to credit risk exposures and market risk transactions above certain thresholds calculated as a percentage of the Common Equity Tier 1 (CET1) capital to ensure a proportionate application of those criteria.

The **quantitative criteria** are different in nature: (i) one is based on total remuneration in absolute terms (staff earning more than EUR 500 000 in the preceding financial year) and (ii) one is defined in relative terms (0.3% of staff with the highest remuneration). The draft RTS also provide provisions regarding the application of a criterion already defined within the CRD to identify staff receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers. The quantitative criteria within the draft RTS are subject to additional conditions under which institutions can establish that members of staff who would be identified only under the quantitative criteria do not in fact have a material impact on the institution's risk profile and are therefore not considered to be Identified Staff. If institutions aim to exclude staff, they are required to hand in the respective assessments to the competent authorities for approval for criteria (i) if staff has received EUR 750 000 or more remuneration in the preceding financial year and (ii) and notify all exclusions of staff identified under the quantitative criteria for staff with remuneration of EUR 500 000 or above. For staff receiving EUR 1 000 000 or more (high earners) exclusions can only be approved in well justified exceptional circumstances and competent authorities need to inform the EBA about any such

⁽¹⁾ OJ L 176, 27.6.2013, p. 338.

exclusions before they are approved. The EBA will ensure a coherent application of such exclusions of high earners.

Directive 2013/36/EU requires institutions to identify all staff members whose professional activities have a material impact on the institution's risk profile. Competent authorities have to ensure that institutions comply with the requirements set out in Articles 92(2) and 94 of Directive 2013/36/EU regarding this issue. These draft RTS set out a common set of core criteria which have to be applied in any case to identify staff. Under these draft RTS, a staff member will be characterised as 'Identified Staff' if at least one of the criteria is met. By providing well-defined qualitative criteria and adding clear and appropriate quantitative criteria, the draft RTS ensure harmonised identification. However, those common criteria are defined in a way that can be applied by all institutions and may, therefore, not identify exhaustively all staff members whose professional activities have a material impact on the risk profile of a particular institution. Consequently, institutions may have to apply a broader internal identification process to ensure that they meet the above CRD requirements. Institutions can also apply the same remuneration policies that have to be applied to Identified Staff to other categories of staff.

2. Background and rationale

Inappropriate incentives for management and employees within institutions' remuneration frameworks are considered to have been among the factors that led institutions to implement short-term oriented and excessively risky strategies, in that they granted disproportionate rewards on the upside and insufficient penalties on the downside. The remuneration policies did not take the long-term risk profile sufficiently into account but focused on the short-term profitability of the institution. To address this problem, Directive 2010/76/EC (CRD III) has already introduced some requirements on the payment of remuneration to Identified Staff.

Article 92(2) of Directive 2013/36/EU (CRD) provides that 'Competent authorities shall ensure that, when establishing and applying the total remuneration policies, inclusive of salaries and discretionary pension benefits, for categories of staff including senior management, risk takers, staff engaged in control functions and any employee receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on their risk profile, institutions comply with the following principles in a manner and to the extent that is appropriate to their size, internal organisation and the nature, scope and complexity of their activities'. For variable elements of remuneration, Article 94 of the CRD will apply in addition to, and under the same conditions as, those set out in Article 92(2) of the CRD.

Recital 62 of the CRD states that international remuneration standards are introduced for 'credit institutions and investment firms to establish and maintain, for categories of staff whose professional activities have a material impact on the risk profile of credit institutions and investment firms, remuneration policies and practices that are consistent with effective risk management'.

Under Article 94(2) of the CRD, the EBA is mandated to 'develop draft regulatory technical standards with [...] respect to qualitative and appropriate quantitative criteria to identify categories of staff whose professional activities have a material impact on the institution's risk profile as referred to in Article 92(2)'.

In developing its draft RTS, the EBA took into account the Guidelines on Remuneration Policies and Practices issued by the Committee of European Banking Supervisors (CEBS). Those contained general criteria for the assessment of the materiality of the influence of staff on the institution's risk profile. The appropriate identification of staff whose professional activities have a material impact on the institution's risk profile is necessary to ensure an effective application of remuneration requirements contained within the CRD.

The EBA conducted a survey on the national implementation and the practical application of the CEBS Guidelines. The 'Survey on the implementation of the CEBS Guidelines on Remuneration Policies and Practices' was published on 12 April 2012 ⁽²⁾. The analysis showed that the range of practices was inappropriately broad and found that the percentage of staff being identified still differs significantly between Member States and institutions. The criteria for the identification of staff developed by institutions so far did not always sufficiently consider the impact on the institution's risk profile and, therefore, sometimes failed to identify appropriately staff members to whom the regulatory requirements regarding the payment of remuneration should be applied. The regulation provided in Directive 2006/48/EC as amended by CRD III and the CEBS Guidelines have not been sufficient to establish consistent practices throughout the European Union.

⁽²⁾ The survey can be found on the EBA website published together with the Guidelines on Remuneration Policies and Practices.

The draft RTS set out qualitative and appropriate quantitative criteria for the identification of categories of staff whose professional activities have a material impact on the institution's risk profile in accordance with the requirements of Article 92(2) of the CRD. Where staff would be identified only under the quantitative criteria but do not, in fact, have a material impact, it is possible to exclude such staff members under additional conditions in line with the CRD and Recital 62, which stipulates that staff should be identified whose professional activities have a material impact on the institution's risk profile.

Competent authorities must ensure that institutions' identification process includes the qualitative and quantitative criteria set out in the draft RTS and that institutions apply the requirements on remuneration policies and variable remuneration to all Identified Staff. The combination of the criteria put forward in these draft RTS, together with the requirements set out in Article 92(2) of the CRD ensures that each institution's individual risk profile is taken into account appropriately, while common qualitative and quantitative criteria promote a consistent classification of Identified Staff between institutions.

The qualitative criteria aim to identify staff in key areas and functions whose impact on the risk profile the EBA considers will always be material, and also staff with the authority to take risks above thresholds defined based on the institution's capital figures. In particular, all members of the management body or senior management must be identified. The draft RTS also set out criteria to identify staff in control and other functions, including the members of the management body in its supervisory function, whose professional activities have a material impact on the institution's risk profile because of their responsibilities, e.g. for managing risks or developing or overseeing the institution's strategy. Other criteria are based on the authority of staff to commit to credit risk exposures and market risk transactions above certain thresholds calculated as a percentage of the CET1 capital and above a *de minimis* threshold to ensure a proportionate application of the criteria.

In addition, the levels of remuneration are used as appropriate quantitative criteria. The total remuneration awarded to staff reflects mainly their responsibilities, duties, abilities, skills and performance of the staff member, of the business line in which they are active and of the institution as a whole. Where an individual is awarded very high total remuneration, this is usually linked to the impact of their professional activities on the institution's risk profile. This can involve active risk taking but also responsibilities for key functions which can pose material operational, reputational or other risks. To ensure that all such staff are identified, the draft RTS put forward quantitative criteria based on the total remuneration an individual receives, both in absolute terms (with predefined quantitative thresholds) and relative to other staff in the institution. The thresholds used take into account the data collected by the EBA and by competent authorities, and responses received during the public consultation. However, as the remuneration is only a proxy for risk taking, institutions may establish that staff identified only by virtue of the quantitative criteria do not in fact have a material impact on the institution's risk profile under additional conditions. An approval process ensures that competent authorities can review the exclusions in a timely manner and can ensure that the exclusions are exercised only in exceptional, well-reasoned cases. Competent authorities should inform the EBA of any exclusions of staff who have received total remuneration of 1 000 000 EUR or more before they are approved; the EBA will ensure a coherent application of these provisions.

The CRD itself states that being in the same remuneration bracket as senior management or risk takers is an indicator that the staff member's activities have a material impact on the risk profile. The draft RTS set out how this criterion should be applied. To avoid variations in remuneration levels between Member States in determining the effectiveness of this criterion as an indicator giving rise to too wide a bracket (e.g. if identification of staff in a country with low remuneration levels led to the

identification of a very large number of staff in a country with high remuneration levels), this criterion should be applied within institutions on a country-by-country basis. Staff need to be assigned to the country where they perform the predominant part of their duties. However, provisions should be made to enable institutions to rebut the presumption that staff members who fall within the remuneration bracket have a material impact, if they can show that their professional activities do not in fact have a material impact on the institution's risk profile. The exclusion of staff will always be subject to supervisory review in accordance with Article 92(2) of the CRD. If staff identified under the quantitative criteria are excluded, a notification is needed for staff receiving more than EUR 500 000 to ensure a timely supervisory review.

The result of the application of all qualitative and quantitative criteria needs to be documented by the institutions so that competent authorities can ensure institutions apply the criteria in line with the regulation.

-
3. EBA FINAL draft regulatory technical standards on criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile

COMMISSION DELEGATED REGULATION (EU) No .../..

of XXX

supplementing Directive 2013/36/EU of the European Parliament and of the Council with regard to regulatory technical standards with respect to qualitative and appropriate quantitative criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC³, and in particular Article 94(2) thereof,

Whereas:

- (1) Article 92(2) of Directive 2013/36/EU provides that competent authorities shall ensure that, when establishing and applying the total remuneration policies, inclusive of salaries and discretionary pension benefits, for categories of staff including senior management, risk takers, staff engaged in control functions and any employee receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers, whose professional activities have a material impact on their risk profile, institutions comply with a number of principles in a manner and to the extent that is appropriate to their size, internal organisation and the nature, scope and complexity of their activities. Article 94(2) of that Directive requires the European Supervisory Authority (European Banking Authority) (EBA) to develop draft regulatory technical standards with respect to qualitative and appropriate quantitative criteria to identify those categories of staff. In accordance with that Article, all the categories identified by the criteria must be of staff whose professional activities have a material impact on an institution's risk profile.
- (2) Article 92(1) of Directive 2013/36/EU provides that the application of Articles 92(2), 93, 94 and 95 of Directive 2013/36/EU shall be ensured by competent authorities for institutions at group, parent institution and subsidiary levels, including those established in offshore financial centres. Recital 67 to Directive 2013/36/EU makes clear that the principles and rules on remuneration which are contained in the aforementioned articles should be complied with by institutions on a consolidated

³ OJ L 176, 27.6.2013, p. 338.

basis, including branches and subsidiaries established in third countries. With regard to the group level, criteria to identify staff whose professional activities have a material impact on the institution's risk profile should therefore be applied on a consolidated basis. All institutions should separately be required to apply the criteria on an individual institution basis.

- (3) Directive 2013/36/EU, and more particularly Article 74 thereof, requires institutions to have robust governance arrangements and effective processes to identify, manage, monitor and report the risks that they are or might be exposed to. These arrangements and processes are to be comprehensive and proportionate to the nature, scale and complexity of the risks inherent in the business model and the institution's activities, taking into account, amongst others, the specific risks identified in Articles 79 to 87 of Directive 2013/36/EU. The arrangements and processes are evaluated by competent authorities as part of the supervisory review and evaluation process pursuant to Article 97 of Directive 2013/36/EU and the risks identified are considered by institutions within the internal capital adequacy assessment process pursuant to Article 73 of that Directive.
- (4) The framework for prudential supervision established by Directive 2013/36/EU requires that all institutions identify all members of staff whose professional activities have a material impact on the institution's risk profile. The criteria that are used to assess the materiality of the influence of the professional activities of staff on the risk profile should take into account the potential impact of staff on the institution's risk profile based on their authority and responsibilities and the institution's risk and performance indicators. The institution's internal organisation and the nature, scope and complexity of its activities should be taken into account in the assessment. The criteria should fully reflect all risks to which the institution or group is or may be exposed. This also enables institutions to set proper incentives within the remuneration policy to ensure the prudent behaviour of staff and should ensure that the identification of staff reflects the level of risk of different activities within the institution.
- (5) In 2012, the EBA published the results of a survey on the national implementation and the practical application of the guidelines issued by the Committee of European Banking Supervisors on remuneration policies and practices (the CEBS Guidelines), which contained general criteria for the assessment of the materiality of the influence of staff on the institution's risk profile. The survey showed that the implementation by institutions and competent authorities of the remuneration provisions laid down in Directive 2006/48/EC⁴ did not result in a sufficient degree of harmonisation. The range of remuneration practices remained inappropriately broad and, in particular, the criteria used to identify staff did not always consider sufficiently the impact of staff's professional activities on the institution's risk profile. As regards the identification of those staff, important discrepancies remained between the approach taken by different institutions and Member States. These regulatory technical standards should therefore build on the experience gathered under the application of Directive 2006/48/EC and the CEBS Guidelines and aim to achieve a higher level of harmonisation. The general framework for remuneration policies set out in Directive 2013/36/EU should also be supplemented by updated guidelines to be issued by the EBA pursuant to Article 75(2) of Directive 2013/36/EU.
- (6) A set of clear qualitative and appropriate quantitative criteria should be established in this Regulation to identify the core categories of staff whose professional activities

⁴ Directive of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (OJ L 177, 30.6.2006, p. 1).

have a material impact on an institution's risk profile, ensuring a harmonised approach across the Union and covering a common set of the most relevant risks, while institutions should also take into account the results of its own risk assessments within their internal procedures. Competent authorities should ensure a complete identification of staff whose professional activities have a material impact on an institution's risk profile.

- (7) Members of the management body have the ultimate responsibility for the institution, its strategy and activities and therefore are always able to have a material impact on the institution's risk profile. This applies to the members of the management body in its management function who take decisions as well as to the members of the supervisory function who oversee the decision making process and challenge decisions made.
- (8) The senior management and senior staff responsible for material business units, for management of specific risk categories such as liquidity, operational or interest rate risk, and for control functions within an institution are responsible for the day-to-day management of the business, its risks, or its control functions. This encompasses the responsibility for making strategic or other fundamental decisions on the business's activities or the control framework applied. The risks taken by the business and the way they are controlled are the most important factors for the institution's risk profile.
- (9) In addition to areas responsible for creating additional business, functions responsible for providing internal support which are crucial to the operation of the business and have authority to take decisions in those areas expose the institution to material operational and other risks. Therefore the professional activities of staff members in such functions also have a material impact on the institution's risk profile.
- (10) As credit risk and market risk are typically entered into in order to generate business, the impact on the risk profile can be assessed using criteria based on limits of authority which are calculated at least annually on the basis of capital figures and approaches used for regulatory purposes, while applying a *de minimis* threshold for credit risks to ensure the proportionate application of the criteria within small institutions.
- (11) In setting the criteria for the identification of staff, account should be taken of the fact that the requirements relating to the trading book can be waived for some institutions under Regulation (EU) No 575/2013 as well as that limits are set in different ways between institutions using different approaches for the calculation of the capital requirements.
- (12) Considering that the outcome of decisions is often influenced by the staff initiating the decision while the formal decision making power is with more senior staff or committees, the criteria should take into account the material elements in such decision-making processes.
- (13) Staff in a managerial position are responsible for the business activities in the area under their management. Therefore, appropriate criteria should ensure that members of staff are identified as having a material impact where they are responsible for groups of staff whose activities could have a material impact on the institution's risk profile. This includes situations where the activities of individual staff members under their management do not individually have a material impact on risk profile but the overall scale of their activities could have such an impact.
- (14) In addition to the qualitative criteria, appropriate quantitative criteria should be established. Total remuneration awarded depends principally on the contribution that staff make to the successful achievement of the institution's business objectives and

therefore on the responsibilities, duties, abilities and skills of staff and the performance of staff and the institution. Where a member of staff is awarded total remuneration which exceeds an appropriate threshold, it is reasonable to presume that this is linked to the staff member's contribution to the institution's business objectives and to the impact of the staff member's professional activities on the risk profile of the institution. Accordingly, it is appropriate to base the quantitative criteria on the total remuneration a member of staff receives, both in absolute terms and relative to other members of staff within the same institution. In the application of these quantitative criteria, account should, where appropriate, be taken of the fact that payment levels differ across jurisdictions. Clear and appropriate thresholds should be established to identify staff whose professional activities have a material impact on the institution's risk profile, taking into account the data collected by the EBA and by competent authorities. However, such presumptions based on quantitative criteria should not apply where institutions establish on the basis of additional objective conditions that staff do not in fact have a material impact on the institution's risk profile, taking into account all risks to which the institution is or may be exposed. As these quantitative criteria form a strong presumption that staff have a material impact on the institution's risk profile. The exclusion of the highest earning staff identified under these criteria should be subject to the approval of the competent authority in order to ensure effective and consistent application of the criteria. For staff awarded more than EUR 1 000 000 (high earners) competent authorities should inform the EBA before exclusions are approved in order to ensure, in particular in such exceptional circumstances, the coherent application of the criteria. The identification process, including the application of exclusions, should nevertheless always be subject to supervisory review in accordance with Article 92(2) of Directive 2013/36/EU.

- (15) Being in the same remuneration bracket as senior management or risk takers may also be an indicator that the staff member's professional activities have a material impact on the institution's risk profile. For these purposes, the remuneration paid to staff in control functions, support functions and members of the management body in the supervisory function should not be taken into account. In the application of this criterion, account should also be taken of the fact that payment levels differ across jurisdictions. Institutions should be allowed to demonstrate that staff who fall within the remuneration bracket, but do not meet any of the qualitative or other quantitative criteria, do not have a material impact on the institution's risk profile, taking into account all risks to which the institution is or may be exposed. The treatment of staff with a high level of total remuneration as excluded from this criterion should be subject to a notification procedure to allow for a timely supervisory review in order to ensure consistent application.
- (16) Competent authorities should ensure that institutions maintain a record of the assessment made and of the staff whose professional activities have been identified as having a material impact on their risk profile to enable the competent authority and auditors to review the assessment. The documentation should also include staff who have been identified under criteria based on their remuneration but for whom the professional activities are assessed as not having a material impact on the institution's risk profile.
- (17) This Regulation is based on the draft regulatory technical standards submitted by the EBA to the Commission.
- (18) The EBA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and

benefits and requested the opinion of the Banking Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1093/2010⁵,

HAS ADOPTED THIS REGULATION:

Article 1
Subject matter and scope

This Regulation establishes regulatory technical standards with respect to qualitative and appropriate quantitative criteria to identify categories of staff whose professional activities have a material impact on an institution's risk profile, as referred to in Article 92(2) of Directive 2013/36/EU, at group, parent company and subsidiary levels, including institutions established in offshore financial centres.

Article 2
Application of the criteria

Without prejudice to the obligation imposed on the competent authority to ensure that institutions comply with the principles set out in Articles 92, 93 and 94 of Directive 2013/36/EU for all categories of staff whose professional activities have a material impact on an institution's risk profile pursuant to Article 92(2) of that Directive, staff who meet one or more of the qualitative criteria in Article 3 or of the quantitative criteria in Article 4 shall be identified as having a material impact on an institution's risk profile.

Article 3
Qualitative criteria

The qualitative criteria referred to in Article 2 are the following:

- (1) the staff member is a member of the management body in its management function;
- (2) the staff member is a member of the management body in its supervisory function;
- (3) the staff member is a member of the senior management;
- (4) the staff member is responsible and accountable to the management body for the activities of the independent risk management function, compliance function or internal audit function;
- (5) the staff member has the overall responsibility for risk management within a business unit within the meaning of Article 142(1)(3) of Regulation (EU) No 575/2013 which has had internal capital distributed to it in accordance with Article 73 of Directive 2013/36/EU that represents at least 2% of the internal capital of the institution (a "material business unit");
- (6) the staff member heads a material business unit;
- (7) the staff member has managerial responsibility in one of the functions referred to in point (4) or in a material business unit and reports directly to a staff member identified under either point (4) or point (5);
- (8) the staff member has managerial responsibility in a material business unit and reports directly to the staff member who heads that unit;

⁵ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC (OJ L 331, 15.12.2010, p. 12).

-
- (9) the staff member heads a function responsible for legal affairs, finance including taxation and budgeting, human resources, remuneration policy, information technology, or economic analysis;
- (10) the staff member is responsible for, or is a member of a committee responsible for the management of a risk category described in Articles 79 to 87 of Directive 2013/36/EU other than credit risk and market risk;
- (11) with regard to credit risk exposures of a nominal amount per transaction which represents 0.5% of the institution's Common Equity Tier 1 capital and is at least EUR 5 million, the staff member meets one of the following criteria:
- (a) the staff member is responsible for initiating credit proposals or structuring credit products, which can result in such credit risk exposures;
 - (b) the staff member has authority to take, approve or veto a decision on such credit risk exposures;
 - (c) the staff members is a member of a committee which has authority to take decisions set out in points (a) or (b);
- (12) in relation to an institution to which the derogation for small trading book business under Article 94 of Regulation (EU) No 575/2013 does not apply, the staff member meets one of the following criteria:
- (a) the staff member has authority to take, approve or veto a decision on transactions on the trading book which in aggregate represent one of the following thresholds:
 - (i) where the standardised approach is used, an own funds requirement for market risks which represents 0.5% or more of the institution's Common Equity Tier 1 capital;
 - (ii) where an internal model based approach is approved for regulatory purposes, 5% or more of the institution's internal value-at-risk limit for trading book exposures at a 99th percentile (one-tailed confidence interval level);
 - (b) the staff member is a member of a committee which has authority to take decisions set out in point (a);
- (13) the staff member has managerial responsibility for a group of staff members who have individual authorities to commit the institution to transactions and either of the following conditions is met:
- (a) the sum of those authorities equals or exceeds a threshold set out in point 11(a), point 11(b) or point 12(a)(i);
 - (b) where an internal model based approach is approved for regulatory purposes those authorities amount to 5% or more of the institution's internal value-at-risk limit for trading book exposures at a 99th percentile (one-tailed confidence interval level). Where the institution does not calculate a value-at-risk at the level of that staff member the value-at-risk limits of staff under the management of this staff member shall be added up;
- (14) with regard to decisions to approve or veto the introduction of new products, the staff member meets either of the following criteria:
- (a) the staff member has the authority to take such decisions;

-
- (b) the staff member is a member of a committee which has authority to take such decisions;
- (15) the staff member has managerial responsibility for a staff member who meets one of the criteria in points (1) to (14).

Article 4
Quantitative criteria

1. Subject to paragraphs 2 to 5, the quantitative criteria referred to in Article 2 are the following:
 - (a) the staff member has been awarded total remuneration of EUR 500 000 or more in the preceding financial year;
 - (b) the staff member is within the 0.3% of staff, rounded to the next higher integral figure, who have been awarded the highest total remuneration in the preceding financial year;
 - (c) the staff member was in the preceding financial year awarded total remuneration that is equal to or greater than the lowest total remuneration awarded in that financial year to a member of staff who is a member of senior management or meets one or more of the criteria in points 1, 3, 5, 6, 8, 11, 12, 13 or 14 of Article 3.
2. A criterion laid down in paragraph 1 shall not be met where the institution determines that the professional activities of the staff member do not have a material impact on the institution's risk profile because the staff member, or the category of staff to which the staff member belongs, meets one of the following conditions:
 - (a) the staff member or category of staff only carries out professional activities and has authorities in a business unit which is not a material business unit;
 - (b) the professional activities of the staff member or category of staff have no material impact on the risk profile of a material business unit.
3. The condition in point (b) of paragraph 2 shall be assessed on the basis of objective criteria which take into account all relevant risk and performance indicators used by the institution to identify, manage and monitor risks in accordance with Article 74 of Directive 2013/36/EU and on the basis of the duties and authorities of the staff member or category of staff and their impact on the institution's risk profile when compared with the impact of the professional activities of staff members identified by the criteria within Article 3.
4. An institution shall notify the competent authority responsible for its prudential supervision of the application of paragraph 2 in relation to the criterion in point (a) of paragraph 1. The notification shall set out the basis on which the institution has determined that the staff member concerned, or the category of staff to which the staff member belongs, meets one of the conditions laid down in paragraph 2 and shall, if applicable, include the assessment carried out by the institution pursuant to paragraph 3.
5. The application by an institution of paragraph 2 in respect of a staff member who was awarded total remuneration of EUR 750 000 or more in the preceding financial year, or in relation to the criterion in point (b) of paragraph 1, shall be subject to the prior approval of the competent authority responsible for prudential supervision of that institution.

The competent authority shall only give its prior approval where the institution can demonstrate that one of the conditions in paragraph 2 is satisfied, having regard, in respect of the condition in paragraph 2(b), to the assessment criteria set out in paragraph 3.

Where the staff member was awarded total remuneration of EUR 1 000 000 or more in the preceding financial year the competent authority shall only give its prior approval in exceptional circumstances. In order to ensure the coherent application of this Article the competent authority shall inform the European Banking Authority before giving its approval in respect of such a staff member.

Article 5

Calculation of remuneration awarded

6. For the purposes of this Regulation, remuneration which has been awarded but has not yet been paid shall be valued as at the date of the award without taking into account the application of the discount rate referred to in Article 94(1)(g) of Directive 2013/36/EU or reductions in payouts, whether through clawback, malus, or otherwise. All amounts shall be calculated gross and on a full-time equivalent basis.
7. For the purpose of the application of points (b) and (c) of Article 4(1), the remuneration awarded may be considered separately for each Member State and third country where the institution has an establishment and staff shall be assigned to the country where they carry on the predominant part of their activities.

Article 6

Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission
The

President

4. Accompanying documents

4.1 Cost–benefit analysis/impact assessment

Introduction

1. Article 10 (1) of the EBA Regulation (Regulation (EU) No 1093/2010 of the European Parliament and of the Council) provides that, when any draft regulatory technical standards developed by the EBA are submitted to the European Commission they should be accompanied by an analysis of 'the potential related costs and benefits'. This analysis should provide an overview of the findings regarding the problem to be dealt with, the solutions proposed and the potential impact of these options.
2. The development of draft RTS covering criteria for the identification of categories of staff who have a material impact on the institution's risk profile stems from the obligations under Articles 92(2) and 94(2) of Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms and amending Directive 2002/87/EC of the European Parliament and of the Council on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate (CRD IV).

Problem definition

Issues addressed by the European Commission regarding staff whose professional activities have a material impact on the institution's risk profile

3. In its impact assessment of the proposed CRD IV framework, the European Commission noted that the existence of inappropriate incentives for management and employees, in particular within remuneration policies, might have been a contributory factor that led institutions to implement short-term, excessively risky strategies. The Commission stated that *'remuneration policies in financial institutions had an enhancing pro-cyclical effect where they entailed disproportionate rewards on the upside and insufficient penalties on the downside, e.g., bonuses based on short-term profits that are paid immediately, with no risk adjustment or deferred payment to take account of future performance of the business unit or institution as a whole'* ⁽⁶⁾.
4. In order to address the harmful effects of poorly designed remuneration structures, in 2010, the European Parliament and Council adopted in the CRD III provisions requiring credit institutions and investment firms to establish and maintain, for those categories of staff whose professional activities have a material impact on their risk profile, remuneration policies and practices that are consistent with effective risk management. These requirements were aimed at creating more incentives for staff members to behave prudently by making short-term excessive risk taking less attractive and ensuring that their personal objectives are aligned with the long-term interest of the

⁽⁶⁾ Impact Assessment accompanying the document Regulation of the European Parliament and the Council on prudential requirements for the credit institutions and investment firms, p. 81

credit institution. They were clarified and later completed by the CEBS Guidelines, which provided additional guidance on the selection of Identified Staff.

5. However, it seems that these principles were too general and not sufficiently precise, and left too wide a margin of discretion that led to a broad range of practices being used ⁽⁷⁾. To address this issue, Article 94(2) of the CRD IV requires that the EBA develop draft RTS to further specify the criteria for identifying staff who have a material impact on an institution's risk profile. Those staff would be subject to the stricter requirements regarding the variable part of remuneration and the applied remuneration policies.
6. Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (the CRR) also contain disclosure requirements on the remuneration of Identified Staff to increase market discipline on remuneration policies. Increased harmonisation of disclosure on remuneration is also expected to reduce information costs to investors and allow comparison of remuneration practices across Europe.

Issues addressed by the RTS and objectives

7. The RTS will supplement at a technical level the provisions of the CRD IV, with the aim of contributing to the realisation of the objectives of the Level 1 text described in the previous section, in accordance with the mandate received under the CRD.
8. The implementation of appropriate criteria to identify staff is the essential starting point for applying the requirements in the CRD for staff whose professional activities have a material impact on the institution's risk profile. To this end, these RTS define criteria ensuring a harmonised identification in the EU of such staff members, taking into account the main risk drivers of institutions. The criteria within the RTS should help to identify not only a limited number of staff at the highest level of the hierarchy but also risk takers and other categories of staff whose professional activities have a material impact on the institution's risk profile, taking into account qualitative and quantitative aspects.
9. The requirements in the CRD IV regarding the remuneration of Identified Staff and the disclosure of remuneration practices should contribute effectively to aligning the remuneration practice with the institution's risk profile and improving risk management practices in credit institutions and investment firms in accordance with the definition provided within the CRD. The criteria should also ensure this, by identifying staff whose professional activities have a material impact on the institution's risk profile.

⁽⁷⁾ A recent survey conducted by the EBA on the implementation of the guidelines in the EU concluded that '*varying practices lead to differences in the criteria used to identify staff and in the number of Identified Staff within jurisdictions and internationally. Those differences could lead to regulatory arbitrage and competitive disadvantages. The result is that institutions have tended to select low numbers of Identified Staff, which is contrary to the objective of managing effectively risks resulting from remuneration policies and practices*'.

Technical options considered

10. The scope of application of these RTS is defined by the CRD. In accordance with Article 92(2) of the CRD, institutions have to identify all staff whose professional activities have a material impact on the institution's risk profile. For this purpose, institutions will implement internal processes which include the criteria provided within the RTS. As the scope covers institutions with very different business models, natures of activities, sizes and degrees of complexity, the EBA has defined criteria that are based on the most common risk areas but are also general enough to fit all types of institutions, including investment firms. The set of criteria chosen should avoid burdening institutions as far as possible yet also ensure an enforceable and appropriate process for the identification of staff.

Data survey

11. Before consulting on the draft RTS, the EBA had conducted a data survey in which some institutions were asked to provide information about the level of Identified Staff and to give feedback on criteria that the EBA considered when developing the Consultation Paper. The EBA received answers from 30 institutions ranging from large to small and including universal, retail and investment banks. In addition, the EBA received two analyses from competent authorities based on their own data analysis. This information covers 18 Member States and was used to develop and fine-tune the criteria which have been made available to public consultation.
12. During the consultation period, the EBA again collected data from 36 institutions of different sizes from 18 Member States to get information about the numbers of staff identified under the proposed draft RTS. In particular, the EBA requested the number of staff who had been identified under the quantitative criteria but not under the qualitative criteria, as well as the number of staff who would be excluded, after a second-round screening, from the group of Identified Staff. The EBA also gathered information to allow a comparison between the numbers of staff identified under the CRD III regime and under the proposed draft RTS.
13. Nonetheless, the EBA was not in a position to assess the quality of the data provided by the institutions. The figures are based only on the institutions' assessments, without the competent authority having ensured that the criteria were applied correctly.
14. The EBA is grateful to the institutions and authorities contributing to the survey, as they added value to the development of the draft RTS by providing qualitative and quantitative feedback on the criteria considered.
15. The EBA considered many different types and combinations of possible criteria before choosing the final set of criteria that is contained in these draft RTS. For the sake of brevity, the following sections present the data, rationale and justifications which led to the decision to retain or discard the options considered.

A. Qualitative criteria: criteria based on the function, responsibility or seniority of the staff

16. These criteria have been considered on the basis that the level of seniority and/or the type of activity and responsibility are, in general, good indicators of the influence that a staff member has on the risk profile of the institution. In all cases, the members of the management body, the senior management and heads of control functions should be identified. The EBA has chosen to retain these criteria because it believes that they successfully identify a large portion of the staff having a material impact on the risk profile of the institution and are also easy to apply. However, to avoid including staff who have no material impact on the risk profile of the institution, the EBA has introduced a materiality threshold for staff who head, or are responsible for risk management within, a business unit, which limits the number of Identified Staff in institutions.
17. Within material business units, the second level of management should also be identified, if those staff members have managerial responsibilities. This was added to clarify the criteria within the draft RTS, as such staff also have a material impact on the institution's risk profile. These staff members have to be identified because they have material delegated or stand-in responsibilities and would, therefore, be identified by either the self-assessment process or the criterion based on collective risk taking, which were both removed. Article 92(2) of the CRD establishes a general requirement that institutions identify all staff whose professional activities have a material impact on the institution's risk profile.
18. The EBA also split some of the criteria into separate ones, e.g. to identify members of the management body in the management function and separately to identify members of the management body in the supervisory function. This separation was necessary to better define the remuneration bracket, which should be based only on the remuneration awarded to senior management and risk takers.
19. Professional activities of staff heading certain key functions (e.g. IT) are always considered to have a material impact on the institution's risk profile, as they have a material impact on operational and other risks. Those persons are not taken into consideration when the remuneration bracket is drawn up. As the functions are named, the identification itself is easy to perform. Some respondents felt that this criterion is too broad and also identifies staff who do not have the responsibility for the function, as, for example, they perform that role in a subsidiary company under the control of the group function and that, therefore, the burden for the application of the requirements on remuneration would increase unduly. The criterion was retained, as the criteria have also to be applied at the individual level. Where a small institution has, in fact, no head of function, as the person purportedly carrying out this function only administers it without having material decision-making powers and is under the direction and responsibility of a member of the management body, then for obvious reasons that person, despite perhaps having the job title 'head of function', should not be considered as satisfying the criterion. Consequently, this criterion, which is easy to apply, will not lead to an overly burdensome application of remuneration requirements.

B. Criterion based on the capacity of the staff to grant credit up to a certain percentage of CET1 capital or to enter into other positions containing a material exposure to credit risk

20. These criteria aim to identify staff members taking credit risk, in particular when granting credit, and also staff who have the authority to enter into positions which contain other credit risk exposures (e.g. bonds) above a certain *de minimis* threshold. The EBA considered that CET1 would be a more appropriate metric for the definition of a ratio than risk-weighted exposure amounts or a ratio defined on the basis of overall own funds, for the following reasons.
21. Institutions usually set limits for lending activities in nominal values per transaction or per counterparty, mostly without considering the applicable risk weights. To take into account the risk of an exposure, the EBA considered the use of risk-weighted exposures as metrics. This option was not retained, as institutions use different approaches for the calculation of the capital requirements, and using risk-weighted exposure would not have given consistent results across the industry.
22. The EBA has also considered using total own funds for the definition of thresholds, as it would have the advantage that the composition of the capital would have no impact on the thresholds. CET1 is relatively stable compared with Tier 2 capital, which has a limited maturity. In addition, larger institutions often hold more additional Tier 1 or Tier 2 capital than smaller firms, whose capital mainly consists of CET1 instruments. Due to the application of the regulatory requirements on Tier 2 capital, the overall own funds can be subject to fluctuations. In addition, stakeholders may expect higher levels of capital in larger or systemically relevant firms. If the total own funds were to be used as a basis, this would lead to lower numbers of Identified Staff within those institutions and to fluctuations in the number of Identified Staff.
23. Therefore, CET1 capital seems to be more suitable to ensure that criteria provide a stable basis for the identification of staff and to avoid any disadvantages for smaller institutions.
24. The assessment process is usually performed on an annual basis, taking into account the criteria based on the actual capital figures at a specified operative date, which need to be calculated for regulatory purposes in any case. Consequently, the calculation of such figures does not create a significant additional burden. Changes in such capital figures between operative dates will not give rise to a need to re-identify staff until the next operative date arrives. Obviously the group of staff identified might change over the years, which is appropriate because their impact on the risk profile, as indicated by the criterion, changes as well.
25. The provisions regarding collective risk taking have been clarified and should now be easier to apply. This should also lead to a lower number of staff being identified than by the criterion which has been consulted on publically.
26. The criterion has been recalibrated during the public consultation to ensure that staff are being identified appropriately, taking into account the number of staff identified under this criterion at different percentages of CET1 capital and numbers of staff identified today under the CRD III regime. At the level set in the RTS for this criterion, on average the number of staff identified in this area is maintained. Therefore, it reflects the level of risk which was considered to be material

under the CRD III provisions. For some institutions there may be an increase and for others a reduction in the numbers of staff identified under this criterion, compared with staff identified today in this business area.

27. The absolute threshold of credit risk exposure of EUR 5 million, which corresponds to the nominal amount per transaction, was chosen after a banking federation of a Member State, which comprises a wide spectrum of banks ranking from large international banks to small cooperative banks, suggested this limit as representative and fair for its jurisdiction. Given that this threshold is considered fair for a Member State's large banking system with a high level of allocation of banking activities among banks and with a wide variety of business models, the EBA also considers it to be an appropriate threshold at EU level.

C. Criterion based on the market risk limits at the trading desk

28. This criterion aims to identify staff members who have a material influence on the market risk of an institution. As market risk limits are generally set for traders or desks, this criterion should be reasonably straightforward to apply. To facilitate the application of this criterion for all institutions, the EBA has included two different thresholds, depending on whether the institution uses the standard or advanced approach for measuring market risk. As the application of the trading book rules are waived for small institutions, the criterion should be applied only if the institution has to comply with the trading book requirements; therefore, it is not necessary to introduce a *de minimis* threshold to avoid a relatively high number of staff being identified in small institutions.
29. The criterion has been amended and refers to the approach which is used for regulatory purposes. Doing so reduces the costs for additional calculations. As a result, staff responsible for market risk in the banking book are no longer identified under this criterion but may be identified under other criteria or criteria applied internally.
30. The provisions regarding collective risk taking have been clarified and should now be easier to apply, leading also to a lower number of staff being identified than by the criterion which has been consulted on publically.
31. The criterion for the Standardised Approach has been recalibrated during the public consultation to ensure that an appropriate number of staff is identified, taking into account the number of staff identified under this criterion at different percentages of CET1 capital and numbers of staff identified today under the CRD III regime. The criterion based on trading limits arising from risk models has been amended and was aligned with the regulatory requirements regarding the 99% confidence level, to ensure that banks can apply this without further costs for additional calculations. At the level set in the RTS, on average the number of staff identified in this area is expected to be maintained, to ensure that the level of risk which led to an identification of staff under the CRD III leads to an identification of staff in accordance with this criterion. For some institutions this may lead to an increase and for others to a reduction of staff identified under this criterion compared with staff identified today in this business area.

D. Criterion based on the capacity of the staff to commit the institution up to a certain percentage of operating income and commissions/fees payable set out in the institution's most recent annual accounts

32. This criterion was considered on the basis that it might be a good indicator of risks influenced by staff who are not involved in the area of credit business or trading activities (e.g. credit risk within sovereign bonds) and to cover all other decisions which may lead to financial obligations (e.g. by entering into outsourcing contracts). However, from the feedback received, it seems that this criterion would be difficult to apply, as one uniform threshold within an institution cannot be set which appropriately reflects the different risks in other areas. Credit risks should be covered specifically. Other material decisions would be made particularly by senior managers, who are already identified. Furthermore, operating income can be very volatile, so this threshold and the number of Identified Staff would be likely to vary considerably depending on the economic situation. For these reasons, the EBA decided not to include criteria based on such metrics.

E. Criteria based on managerial responsibility

33. The EBA has considered criteria based on managerial responsibility for:

- staff members who are Identified Staff; and
- units consisting of staff members who have individual authorities to commit the institution to transactions, the sum of which equals or exceeds some of the thresholds proposed in these RTS.

34. Such criteria aim to ensure that individuals who are not otherwise identified themselves but who have a material influence on Identified Staff members (or on groups of staff members with a cumulative impact that exceeds some of the thresholds proposed in these RTS), are also identified. The EBA retained these criteria, as the potential impact of those members of staff resulting from the sum of their responsibilities and their influence on other Identified Staff constitutes a material impact on the risk profile of an institution. Most of these individuals are likely to be identified already through other criteria (for instance, those based on the function, responsibility or seniority of the staff), so only a few additional staff members should be identified by these two criteria. This is also suggested by the preliminary data from the banks that participated in the data collection exercise. However, these criteria are important for ensuring that staff members with such responsibilities, but who don't belong to the senior management or heads of business units, are identified.

35. With regard to the market risk criterion for banks using an internal model for regulatory purposes, the EBA has consulted on an option which would require summing up the value-at-risk (VaR) limits of staff who are managed by an individual. Technically, it is not correct to add up such VaR limits, as diversification and netting effects would not be considered. However, the sum of such limits should always be higher than a VaR limit calculated for the cumulative portfolio. The EBA has introduced two options for this criterion. Institutions should be able to add up such limits. This is easy to apply without generating additional costs and provides for a conservative figure. Alternatively institutions may calculate a VaR limit at the level of the individual concerned and

apply this criterion. Some institutions would do this anyway for internal purposes, in which case additional costs would not be incurred. Institutions that choose this option but have not yet put in place such assessments for this level would incur additional costs, but they could opt for the simpler method to avoid these.

F. Criteria based on the amount of remuneration

36. The EBA has considered criteria based on the amount of variable, fixed and total remuneration. The amount and type of remuneration awarded depends principally on the responsibilities, duties, abilities and skills of staff and the performance of staff and the institution. High levels of total remuneration, in which the variable component often represents the biggest element, are generally awarded to individuals conducting activities that have a direct impact on the risk profile of the institution. Therefore, high levels of total remuneration lead to the presumption that staff members have a material impact on the risk profile.
37. The EBA has consulted on a combination of a relative and an absolute threshold based on the level of variable remuneration. For instance, all individuals having a ratio of variable to total remuneration higher than 75% and an absolute amount of variable remuneration higher than EUR 75 000 would be automatically identified. The provision setting the proportion of variable to fixed remuneration at higher than 75% was aimed at identifying the staff whose variable remuneration is a big proportion of total remuneration, thereby potentially providing these staff members with incentives to undertake risky positions to increase their variable remuneration. On the other hand, a relatively low absolute monetary threshold in this criterion would set an appropriate limit to the capacity for such risk taking, thereby ensuring that staff whose variable remuneration falls below such a limit would have, in fact, no material impact on the institution's risk profile. For this option, the option of granting exemptions was considered in order to allow institutions to exclude staff from the category of Identified Staff, if identified only under this criterion, where such exception is justified by the facts. The criterion would lead to a high number of staff that could be excluded. The cost of implementing this criterion would be significant. In addition, it would result in a considerable overlap with staff identified under the remuneration bracket. For this reason, this option was not retained.
38. The EBA has decided to set two criteria independently, one aiming to identify staff receiving a particularly high salary in relative terms within the institution and one set in absolute terms. A relative measure has the advantage of identifying the top earners within an institution. Those staff members have high responsibilities and authority and therefore are considered to have a significant influence on the institution's risk profile. For small institutions, this will not lead to the identification of additional staff, as a relatively high percentage of staff with the highest total remuneration will be identified by qualitative criteria.
39. The absolute threshold takes account of the experience gathered within competent authorities and data collected. Across the EU, 23 institutions submitted specific data regarding the numbers of staff whose professional activities would be considered as having a material impact on the institution's risk profile, if a criterion were applied based on staff receiving total remuneration above certain thresholds. A threshold of EUR 1 000 000 would lead to the identification of additional staff members in only four institutions, a threshold of EUR 750 000 in five institutions, a

threshold of EUR 500 000 in 11 institutions and a threshold of EUR 250 000 in 14 institutions. This translates to the following absolute figures with regard to staff who would be identified compared with staff already identified under the current arrangements:

Total remuneration (EUR)	Number of staff to be identified after the implementation of the RTS	Staff already identified under the current arrangements
> 250 000	13 751	2 702
> 500 000	4 796	1 792
> 750 000	2 430	1 468
> 1 000 000	1 490	1 110

40. Based on data collected from 36 institutions during the public consultation, the following cumulative figures can be derived regarding the identification of staff under a quantitative criterion with a threshold of EUR 500 000 and the criterion based on the 0.3% of staff with the highest total remuneration. The sample of banks represents 1 492 359 staff members; 19 642 (or 1.3 %) of them would be identified staff under the consultation paper proposal based on data provided by the institutions.

41. Institutions mainly provided data under the assumption that nearly all staff under the remuneration bracket and the variable remuneration criterion (75 % / EUR 75 000) would be excluded, while staff identified under the EUR 500 000 or 0.3 % criteria cannot be excluded.

42. Based on the table above it can be assumed that the figures for a criterion based on EUR 750 000 would be reduced by a little more than 50 % compared to a criterion based on EUR 500 000, which leads on average to an identification result which is comparable with a criterion based on the 0.3% of staff with the highest total remuneration.

	Remuneration > EUR 500 000	0.3 % of highest earners
Staff identified under the criterion	8259	4475
Thereof identified also by qualitative criteria	1927	1524
Staff which could potentially be excluded subject to the conditions being met	6332	2951

43. Under the EUR 500 000 criterion a maximum of 6 332 staff members identified under the quantitative criterion (within institutions included in the sample) would not be identified by qualitative criteria according to information provided by 36 institutions. Statistical data from the European Central Bank shows that credit institutions in the EU had 3 088 403 employees in 2011. The EBA has extrapolated the above figures to estimate the total number of staff who may be identified only by this quantitative criterion, resulting in slightly more than 12 000 employees in the EU. Under a threshold of EUR 750 000 only half the number of staff would be identified compared

with a threshold of EUR 500 000. Such staff members could be excluded when additional conditions are met which demonstrate that they do not have a material impact on the institution's risk profile. To ensure a sufficient level of supervision by competent authorities, exclusions should be subject to notification or prior approval requirements.

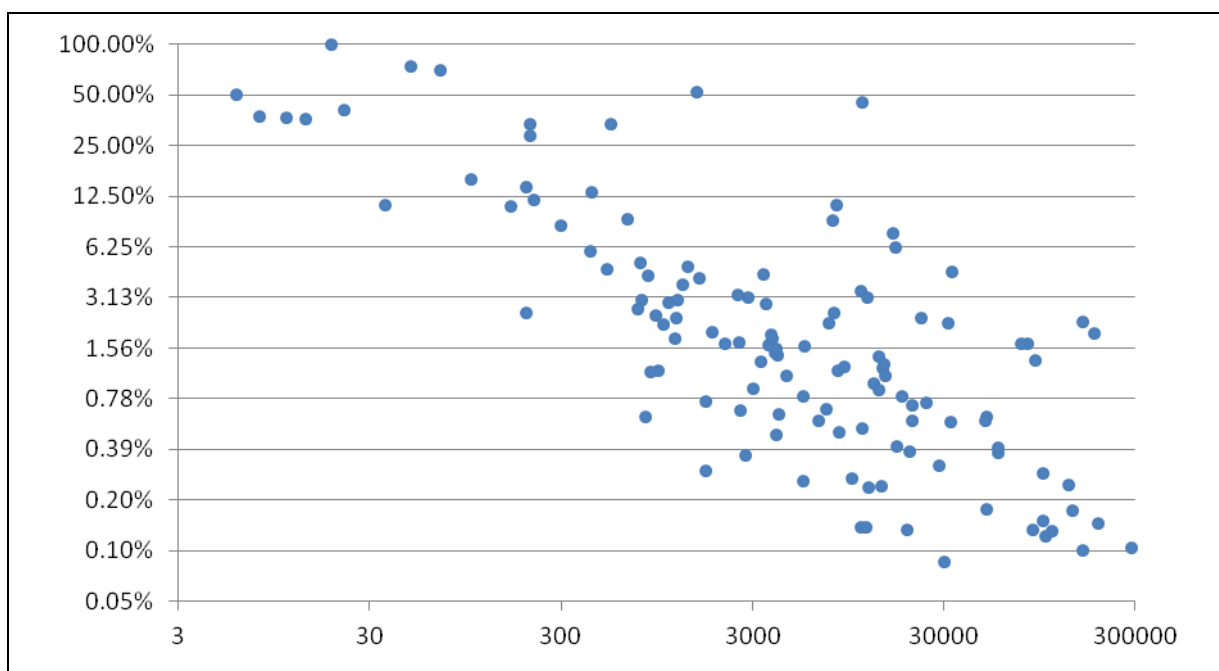
44. According to benchmarking data received for 110 institutions, the average total remuneration of risk takers in 2011 was EUR 508 000.

45. The options considered for setting the threshold were the following:

- a. threshold of EUR 500 000: at the average income of Identified Staff;
- b. threshold of EUR 750 000: between the average income of Identified Staff and the threshold derived from the provisions of the CRD regarding high earners;
- c. threshold of EUR 1 000 000: in line with the provision on high earners in the CRD.

46. Based on benchmarking data for 2011, only very few institutions show ratios of identified to total staff of under 0.3%. It can be observed that other institutions of comparable size and business model have significantly higher ratios of Identified Staff. It is appropriate to require the identification of the highest earners, as it can be expected that those staff members have a material impact on the risk profile based on their managerial, business or technical responsibilities. As payment levels differ between jurisdictions, this needs to be applied on a country-specific basis. This may be slightly more costly than the application at group level or within an institution, but it ensures that a risk-based approach is taken when using remuneration as an indicator of risk taking.

Ratio (in %) of Identified Staff and number of staff within institutions in 2011 (logarithmic scale), based on benchmarking data of 124 banks



47. Depending on the thresholds used, staff identified only under the quantitative criteria could, in certain exceptional circumstances, be considered nevertheless to have no material impact on the institution's risk profile. The EBA has, therefore, considered combining different thresholds with the possibility of excluding staff who are identified only by the quantitative criteria and who institutions can show do not in fact have a material impact on the risk profile. Such an exclusion could be subject to a notification or approval process, depending on the level of the thresholds used.
48. An absolute threshold of EUR 500 000 and a relative threshold of 0.3%, both with the possibility of excluding staff, have been retained. Additional qualitative assessment conditions were introduced which have to be fulfilled if the institution wishes to exclude staff identified only under those quantitative criteria. To provide flexibility, the exclusion possibility should not be mandatory. Exclusions are subject to supervisory review.
49. The EBA has considered the costs of allowing the exclusion of staff identified only by the quantitative criteria. Having no exclusion process in place would not trigger additional costs for the application of the criteria but might have some impact on three areas: administrative costs for applying the remuneration requirements; competition between institutions for the 'most talented staff' (particularly in locations outside the EU); and employment conditions for staff who may – as respondents stated – not have a material impact on the institution's risk profile. When assessing the impact on competition, it needs to be remembered that the criteria are applied at group level, including subsidiaries and branches in third countries and subsidiaries which are not themselves subject to the CRD requirements.
50. A combination of notification and approval processes limits the number of approvals required. An exclusion process for those categories of staff would need to follow a strict set of criteria. In accordance with Article 92(2) of the CRD, competent authorities will ensure the compliance of

institutions with the requirements for remuneration policies for Identified Staff. Such a process would need to be scrutinised by the competent authority and there would need to be sufficient evidence that the staff concerned have no material impact on the risk profile. Therefore, exclusion should take into account the institution's risk assessment, the duties and authorities of staff and how they relate to the impact on the institution's risk profile compared with staff identified on the basis of qualitative criteria.

51. Two options for the additional assessments have been considered: firstly an assessment where the responsibility is mainly with the institution and is subject to the regular supervisory review by the competent authority; and secondly an assessment which would directly involve the competent authority. In view of the above data and to limit the costs which are driven by the number of assessments, thresholds have been introduced to limit the number of exclusions which have to be notified to the competent authority and the number of exclusions which require prior approval of the competent authority. For staff receiving EUR 500 000 or more in the preceding financial year, a notification of exclusions to the competent authority ensuring a timely review by the competent authority was deemed to be sufficient. The threshold for a prior approval process was set at EUR 750 000 or more in the preceding financial year. This process requires an additional assessment by competent authorities and applies also to the criterion which aims at identifying the highest earners within an institution (the 0.3% criterion) independent of the absolute amount paid. If in exceptional cases staff receiving EUR 1 000 000 or more in the preceding financial year would be excluded, the competent will inform the EBA before such an exclusion is approved to ensure a coherent application of the requirements.
52. The criterion based on the absolute amount of total remuneration was set at EUR 500 000, allowing for exclusion under a notification process and starting with EUR 750 000 under a prior approval process. The prior approval requirement also applies to staff belonging to the 0.3 % of the highest earners of an institution. The reasons underlying the decision are the following:
- a. The threshold is set high enough to avoid having excessive administration costs due to the identification of too many staff for whom an additional analysis and approval by the competent authority would potentially be needed. The marginal costs are acceptable because, under the remuneration bracket, which is set within the CRD, those staff members would in most cases already be identified and additional analysis with regard to their impact on the risk profile would be needed. The incremental costs mainly result from the application of a different process. The threshold identifies the top end of staff remuneration within institutions, and the identification process should come under more scrutiny if staff receiving the highest of remuneration are excluded. The threshold considers the resources needed within institutions, competent authorities and the EBA to supervise the identification process and, in particular, to assess ex-ante the exclusion of staff members in order to provide approval.
 - b. The threshold is set low enough to identify staff whose professional activities are presumed to have a material impact on the institution's risk profile but who are not identified by the qualitative criteria, ensuring in most cases a complete identification of staff whose professional activities have a material impact on the institution's risk profile.

-
53. The CRD contains the requirement to identify any employee receiving total remuneration that takes them into the same remuneration bracket as senior management and risk takers and whose professional activities have a material impact on the institution's risk profile.
54. The RTS clarify the application of this requirement by clarifying which groups of staff are considered to be senior management and risk takers and by clarifying that the bracket should be drawn up and applied by institutions on a country-specific basis. The latter is necessary to take account of different remuneration levels in Member States and third countries. This approach reduces the cost of applying the remuneration bracket, as it reduces the number of staff members who need to be further assessed to determine if they have a material impact on the risk profile.
55. The RTS contain criteria which have to be applied if staff identified under the bracket are to be excluded. All exclusions are subject to supervisory review in accordance with Article 92(2) of the CRD. The notification and prior approval requirements apply at the given thresholds as explained above.

Impact of the proposals

56. The impact of these RTS will vary greatly between institutions and will depend mainly on the size of the institution, the activities it conducts and the composition of its staff. Within a questionnaire answered by 36 institutions, some larger institutions mentioned costs, in particular for the exclusion of staff identified under the remuneration bracket ranging from EUR 100 000 to EUR 900 000, while for smaller institutions the additional costs seem to be less significant.

- *Direct compliance costs:* these cover all the incremental costs that meeting the new requirements of these RTS will generate for institutions and national authorities, including the implementation of new policies, identification processes and the necessary resources for their development, including HR, legal services, IT systems and consultancy services. The costs assessed are limited to those caused by the implementation of the criteria set out in the draft RTS, and do not include costs arising more generally from compliance with the remuneration requirements of the CRD.

Table 1 – Summary of the direct compliance costs of the measure

Party concerned	Costs
Credit Institutions	One-off costs <ul style="list-style-type: none">a. Costs of IT changes to the current information systems to identify staffb. Costs of changing the current relevant internal processes for identifying staff, including the amendment of contracts if necessary, legal advice and consultancy servicesc. Costs of training or hiring staff members in charge of identifying staff
	Ongoing costs <ul style="list-style-type: none">d. Additional costs (compared with the current requirements) of monitoring and identifying potential additional staff members (new hires, changes in the institution's structure, etc.) by means of more complex criteria, and of monitoring compliance with a broader set of requirements, including costs of additional audits. Costs of the performance of additional materiality assessments for staff identified under quantitative criteria and subject to the exclusion process
National Supervisory Authorities and EBA	Ongoing costs <ul style="list-style-type: none">e. Incremental costs (compared with the current requirements) of supervising compliance with new requirements for identifying staff and costs of the prior approval of potential exclusions

57. Almost all the institutions in the survey that provided answers on costs confirmed that the main drivers of costs of the RTS had been appropriately listed in the table above. From this limited sample, it appears that for most institutions, independently of their number of employees, changes to IT systems will be one of the main drivers of costs. Changing processes is another important driver of costs, but one that tends to affect larger institutions. As expected, smaller institutions cited rather hiring/training new staff as an important driver of costs. Most of the institutions in the sample were not able to provide any estimate of the scale of these changes.

- *Indirect compliance costs:* by defining the scope of the staff identified as having a material impact on the institution's risk profile, the RTS will also affect the size of the costs driven by the requirements of the directive; for instance, the costs associated with changing individual contracts for Identified Staff that are not compliant with the CRD IV requirements or due to the disclosure requirements under the CRR.

-
- ▶ *Other effects:* changes to the regulatory framework brought about by the CRD IV are expected to have an impact on the remuneration structures. Variable remuneration should be reduced in order to avoid incentives for excessive risk taking. However, this may also lead to challenges when staff are hired in jurisdictions where no maximum ratio for variable remuneration is applicable. Some respondents argue that the costs of such competitive disadvantages are significant. The RTS may have a minor impact, as the criteria may lead to the identification of a wider staff population to which the regulatory requirements apply.

Benefits: by establishing harmonised criteria to identify staff who have a material impact on the institution's risk profile, the RTS will ensure that institutions in different Member States use the same regulatory criteria as part of their internal processes to identify staff. This will reduce the burden of complying with different regulatory frameworks. In some Member States, these criteria may identify more staff as having a material impact on the institution's risk profile than the application of the current national framework. By doing so, the criteria will contribute to realising the benefits sought by the CRD IV requirements, which include ensuring that the remuneration of Identified Staff more accurately reflects the risks they create and is more aligned with the longer-term interests of the institution.

4.2 Views of the Banking Stakeholder Group (BSG)

Letter received from the Banking Stakeholder Group⁽⁸⁾

Consultation on the EBA's draft technical standards for the definition of material risk takers for remuneration purposes (EBA/CP/2013/11)

The EBA has issued a Consultation Paper on draft regulatory technical standards on the criteria to identify categories of staff in regulated institutions whose professional activities have a material impact on an institution's risk profile. These material risk takers will be subject to specific provisions of the Capital Requirements Directive (CRD) related, in particular, to the payment of variable remuneration. The objective is to ensure an appropriate harmonisation and level playing field across the EU while taking into account each institution's profile.

General observations

In its in-depth analysis of the crisis in 2008, the de Larosière report highlighted as one of the risk-factors the remuneration and incentive schemes within financial institutions which contributed to excessive risk-taking by rewarding short-term expansion of the volume of (risky) trades rather than the long-term profitability of investments. Therefore, remuneration policies have received special attention by civil society and the European Parliament, and since the CRD 2.5, financial institutions have been requested to produce a report on remunerations, including the number of staff regulated by the Basel criteria

In April 2009, the predecessor of the EBA, the Committee of European Banking Supervisors (CEBS), published a first set of principles on remuneration policies and practices, followed by formal guidelines to be implemented by the end of 2010. A survey on the implementation of the Guidelines on Remuneration Policies performed by the EBA in April 2012 showed serious inconsistencies and discrepancies between the definitions of "identified staff" (those staff who have a material impact on risk taking) that make effective comparisons between institutions difficult if not almost impossible. The EBA also stated that if "the potential variable remuneration is greater than the fixed one, this could incentivise staff to take too much risk in order to assure a certain minimum pay level."

The final text of the CRD4 was published on June 26th, 2013 in the Official Journal. The part related to remuneration includes several important changes concerning remuneration policies, notably the introduction of a ratio of 1:1 between fixed and variable pay (with some flexibility to increase the ratio to 1:2 with shareholder approval).

Its stated objective is to ensure that institutions have a sound remuneration policy in place. In order to ensure that competent authorities are able to verify a consistent compliance across all banks, the EBA is requested, in Article 94.2.(ii) of CRD4, to develop adequate standards to specify criteria to identify categories of staff whose activities have a material impact on risk taking.

⁽⁸⁾ The opinion of the BSG can be found under the following link:
<https://www.eba.europa.eu/documents/10180/206140/Banking+Stakeholder+Group+%28BSG%29.pdf>

Achieving this objective is a formidable challenge because of the sensitivity of any criteria that are chosen. The risk to make uneven the playing field with the rest of the world and to be over-prescriptive is very significant. While the criteria are applicable both in EU and in subsidiaries established in third countries, banks outside the EU jurisdiction, and most likely their branches in the EU, would benefit from a distinctive competitive advantage. Playing in combination, the proposed criteria will capture an extensive perimeter which might to some degree go beyond the intent of the legislators and could significantly reduce the degrees of freedom left for internal remuneration policies.

The first point is known and recognized by the European political bodies. The second, driven by the lack of trust in the banking industry, may lead to regulation without adequate consideration to any specificities, a situation that globally might exacerbate the dangers of the first point and cause inefficiencies.

Specific issues

In this respect three specific observations are made:

1. The number of criteria proposed in the EBA draft is too high. Their combined role makes the system very complex to understand and to implement. Most of the time they will overrule firms' internal criteria.
2. Some of the criteria are overlapping and might capture staff members who are already considered by other criteria or who should not be covered by the regulation. This is clearly the drawback of the contagion principle (Article 3.3) which is defined too broadly and could hamper efficient and expert decision making.
3. The "500K €" absolute criterion needs to be made more flexible while acting as an efficient backstop. We would suggest turning it into a "comply or explain" threshold in order to allow some necessary, yet controlled, adaptability.

Given the diversity of the European banking sector, great care is needed when formulating and writing this regulation in order to keep it proportionate and efficient for large as well as small financial institutions.

4.3 Feedback on the public consultation and on the opinion of the BSG

The EBA publicly consulted on the draft of the proposal contained in this paper.

The consultation period lasted for three months and ended on 21 August 2013; 48 responses were received, of which 37 were published on the EBA's website.

The EBA welcomes the comments handed in during the consultation period. In parallel to the consultation, the EBA has collected data from 36 institutions throughout the EU to better evaluate the numbers of staff identified under the proposed RTS criteria.

This paper presents a summary of the key points and other comments arising from the consultation, the analysis and discussion triggered by these comments and the actions taken to address them if deemed necessary.

In many cases, several industry bodies made similar comments or the same body repeated its comments in the response to different questions. In such cases, the comments and EBA analysis are included in the section of this paper where the EBA considers them most appropriate.

Changes to the draft RTS have been incorporated as a result of the responses received during the public consultation.

(a) Summary of key issues and the EBA's response

1. Altogether, 48 respondents replied to the public consultation, some of them requesting that their comments not be published.
2. A few comments were raised repeatedly. The criteria set out in the RTS for identifying staff were considered to be too prescriptive, too broad and too many. In particular, the quantitative criteria based on remuneration were criticised. The absolute criteria based on specific amounts and the remuneration bracket would lead to an identification of many staff members whose professional activities have no material impact on the institution's risk profile. Most importantly, the thresholds set in the remuneration criteria were too low and did not take into account different payment levels in different countries. Respondents suggested that exclusion should be allowed for all staff that would be inappropriately identified through the criteria based on remuneration. The use of remuneration which could be awarded to staff would widen the scope of staff being identified under the draft RTS even further. However, other respondents would agree with criteria based on remuneration using higher thresholds and basing them on the actual remuneration paid.
3. Some respondents pointed out that the RTS would not leave the necessary flexibility to reflect the nature, scope and complexity of an institution's activities, and they requested clarification that the remuneration framework would be applied in a proportionate way.
4. Many comments dealt with topics around the scope of application. Respondents suggested that the criteria should be applied only at group level or that investment firms be completely excluded,

as they are also subject to the requirements of the Markets in Financial Instruments Directive 2004/39/EC (MiFID).

5. Respondents were concerned that the RTS would induce a further increase of fixed remuneration components, limiting the possibility of applying ex-post risk adjustments, reducing the cost flexibility of institutions and leading to competitive disadvantages, in particular for international banking groups and if applied in third countries. Overall, inappropriate incentives may be created for institutions to significantly restructure the entire remuneration system to mitigate the impact on the institution's competitiveness, rather than ensuring that remuneration is aligned with long-term risk taking for a targeted population of senior management and 'true material risk takers'.
6. The impact of the RTS was perceived as being higher than was estimated within the impact assessment. In particular, the number of the criteria based on remuneration levels, the inappropriate identification of a high number of staff as material risk takers and the burdensome process for the exclusion of staff would trigger additional significant costs which were not appropriately identified in the impact assessment.
7. The draft RTS are based on the EBA's mandate to develop criteria with respect to qualitative and appropriate quantitative criteria to identify categories of staff whose professional activities have a material impact on the institution's risk profile. The application of requirements regarding the remuneration framework laid down in the CRD is not part of these draft RTS and their costs and benefits have, therefore, not been assessed within the impact assessment.
8. The requirement to identify all staff whose professional activities have a material impact on the institution's risk profile, including staff members who receive total remuneration which brings them into the same remuneration bracket as senior management and other risk takers, is already contained within the CRD.
9. The draft RTS complete the regulatory framework laid down in the CRD by providing technical criteria for the identification of staff whose professional activities have a material impact on the institution's risk profile. In accordance with the CRD, the identification takes places at group, parent and subsidiary level and needs also to be made by every institution which is subject to the CRD.
10. The draft RTS are proportionate and define criteria, where possible, relative to the institution's CET1 capital figures. However, some key function holders always have a material impact on the institution's risk profile.
11. The application of the remuneration requirements contained in the CRD is subject to the proportionality principle. The EBA will update its existing guidelines, which deal also with the application of this principle, as soon as possible.
12. More detailed responses to the issues brought forward during the consultation, and in particular with respect to the self-assessment (Article 2 of the Consultation Paper), the criteria (Article 3) and the exclusion process (Article 4), are provided in this feedback table together with a summary of the specific comments made by respondents.

(b) Summary of responses to the consultation and the EBA's analysis

Topic to which comment relates	Summary of responses received	The EBA's analysis	Amendments to the draft RTS
General comments			
EBA's mandate	A few respondents claim that the RTS exceed the legislative mandate, as the criteria would lead to the identification of staff whose professional activities would not have a material impact on the risk profile.	The EBA is mandated to develop draft RTS, which will be submitted to the European Commission for adoption. The EBA is of the view that the draft RTS are in line with the legal mandate. The EBA has collected data in parallel to the consultation regarding the levels of staff identified under the draft RTS, analysed the responses received during the consultation and revised the draft RTS as appropriate. Therefore, the criteria laid down in the final draft RTS are suitable and appropriate to identify staff whose professional activities have a material impact on the risk profile for all institutions covered by the CRD. In some cases, an exclusion of staff will be possible under additional criteria set out in the draft RTS. The possibility for exclusions has been broadened. Depending on the remuneration paid, exclusions require the notification of the competent authority or, for staff with the highest remuneration, the prior approval of the competent authority.	Article 4 The criteria within the draft RTS have been partially revised
Application of the remuneration framework	A few respondents refer to topics which are not within the scope of these RTS, e.g. the application of the remuneration framework and the definition of variable remuneration itself. They ask for clarification of how the remuneration requirements should be applied to Identified Staff, requesting that the option of not applying certain provisions as laid down by the CEBS guidelines will be retained.	The EBA's predecessor, the CEBS, issued Guidelines on Remuneration Policies and Practices, which remain in force until replaced by updated EBA guidelines regarding this issue. An update of the guidelines is necessary, in view of the new and amended provisions laid down in the CRD IV. The EBA will update the guidelines as soon as possible.	No change

Responses to questions in EBA/CP/2013/11

For consistency and clarity, the answers to the consultation have been grouped in several blocks. Responses to questions related to defined articles have sometimes been merged with other comments on the corresponding articles. In addition, articles of Directive 2013/26/EU (CRD) are referenced as 'Article xx of the CRD' whereas articles of the draft RTS are mentioned only as 'Article xx'

1. General comments on the RTS

<p>Group-level application</p>	<p>Many respondents raise the issue of group-level application of the RTS. For example, if the word 'entity' in a remuneration bracket criterion encompasses branches in different geographical locations, the scope of this criterion becomes too wide, and low-income countries would dominate the identification processes in other EU countries.</p> <p>The issue of the level of application has been raised for other articles as well. Many respondents stress that the criteria in the draft RTS should apply only at the group level, in particular so that staff would be considered to be material risk takers only if they had a material impact on the risk profile of the group. This applies, in particular, to the criterion identifying senior staff in support functions, who sometimes act under the direct control of the group function.</p> <p>A few of these respondents argue that, in addition, the draft RTS could also be applied to subsidiaries that are significant in terms of both the group and their state of operation, and that a materiality threshold should be indicated. For these purposes it is suggested that the draft RTS use a concept of significance introduced elsewhere in EU law, such as the proposed bank recovery and resolution directive. Other respondents argue that investment firms should be excluded from the identification process.</p>	<p>Article 92(1) of the CRD requires that the application of Article 92(2) of the CRD (identification process) be 'ensured by competent authorities for institutions at group, parent company and subsidiary levels, including those established in offshore financial centres.'</p> <p>Article 92(2) of the CRD is applicable to all institutions subject to the CRD. The criteria to identify staff should be applied both on a solo basis using the figures of the institution, and on a consolidated basis using the consolidated figures of the group.</p> <p>The remuneration bracket should be applied, in any case, on a country-specific basis to ensure that different levels of pay within different Member States are appropriately taken into account. This assessment includes all staff within institutions within the scope of consolidation, including third-country subsidiaries. The draft RTS have been amended.</p> <p>When identifying a responsible function, it should be remembered that the main criterion for the identification is not the name of the function but the authority and responsibility conferred by the function. For example, the 'head of HR' in a very small subsidiary, who executes and administers the function under the control of the management body or senior management without significant discretionary or decision-making powers of his or her own, should not be considered to be the head</p>	<p>The criteria within the draft RTS have been partially revised</p>
--------------------------------	---	--	--

		of the function.	
Third-country application	<p>A few respondents are concerned about the global application of the RTS. They suggest that the Article 3 criteria should be applied only in the EU, while the internal criteria agreed with regulators should be applied on a global basis to ensure that material risk takers are identified appropriately.</p> <p>In contrast, one respondent welcomed the application to subsidiaries outside as well as in the EU as important in ensuring a level playing field and harmonised application to staff in large banking groups.</p>	<p>Article 92(1) of the CRD requires that the application of Article 92(2) of the CRD (identification process) be 'ensured by competent authorities for institutions at group, parent company and subsidiary levels, including those established in offshore financial centres.'</p> <p>The criteria aim to identify staff whose professional activities have a material impact on the institution's risk profile, independent of the actual location of the staff member.</p> <p>The criteria, when applied at group level, take into account the scope of consolidation, including subsidiaries and branches in third countries.</p>	No change
Proportionality	<p>Many respondents raised the issue of proportionality, with a significant proportion of respondents suggesting that the draft RTS would not be compliant with the proportionality principle.</p> <p>A few respondents point out that firms could not apply the rules in a proportionate manner as they are too prescriptive and that an annual assessment is too burdensome.</p> <p>Another respondent suggested that the use of criteria based on CET1 would mean that staff in large firms who took big risks would not be covered whereas staff in small firms taking small risks would be in scope.</p> <p>One respondent called for more competent authority discretion to be permitted to enable a proportionate application of the criteria.</p> <p>A few respondents suggest that small banks should not have to set their own criteria for identifying risk takers</p>	<p>The draft RTS set out criteria for the identification of staff whose professional activities have a material impact on the institution's risk profile.</p> <p>The application of the remuneration requirements for these Identified Staff members is subject to the proportionality principle. For this purpose, the CEBS issued guidelines, which will be updated by the EBA, as soon as possible.</p> <p>Concerning the threshold for credit risk, the draft RTS have been revised and a <i>de minimis</i> threshold for credit risk has been included to have a more proportionate approach for the identification of staff.</p> <p>Criteria for credit risk and market risk are based on simpler metrics, allowing a relatively easy application, and take into account the size of the institution. Staff will be identified if their professional activities have a material impact on the institution's risk profile.</p> <p>Institutions have different risk profiles; consequently, the</p>	Article 3 amended

	and stated that the draft RTS would lead to higher percentages of staff being identified in small banks.	<p>level of risk which is considered to be material cannot be set by providing absolute amounts.</p> <p>Some key function holders always have a material impact on the institution's risk profile. All institutions have a management body, at least two persons directing the business and some key function holders. This automatically leads to a higher ratio of staff being identified in very small institutions than in large institutions. It can be observed that the percentage of Identified Staff compared with the total staff number in an institution differs to some extent depending on the institution's size. This is not a result of the draft RTS but is also true of practices implemented under the current legal framework.</p>	
Collective bargaining	<p>A few respondents point out that Recital 69 of the CRD should be referred to directly within the draft RTS and argue that the draft RTS should make clear that collective agreements were exempt from the scope of the draft RTS.</p> <p>The draft RTS should not identify too many middle management staff, in order to ensure that it does not interfere with collective bargaining.</p>	The draft RTS set out criteria for the identification of staff pursuant to the CRD, and the RTS remain within the scope of the CRD.	No change
Article 1(2) Application to investment firms and related topics	<p>Several respondents emphasise the difference between investment firms and banks, and question the applicability of the proposed qualitative and quantitative criteria for investment firms or certain categories of investment firms. These respondents suggested that not all types of investment firms should be included in the scope of the RTS or, if included, they should be subject to separate treatment and that investment firms should have more flexibility in the application of the draft RTS based on proportionality considerations.</p> <p>One respondent stated that many of the criteria were based on the hierarchy of large banking groups and so</p>	<p>The EBA is mandated to develop criteria for the identification process. The scope of application of such criteria is defined within the CRD. Not all criteria can be applied to all investment firms (e.g. credit risk or market risk criterion). In such cases, those criteria are simply not applied.</p> <p>All institutions have a management body, senior management and some key functions, so the draft RTS can be applied to all institutions. The criteria should cover all relevant risks in line with the CRD provisions regarding institutions' internal governance, as those risk exposures establish the institutions' risk profile. All</p>	No change

	<p>were not relevant for less hierarchical private equity and venture capital firms.</p> <p>A few respondents suggested that the criteria should apply only to firms that pose credit and market risks, with one of these respondents arguing that the types of risks covered should be narrowed to those that impact these risks – removing, for example, references to operational risk and reputational risk.</p> <p>One respondent said that ‘market infrastructure firms’ (the EBA understands that this refers to, for example, transaction banks or central counterparties) should not be subject to the draft RTS, as their activities are not comparable with those targeted by the proposed criteria. This respondent argued that, if such firms were to be covered, then different criteria would need to be developed that were specific to this type of firm.</p> <p>A few respondents suggested that, where relevant, specific remuneration legislation should apply for firms instead of the CRD IV rules if applicable; for example, non-bank firms in a banking group that are subject to AIFMD, UCITS V, etc. should be treated differently.</p>	<p>investment firms which are authorised to do ‘safekeeping and administration of financial instruments for the account of clients, including custodianship and related services such as cash/collateral management’ are subject to the CRD. Investment firms which do not have this authorisation and are authorised only for specific activities are excluded from the scope of the CRD (see Article 4 of Regulation (EU) No 575/2013). Those specific activities are:</p> <ul style="list-style-type: none"> • reception and transmission of orders in relation to one or more financial instruments; • execution of orders on behalf of clients; • portfolio management; and • investment advice. <p>Article 92(2) of the CRD must be applied at the individual level to all institutions and at the consolidated level to all entities of the group, including branches.</p> <p>Subsidiaries which are not subject to the CRD on an individual basis do not need to apply the CRD, and consequently these draft RTS, on a solo level, but are included in a consolidated group level assessment.</p> <p>All institutions and other entities need also to comply with other applicable regulations. Member States need to implement the CRD and may choose to implement the scope of application more broadly than the minimum requirements set out in the CRD. Some Member States have implemented broader definitions for ‘credit institution’ and ‘investment firm’.</p>	
Exchange rate and other fluctuations	<p>The criteria do not take into account variation in global pay due to performance or simply exchange rate fluctuation. Consequently, the number of Identified Staff will vary year to year because of factors unrelated to the level of risk created by the employee.</p>	<p>The EBA has limited the criteria based on remuneration and made the criterion on the remuneration bracket more specific, so that such fluctuations will have a lesser impact on the staff identified under the RTS. Institutions should take into account current exchange rates for converting currency amounts if necessary when the</p>	<p>The remuneration bracket criterion was specified. An explicit recognition of</p>

		identification of staff is performed, or use already converted values from financial accounts. Future revisions of the draft RTS may reflect future trends in remuneration levels as appropriate.	exchange rate fluctuations has not been introduced.
2. General comments on the identification criteria (Articles 2 and 3)			
Articles 2 and 3	A few respondents criticise the number of criteria proposed within the draft RTS, mentioning that the draft RTS could place institutions in the European Union at a significant disadvantage. The assessment should primarily rely on internal and qualitative criteria.	<p>It is not possible to identify all relevant staff based on a relatively small number of criteria which can be applied by all institutions. The requirement to identify staff complies with international standards. The remuneration framework, as such, is part of the CRD. The EBA's mandate is to develop criteria for the identification of categories of staff whose professional activities have a material impact on the institution's risk profile.</p> <p>The EBA has reviewed the criteria to ensure that an appropriate level of staff who have a material impact on the institution's risk profile is identified.</p> <p>The criterion based on variable remuneration has been deleted and the criteria which should be applied collectively have been clarified.</p> <p>The self-assessment process (consulted on under Article 2 of the Consultation Paper) was not retained. Indeed all institutions are already required to identify all staff whose professional activities have a material impact on the institution's risk profile pursuant to Article 92(2) in the CRD. For this purpose, institutions should use internal processes which must at least include the criteria set out in the draft RTS.</p>	Article 2 of the CP deleted; the criteria in the draft RTS have been revised
Articles 2 and 3	Most respondents agree with the self-assessment approach, with a few respondents clearly pointing out that it is fundamental to use internal criteria which must be based on corporate risk assessment processes and must reflect the institution's risk profile. Among the factors that should be taken into account in developing	Institutions should, in accordance with the CRD, apply the specific remuneration requirements within Articles 92 and 94 of the CRD to all staff whose professional activities have a material impact on the institution's risk profile (in accordance with the principle of proportionality). A new Article 2 recalls this legal	The criteria in the draft RTS have been revised; the self-assessment process has

	<p>internal criteria is the extent to which the professional activities of the staff could have a material impact on the institution's annual financial results or balance sheet because of the risk they carry.</p> <p>While a few respondents find that the self-assessment is not needed alongside the criteria provided in the draft RTS, a few other respondents suggest relying solely on the self-assessment for staff below the level of senior management.</p>	<p>requirement. Institutions should also have appropriate remuneration policies for all staff.</p> <p>In line with the EBA's mandate, the criteria contained in these draft RTS provide for a binding and common set of criteria which ensure a sufficiently level playing field between institutions.</p> <p>Article 2 of the consultation paper, containing a self-assessment process, was deleted for reasons relating to the scope of the EBA's mandate.</p> <p>Considering the actual impact of staff on the balance sheet or profit and losses is not sufficient to identify staff whose professional activities have a material impact on the institution's risk profile, as risk exposures do not necessarily lead to losses. The actual impact of single staff members can be quite limited although there is still a potential material impact due to possible unexpected losses. The performance of staff, business lines and institutions has to be considered when variable remuneration is awarded to staff identified under the draft RTS.</p>	been deleted
3. Qualitative and quantitative criteria (Article 3)			
3.1. Comments on Article 3(1)			
No material impact per se	<p>Several respondents disagree with the assumption that all functions mentioned in Article 3(1) can have, per se, a material impact on the risk profile. They argue that the list of functions is too broad. Some of the respondents suggest limiting the list to senior managers or applying a materiality test based on an economic analysis. Several respondents argue that supervisory board members are not (per se) material risk takers, because they are not part of the staff and are not remunerated or receive no variable remuneration. In addition, respondents argued</p>	<p>The EBA has the mandate to develop draft RTS on criteria to identify classes of staff whose professional activities have a material impact on the institution's risk profile. This includes senior management and risk takers but also other classes of staff.</p> <p>It is not only the professional activities of senior management that have a material impact on the institution's risk profile. The criteria are not limited to 'risk takers', who actively take risk for the institution in order</p>	The criteria in the draft RTS have been revised

	that staff active in functions within subsidiaries who have no material impact on the risk profile of the group would be identified.	<p>to create business revenues; they aim to identify all staff whose professional activities have a material impact on the institution's risk profile. This also includes control and other functions. The identification also does not depend on whether or not a person actually receives variable remuneration.</p> <p>The EBA has adjusted the criteria to take account of some of the comments, in particular regarding collective risk taking. A materiality threshold for business units has been introduced.</p> <p>Please refer also to the comment on the group-level application, which takes into account the consolidated situation. However, the criteria also have to be applied at the level of each institution to which the CRD requirements apply.</p>	
Business models	A few respondents argue that the list of functions is not appropriate for certain business models, investment firms or market infrastructure groups. One respondent asks for clarification of how to apply the criteria to those business models and firms; another suggests creating the possibility of applying Article 4 (exclusion) to Article 3 (all regulatory criteria) in general for investment firms.	<p>The EBA has reviewed the criteria and provided necessary clarifications. Article 92(2) of the CRD requires all institutions to identify all staff whose professional activities have a material impact on the institution's risk profile.</p> <p>Some of the criteria may not lead to the identification of any staff in institutions, as they are not active in business areas to which those criteria refer.</p> <p>The draft RTS, in line with the CRD, aim to harmonise the identification criteria. A broader possibility of excluding Identified Staff would be contrary to this objective. The remuneration requirements should be applied in a proportionate way to Identified Staff. EBA will update the CEBS Guidelines on Remuneration Practices and Policies as soon as possible.</p>	The criteria in the draft RTS have been revised
Article 3(1)(a) and (b)	One respondent states that 'senior management' is a generic concept that can be interpreted narrowly or widely, and recommends merging Article 3(1)(a) and 3(1)(b).	'Senior management' is defined within Article 3(1)(9) of the CRD and the same definition applies for these draft RTS.	No change

Article 3(1)(c)	<p>A few respondents state that control functions should not be included at all, because their activities are not linked to risk taking and their remuneration structure does not (always) set incentives to take substantial risks.</p> <p>Two respondents suggest excluding staff with responsibility for control functions within insignificant business units or who merely have local responsibility and report to a group function.</p>	<p>In accordance with Article 92(2) of the CRD, control functions should be included in the scope of Identified Staff.</p> <p>In a hierarchically organised control function, not only the head of the function but also the next hierarchical management level and staff responsible for specific relevant risk types (e.g. head of operational risk) should be identified.</p> <p>The criteria aim to identify staff in the independent control functions but also staff with overall responsibility for risk management in the business areas.</p> <p>The identification process will be applied separately for the group, parent and subsidiary levels and all institutions.</p> <p>The listed functions within an institution which is part of a group cannot be excluded, as the CRD is also applied on an individual level. Staff responsible for these functions will be identified when the criteria are applied at the level of the institution, but they may not be identified when the criteria are applied at the group level.</p>	No change
Article 3(1)(d)	<p>Several respondents argue that staff members heading a business unit will not (per se) have a material impact on the risk profile. An example given is staff heading small legal entities performing non-financial operations.</p>	<p>The comment was accommodated and a materiality threshold for the business unit, based on the institution's internal capital allocation, was introduced.</p>	The criteria in the draft RTS have been revised
Article 3(1)(e)	<p>Budgeting:</p> <p>Several respondents comment on the 'budgeting function'. A few propose to delete it. Others argue that budgeting is part of the finance function and should be specified as such.</p> <p>Business continuity planning:</p> <p>Several respondents suggest deleting 'business continuity', because these staff members are not material risk takers, and/or the function is already</p>	<p>Budgeting and taxation:</p> <p>The comment was accommodated and the RTS redrafted to read 'finance, including budgeting and taxation'.</p> <p>Business continuity planning:</p> <p>The function was deleted from the RTS.</p> <p>IT:</p>	The criteria in the draft RTS have been revised

	<p>included in other risk control functions.</p> <p>Taxation:</p> <p>A few respondents suggest deleting 'taxation', because this function would not have a material impact or because it reports to 'finance'.</p> <p>IT:</p> <p>One respondent suggests deleting 'IT'. Another respondent raises the problem of outsourcing. 'IT' is often outsourced all over the world. It would be difficult to include those outside firms in the draft RTS. The respondent suggests including only relevant staff responsible for the outsourced project inside the institution.</p> <p>Economic analysis:</p> <p>Several respondents suggest deleting 'economic analysis' because these staff members are not material risk takers, and/or the function is part of 'finance'. A few respondents ask that 'economic analysis' be clarified or specified to ensure that only intended staff are identified.</p>	<p>The IT function can be an important source of operational risk, and therefore the head of that function or the person responsible for the outsourced activities within the institution should be identified.</p> <p>Economic analysis:</p> <p>'Economic analysis' refers to the research department of an institution. Usually these departments are independent from the financial function. The chief economist and the economic analysis have a material impact on the strategy of the institution and, therefore, have a material impact on the institution's risk profile.</p>	
Article 3(1)(e)	<p>A few respondents suggest including some additional functions: Treasury; Chief Financial Officer; Head of Operational Risk; individuals on key committee structures for the determination of internal limits, such as the Chair of the Asset–Liability Committee (ALCO); Finance; Operations; Communications; and group reward, as some institutions make a distinction between group reward and HR.</p>	<p>Staff performing the named functions would partially be identified also under other criteria in the RTS. The EBA has included some of the named functions in the criteria. The function 'finance' has been added to ensure, regardless of the actual title within the institution, that the relevant staff with responsibility for the finance function are identified. The EBA has added a criterion to identify those responsible for managing other risk functions such as separate operational risk or liquidity risk functions.</p>	<p>The criteria in the draft RTS have been revised</p>
Article 3(1)(f) and (g) and (h)	<p>A few respondents state that those staff members identified under (f) and (g) should not themselves be classified as risk takers, but those to whom they are accountable under (h) should be identified. This would be more reflective of the actual allocation of authority</p>	<p>Article 3(1)(h) applies to staff members having managerial responsibility for a group of staff members which may not be identified as having a material impact on the risk profile themselves. They are responsible for the activities of the staff they manage and are, therefore,</p>	<p>No change</p>

	<p>and decision-making powers within firms.</p> <p>A few respondents state that Article 3(1)(h) can identify managers who individually are not entitled to a delegation as defined in point (f) or (g). The authority of managers to commit to credit risk exposure should rather be assessed based on their own authority.</p>	<p>identified if those activities in total pose a material risk.</p> <p>With regard to Articles 3(1)(f) and 3(1)(g), the EBA considers that individuals who reach the thresholds for credit risk or market risk have a material impact on the risk profile and should, therefore, be identified as well as their managers, who oversee or steer their activities.</p>	
Article 3(1)(f) and Question 2	<p>A few respondents argue that Article 3(1)(f) creates challenges in its application or is not appropriate to all institutions, business models and activities.</p> <p>A few respondents question the 'per transaction' application, as, in some institutions, authority levels are based on aggregate exposures.</p> <p>A few respondents state that netting/hedging should not be discouraged. Taking on exposures that reduce risk should not lead to being identified by criteria.</p>	<p>Please refer also to the response regarding proportionality.</p> <p>If criteria cannot be applied because the institution does not perform such activities, then those criteria will not lead to the identification of staff. The EBA aims to provide a common set of criteria which can be used by all institutions, leading to a harmonised identification approach. Independent of these criteria, institutions are required under Article 92(2) of the CRD to identify all staff whose professional activities have a material impact on the institution's risk profile.</p> <p>If limits are set at an aggregated exposure level, institutions should apply the criterion based on this amount or set additional limits.</p> <p>Netting/hedging is one possible way to manage risk. However, on a single staff member basis, it is difficult to establish which transactions can be considered to be netted. For netting to be accepted for regulatory purposes, the requirements set out in Regulation (EU) No 575/2013 apply. The option of using netted amounts when the criteria are applied would add additional complexity to the identification process and was, therefore, not chosen. Besides, based on experience, it cannot be confirmed that institutions active in hedging have necessarily a low risk profile.</p>	No change
Article 3(1)(f), Question 2 and Article 3(3)	<p>Several respondents raise the question of how the concept 'authority to commit' should be interpreted. They ask whether it refers to staff who undertake a trade and commit to an exposure or to senior managers who are in</p>	<p>The EBA has redrafted the requirements taking into account the comments received clarifying the scope of the staff who should be included. The wording 'collectively' is no longer used. Staff initiating and also</p>	The criteria in the draft RTS have been

	<p>a position to authorise the taking of risk, or to both. The present wording could refer to both the front office area and/or risk management areas. A few respondents state that Article 3(1)(f) should identify only senior business individuals who 'can authorise the taking of the credit risk exposures', not those who commit to the exposure or approve the transaction from a counterparty credit risk perspective. Several respondents argue that 'collectively' is very broad and could identify some very junior staff on trading desks.</p>	<p>staff approving such exposures should be identified.</p>	<p>revised</p>
<p>Article 3(1)(f) and Question 2</p>	<p>Many respondents state that the threshold is too low and would probably identify a disproportionate number of staff (especially in small institutions). They suggest using a threshold between 1% and 5% and introducing a <i>de minimis</i> threshold.</p> <p>Several respondents ask for more flexibility, either because they use different metrics or because they state that the use of fixed thresholds would not be appropriate for smaller institutions.</p> <p>A few respondents suggest taking into account the counterparty risk/credit rating.</p>	<p>The EBA has raised the threshold in Article 3(1)(f) to 0.5% of CET1 capital based on information collected from 36 institutions. A further increase of the threshold would have reduced, in many institutions, the number of staff identified in the credit risk area compared with the staff numbers identified under the existing framework. The application of Article 3(3) was clarified by including the provisions directly in the criterion. A <i>de minimis</i> threshold has been introduced.</p> <p>Taking into account counterparty risk or the credit rating of counterparties in the criterion would create an additional burden for institutions within the identification process. Ratings are not always available, change over time and may even differ between different rating agencies.</p>	<p>Article 3 amended</p>
<p>Article 3(1)(f) and Question 2</p>	<p>A few respondents state that Article 3(1)(f) should not be applied to investment firms, as it is inapplicable to those firms or because the threshold of 0.25% CET1 is too low for investment firms (it would identify staff who are not material risk takers and staff who do not undertake proprietary trading).</p>	<p>Article 3(1)(f) relates to credit business as defined by the CRD. If the activities of an institution do not include credit business as defined by the CRD, the criterion is not applicable and no staff member will be identified under this criterion.</p>	<p>No change</p>
<p>Article 3(1)(f) and Question 2</p>	<p>A few respondents state that the identification of individuals does not follow business operations in practice, because credit approval decisions are taken at higher levels within the institution and are pre-</p>	<p>Credit risk exposures are committed to not only by risk committees but also by individuals who act within their limits. Therefore, both individuals and committees should be identified. The individual staff members fulfil</p>	<p>No change</p>

	<p>determined in risk committees. A few respondents, therefore, suggest applying Article 3(1)(f) to senior committees instead, but with the exclusion of junior non-voting members.</p>	<p>different functions in the process of granting credits: staff who initiate risk (those who deal with clients and credit-structuring staff) and those who manage risk (risk management function and risk committees).</p> <p>The EBA assumes that all members of a committee influence its activities and decisions. However, staff who just report to a committee, but are not members of the committee, should not be identified under this criterion.</p>	
Article 3(1)(g) and Question 3: Level of application	<p>A few respondents state that delegations to commit to transactions are set at desk/book level, so the criterion should apply only to senior traders or, in any case, not to individuals. Others state that only individuals directly accountable for the risk taken should be identified (the head of the desk) or the committee that takes decisions on transactions and risk appetite.</p>	<p>The EBA considers it appropriate to include individual staff members, as the mandate is to develop criteria to identify categories of staff whose professional activities have a material impact on the institution's risk profile. When staff members have a material impact on the risk profile, they should be identified even if they work under the supervision of other staff members.</p> <p>Exposures are created not only by risk committees but also by individuals who act within their limits. Therefore, all levels, individuals, heads of desks and committees should be considered when the criterion is applied.</p>	No change
Article 3(1)(g) Question 3: VaR methodology	<p>Some respondents state that the approach referring to VaR is too simplistic and reference to other stress measures should be added (Stress-VaR approach). A few state that the VaR limit should be increased to 10%.</p> <p>Many banks' internal VaR methodologies cover both trading and banking book market risk in a combined approach.</p> <p>Some respondents note that institutions use different/higher VaR percentiles (99th percentile), which should be allowed in the RTS, or use other approaches (Stress-VaR), and that flexibility should be allowed to institutions in the approach used. Alternatively, competent authorities could exercise discretion in allowing institutions to vary the approach.</p>	<p>Institutions should, in any case, be able to use the approach they use for the calculation of the regulatory capital requirements for market risks also for the identification of staff. The criterion has been redrafted accordingly. The regulatory approaches refer only to the trading book.</p> <p>Based on data collected, a higher threshold of 10% would lead in many institutions to a significantly lower number of staff being identified than current practices.</p> <p>Other approaches may be used internally by the institution to identify staff members who have a material impact on the institution's risk profile in addition to the staff identified under the RTS. Institutions can also apply the stricter remuneration policies for Identified Staff to a wider population of staff.</p>	The criteria in the draft RTS have been revised

Article 3(1)(h)	A few respondents state that Article 3(1)(h) is difficult to apply, as it is not possible to sum risk exposures due to netting effects, especially regarding market risk.	Netting should not be taken into account when the criterion is applied; please refer also to the comments made above regarding netting/hedging. Regarding market risks, the criterion has been clarified and allows the use of the VaR limit at this level instead of the sum of VaR limits of staff under the management of a staff member. The addition should be used if such a VaR limit does not exist at this level. The introduction of a more sophisticated aggregation method to allow for diversification effects was considered to be too burdensome.	The criteria in the draft RTS have been revised
Article 3(1)(i)	A few respondents suggest deleting Article 3(1)(i), because the staff referred to in this article should already be identified under Article 2 (internal assessment).	The EBA considers that staff members who are responsible for other staff members whose professional activities have a material impact on the risk profile should also be identified, as they steer and oversee their activities as part of their managerial responsibilities.	Article 2 of the CP deleted; the criteria in the draft RTS have been revised
Article 3(1)(i)	A few respondents suggest deleting the phrase 'or may have', as they consider it confusing.	The wording has been clarified.	The criteria in the draft RTS have been revised
Article 3(1)(j)	A few respondents state that Article 3(1)(j) is too broad and could identify staff who have no material impact on the risk profile. They suggested deleting Article 3(1)(j) or clarifying the meaning of 'collectively'.	The wording has been clarified and the criterion limited to new products. It is not possible to define the 'materiality' of new products, as it can often not be predicted whether or not a new product will be of material importance for an institution once it is introduced.	The criteria in the draft RTS have been revised
3.2. Comments on Article 3(2)			
Article 3(2)(a) general comments	<p>Almost all respondents find the criterion based on variable remuneration (Article 3(2)(a)) inappropriate and many of them propose to delete this article completely.</p> <p>This criterion does not take into account different pay</p>	<p>The EBA has accommodated the comments and deleted the criterion.</p> <p>The data collected from institutions show that a large population of staff would be identified and that there is a</p>	Article 3(2)(a) of the Consultation Paper was deleted

	<p>levels in different jurisdictions and will ultimately lead to disparities both across the industry and internally within organisations. The criterion would also identify junior staff. It would treat differently employees who perform the same role but receive different salaries because of, for example, different experience.</p> <p>All but one respondent think that the thresholds are too low, in particular the absolute threshold of EUR 75 000. Some respondents propose increasing the relative threshold to 100% and either deleting the absolute threshold or increasing it.</p> <p>Nearly all respondents state that the number of Identified Staff would significantly increase because of the application of Article 3(2)(a), three to five times higher than those identified currently. Several respondents state that between 60% and 80% of these identified employees would need to be excluded under Article 4.</p> <p>Several respondents find the reference to the potentially awarded remuneration inappropriate, because it is not in line with the CRD IV and because the criteria should use a uniform concept throughout the RTS. Many employees who could theoretically receive such bonuses (above 75% of the fixed remuneration and above EUR 75 000) under institutions' remuneration policies would be identified and have to be reviewed under Article 4. This introduces considerable uncertainty, operational complexity and costs.</p>	<p>significant overlap with the criterion of the remuneration bracket, which is included within the CRD. Therefore, the criterion is not needed to ensure the appropriate identification of staff whose professional activities have a material impact on the institution's risk profile.</p> <p>Where quantitative criteria are retained in the draft RTS, the EBA has accommodated the comment relating to the potential remuneration which could be awarded and always made reference to the awarded remuneration.</p>	
Article 3(2)(a) costs	<p>The additional costs of implementing criterion 3(2)(a) mentioned by respondents are:</p> <ul style="list-style-type: none"> - additional IT and HR costs; - administrative burden will make the EU an uncompetitive place to do business; - creation of an uneven playing field; - increase in fixed salaries and consequently fixed 	<p>The EBA has taken the comments into account and has deleted the criterion. The impact assessment has been revised.</p>	Impact assessment revised

	<p>costs for the institutions;</p> <ul style="list-style-type: none"> - perverse incentives for banks to significantly restructure the entire remuneration system away from performance-related deferrals and long-term incentive, to mitigate the impact on the firm's competitiveness; - creating uncertainty for the bank and the individual because the exclusions process is not clearly defined in the draft RTS and, depending on how it was implemented, would involve a significant amount of discretion by banks and supervisors. 		
Article 3(2)(b) general	<p>All respondents find this criterion (remuneration bracket) inappropriate or difficult to apply. The scope of the remuneration bracket is very wide. Control functions should be excluded from this criterion as well as functions identified under Article 3(1)(e).</p> <p>A few respondents ask for the word 'entity' to be clarified, as it is not clear whether it refers to a legal entity, a business area or an organisational entity. If the word 'entity' encompasses branches in different geographical locations, the scope of Article 3(2)(b) becomes even wider.</p> <p>The criterion would lead to the identification of a high number of staff who are not material risk takers and also result in a substantial variation in the identified population from one year to the other because of the volatility of the lower bracket and the need to reassess this criterion every year. A few respondents state that this criterion will prevent institutions from paying zero/low bonuses to risk takers, as this would broaden the bracket and bring too many additional employees into the category of Identified Staff.</p> <p>Many respondents say that the rationale of the reference to 'two preceding financial years' is not clear; it</p>	<p>The CRD requires that any employee receiving total remuneration that takes him or her into the same remuneration bracket as senior managers and risk takers be identified, if the professional activities of this staff member have a material impact on the institution's risk profile. The RTS clarify the application of this provision. The requirement as such was already part of the CRD III and should have been applied by institutions when identifying staff in the past.</p> <p>The definition of the 'lowest remuneration level' which is used to draw up the bracket is crucial. As staff could be identified within the remuneration bracket whose professional activities have no material impact on the institution's risk profile, the exclusion of staff members identified only under quantitative criteria is provided for. For this purpose, an additional assessment of all staff within the bracket is necessary.</p> <p>Excluded staff receiving remuneration of EUR 500 000 or more have to be notified to the competent authority to allow for a timely supervisory review in line with Article 92(2) of the CRD; for staff receiving EUR 750 000 or more or staff belonging to the 0.3 % of staff with the highest total remuneration a prior approval is required.</p>	Article 4: the criteria in the draft RTS have been revised

	<p>complicates calculations and comparisons.</p> <p>Some suggest a different reference for the 'lowest remuneration level' should be considered, e.g. the median remuneration of the pay bracket, or the average annual gross remuneration awarded to identified material risk takers at group level; the Level 1 requirement could be met by calibrating the threshold and excluding from the calculation of the threshold the lowest-paid quartile or those in infrastructure functions which have no direct effect on the risk profile of the institution.</p> <p>A few respondents state that this criterion does not take account of the proportionality principle and conflicts with the principle that the status of an employee as a risk taker should depend on his or her performance and not the performance of other employees.</p>	<p>The EBA has reviewed the application of the remuneration bracket and redrafted the provision to clarify its application in such a way as to avoid an inappropriately high number of staff being identified under this criterion. The remuneration bracket will apply on a country-specific basis to take into account different remuneration levels between countries and will be based on the remuneration of senior management and risk takers receiving remuneration for their professional activities in the same country. Remuneration paid to other classes of staff will not be taken into account when the bracket is calculated. The remuneration bracket will be based on the actual remuneration awarded for the last financial year.</p> <p>The assessment of whether or not professional activities of staff members who are identified under the bracket have a material impact on the institution's risk profile may be carried out, if appropriate, for 'groups of staff' and not for each individual identified employee separately.</p>	
Article 3(2)(b) awarded remuneration	<p>A few respondents find the reference to potentially awarded remuneration more appropriate than a reference to past remuneration. Several others consider the reference to remuneration which 'could be awarded' to be too complex and not in line with the Level 1 text and suggest using the actual awarded remuneration. These respondents think that the reference, here and elsewhere, should always be to remuneration that has been awarded.</p>	<p>The EBA has reviewed the quantitative criteria. The remuneration bracket is part of the CRD. The EBA has clarified its application as described above.</p> <p>Institutions should always use the actual remuneration awarded. Please also refer to the additional explanations above and under the topic of group application.</p>	<p>The criteria in the draft RTS have been revised</p>
Article 3(2)(b)	<p>The additional costs of implementing criterion 3(2)(b) mentioned by many respondents are:</p> <ul style="list-style-type: none"> - additional resources necessary to deal with the additional number of Identified Staff; - the administrative costs and the inefficiency due to the need to exclude a high number of staff 	<p>The remuneration bracket is a Level 1 requirement (Article 92(2) of the CRD); the draft RTS sets out how this should be applied. The costs which come with the remuneration bracket as such are not caused by the draft RTS and are, therefore, not considered in the impact assessment. To avoid additional costs for a notification procedure, a threshold was set above which</p>	<p>The impact assessment has been clarified</p>

	<p>inappropriately identified under Article 3(2)(b);</p> <ul style="list-style-type: none"> - uncertainty related to the fact that the review/exclusion process is not clearly defined and there may be significant variation between jurisdictions on how it is implemented. 	<p>exclusions have to be notified to the competent authority. However, the application of remuneration policies for Identified Staff is subject to supervisory review under Article 92(2) of the CRD.</p>	
Article 3(2)(c) and Question 6	<p>Several respondents criticise this criterion based on total remuneration of EUR 500 000, as it does not relate directly to risk. They say that there is no basis in the CRD IV for considering the level of remuneration alone as an indicator of the employee's influence on an institution's risk profile.</p> <p>The application of the criterion will bring into scope many employees who are not risk takers. The threshold is too low and does not take into account exchange rate fluctuations and different costs of living in different countries, and will lead to fluctuations in the population identified from one year to the other.</p> <p>Respondents state that it is not clear why a reference is made to 'two preceding financial years'. This would add uncertainty into the process for some individuals as well as operational challenges and costs, and it will increase variability in the year-to-year population.</p> <p>Respondents suggest, if the criterion is retained, increasing the threshold to EUR 750 000 or EUR 1 000 000. One respondent suggests relating the threshold to variable remuneration only. The exclusion under Article 4 should be extended to this criterion.</p> <p>A few respondents ask for clarification of the definition of 'awarded gross remuneration' in relation to defined benefits plans (pension reservations), which often vary over time.</p>	<p>The EBA has taken the comments into account and refined the criterion. The criterion is based on the presumption that all staff earning a very significant amount of total remuneration also carry material responsibilities and risks. This is an appropriate quantitative criterion which ensures the complete identification of staff whose professional activities have a material impact on the institution's risk profile.</p> <p>The thresholds have been retained, but the draft RTS allow for the exclusion of staff members under additional conditions.</p> <p>Staff identified by the criterion of receiving EUR 500 000 or being within the 0.3% of highest earners are not considered to be Identified Staff, when the institution can demonstrate in an additional risk assessment that those staff members have in fact no material impact on the institution's risk profile. The prior approval of the competent authority is required, if institutions want to exclude such staff members who received total remuneration of EUR 750 000 or more or belong to the 0.3% of the staff with the highest total remuneration. For staff receiving EUR 500 000 to EUR 750 000 a notification of exclusions is required. The exclusion is subject to additional conditions. The exclusion is limited to staff who have not been identified under any of the qualitative criteria and is based on the assessment of additional criteria. For exclusions of staff receiving more than EUR 1 000 000 total remuneration the involvement of the EBA is required to ensure a coherent application of these draft RTS.</p> <p>If staff receive a particularly high remuneration there is a</p>	<p>The criteria in the draft RTS have been revised</p>

		<p>strong assumption that they have a material impact on the institution's risk profile, as such staff often have the authority to commit to transactions or are responsible for the management of other staff or for support functions which are crucial for the sound operation of the institution. 'Risk takers' are only one category of staff; staff within other categories should also be identified if their professional activities have a material impact on the institution's risk profile. Therefore, it is appropriate to apply an ex-ante approval process, to ensure that the exclusion is applied consistently.</p> <p>Taking into account different pay levels in different jurisdictions or exchange rate fluctuations and different costs of living in different countries would make this criterion overly complex and would create uncertainty for institutions and staff.</p> <p>The criterion will be based on the total remuneration awarded in the preceding financial year. The total awarded remuneration has to be used in line with the CRD requirements, as clarified by the CEBS Guidelines on Remuneration Policies and Practices, which will be updated by the EBA.</p> <p>Discretionary pension benefits are variable remuneration. Regular pension contributions are part of the fixed remuneration.</p>	
Article 3(2)(d) and Question 7	<p>Several respondents, who do not agree with the use of remuneration as a proxy for the employee's impact on the institution's risk profile, consider this criterion (0.3% of staff with the highest remuneration) a more proportionate approach than the other quantitative criterion based on absolute amounts of remuneration.</p> <p>Some respondents consider this criterion useful for large institutions but not for small, non-complex institutions (retail bank) or institutions with a relatively equal distribution of remuneration. A few respondents suggest applying the proportionality principle. Only one</p>	<p>This criterion is defined in relative terms considering the different remuneration levels in Member States.</p> <p>The criterion is applied to all staff.</p> <p>Taking account of the answers received during the consultation period and the responses to the questionnaire, the EBA considers 0.3% to be an appropriate threshold for the identification of staff.</p> <p>The criterion was changed to refer to total remuneration awarded in the preceding financial year, consistent with</p>	The criteria in the draft RTS have been revised

	<p>respondent proposes reducing the threshold to 0.2%, another one increasing it to 1.5%.</p> <p>The criterion should refer to the most recent financial year only. Two respondents suggest that the criterion should refer to variable remuneration only.</p> <p>Only five out of 48 respondents suggest that the exclusion under Article 4 should be extended to cover this criterion as well.</p>	<p>the other criteria used on remuneration.</p> <p>The criterion has to be applied in line with the CRD at group level, parent company level and subsidiary level and for each institution. For each level, a separate exercise should be carried out with no impact on the results at another level. For example, the identification of staff in a subsidiary as a result of the application of the 0.3% criterion will not lead to an is not effecting its application in another group entity.</p> <p>The criterion should be applied on a country-specific basis, as, otherwise, staff in a country where higher levels of remuneration are paid would be more likely to be identified, thereby weakening the link between differences in pay levels and their impact on the institution's risk profile.</p> <p>An option to exclude staff identified under this criterion has been introduced. Exclusion of staff is possible only after an additional assessment and subject to the prior approval of the competent authority. The provisions regarding notification, prior approval and involvement of the EBA apply as explained above.</p>	
3.3. Individual or collective risk taking (Article 3(3))			
Article 3(3)	<p>Many respondents raise concerns about Article 3(3). The provision is too broad and would identify too many staff who are not material risk takers. Most of those responding on this paragraph call for the deletion of all or part of the text or of at least point (a) of this paragraph. A few respondents suggest that, if point (a) were to be retained, it should be reworded to refer to staff who are responsible for advising on or initiating, and have significant influence over, such commitments or decisions.</p>	<p>The EBA has deleted parts of the paragraph and, where appropriate, integrated this requirement into the criteria on credit risk and market risk.</p> <p>When identifying staff whose professional activities have a material impact on the risk profile, the identification should identify not only the risk taker but also other staff who have a material influence on the risks taken and the resulting risk profile of the institution. Those are, for example, decision-making committees and both staff approving and staff initiating, for instance, material credit</p>	<p>The criteria in the draft RTS have been revised</p>

	<p>Junior staff often have a role in advising on decisions even though they do not have a material impact on a firm's risk profile. A few respondents say it is unclear what was meant by the provision – for example, whether it refers to those staff members giving final advice or to all staff involved in the analysis to develop advice – and say that it would be difficult to apply the criterion in practice.</p>	<p>exposures.</p> <p>The reference to advice has been deleted to address the main concerns raised.</p> <p>Where a chain of staff is involved in initiating, carrying out and approving the taking of a material exposure, all those staff should be identified.</p>	
Article 3(3)(b)	<p>A few respondents raise concerns regarding point (b), pointing out that committees can include junior staff who do not materially affect the final decision. They suggest the provision could discourage wide membership of committees and, therefore, reduce the quality of decisions made.</p>	<p>Where decisions are taken by committees, all members of the committee can influence the decision. Therefore, the EBA considers all members should be within the scope of the criteria (where the decisions the committee takes are material under the relevant criteria). Staff members who would only present issues at a committee but are not members of a committee are not identified under this criterion.</p>	<p>The criteria in the draft RTS have been revised</p>
Article 3(3) and Question 8	<p>Of the several respondents who address specifically the question asked, the majority say they do not think there are further criteria which should be used to identify staff whose professional activities have a material impact on the institution's risk profile. A few of these respondents emphasise that the overall effect of the criteria already proposed in Articles 2 and 3 is, in their view, too broad.</p>	<p>In connection with this point, the EBA has collected additional information from 36 institutions via a questionnaire. A few institutions at the moment identify all staff active in market risk areas and would suggest adding heads of risk in business lines, heads of communication and, in some cases, more senior staff in the credit area who are not yet identified under the provided threshold.</p> <p>In view of the above the EBA has added a few additional aspects to the criteria to identify staff.</p> <p>Article 92(2) of Directive 2013/36/EC requires that all categories of staff whose professional activities have a material impact on the institution's risk profile be identified and the respective provisions of Articles 92 and 94 of the CRD be applied.</p>	<p>Article 2: the criteria in the draft RTS have been revised</p>

3.4. Comments on Article 3(4)			
Article 3(4)	A few respondents suggest that it would be difficult to implement the calculation of the amounts based on a full-time equivalent basis in institutions' systems. One of these respondents also states that it would discriminate against part-time employees and proposes that 'full-time equivalent' be deleted and replaced with 'actual'.	The provision is not intended to limit the possibility of part-time employment. However, if, for example, the remuneration bracket were applied using the pro rata equivalent of part-time salaries, this would broaden the remuneration bracket significantly. Comparing the level of remuneration would not be meaningful if a different basis were used. The implementation costs should be limited, as information about part time employees should be available in HR systems.	No change
Article 3(4)	A few respondents point out that calculating the amounts at the end of the financial year is not possible as this differs from the date of the award. They state that the award takes place after the end of the performance year and therefore are unclear how they would calculate the amounts at the end of the financial year.	The comment has been accommodated and the criteria clarified accordingly.	The criteria in the draft RTS have been revised
4. Exclusion of staff (Article 4)			
Article 4	Most respondents suggest extending the scope of the article to cover at least all criteria based on remuneration. Some raised concerns about the burden of the process. Some of these respondents suggest that all staff identified by any of the Article 3 criteria should be subject to exemption; a few point in particular to the specific business models of investment firms and ask for broader exclusion possibilities.	<p>The EBA has considered the arguments for extending the ability to exclude staff. Please also refer to the comments above with respect to the quantitative criteria.</p> <p>The EBA has revised the quantitative criteria and restructured the RTS. An exclusion for staff identified only by the revised quantitative criteria has been introduced.</p> <p>Extending the exemption to all or some of the qualitative criteria, would in the EBA's view, not be appropriate, as its mandate is to set out criteria, and a possibility of excluding staff identified under those criteria would, de facto, limit the criteria to a self-assessment process.</p> <p>As the quantitative criteria are considered to be an</p>	Article 4: the criteria in the draft RTS and the impact assessment have been revised

		<p>indicator for risk taking, an exclusion process limited to these criteria is appropriate. The criteria within the draft RTS provide for a sufficient level of harmonisation by specifying those activities which have a material impact on the risk profile. If all the criteria of the RTS were subject to exclusion, there would be no harmonised basis on which to determine whether or not a staff member did in fact have a material impact on the risk profile of the institution.</p> <p>Remuneration reflects several aspects of a person's professional activities, including their duties, authorities, responsibilities and competencies. When considering managerial responsibilities, as well as operational and reputational risks, it is appropriate to identify staff members receiving a particularly high amount of remuneration.</p>	
Article 4	<p>Many respondents have concerns about the potential burden of operating the exemption as proposed in the RTS.</p> <p>Several of these respondents suggest that the solution to this problem would be to make it possible to apply the exemption to whole classes of employees, where it can be shown they are not engaged in activities that, as a whole, present a material risk to the institution, without having to justify the exemption on an individual basis for each member of staff in that class.</p> <p>Several respondents argue that the process of identifying many staff under the criteria in Article 3(2) and then exempting them under Article 4 would be a waste of resources, and argue instead for narrower, less prescriptive criteria in Article 3, with a focus on the qualitative criteria, in particular those that identify management and oversight roles.</p>	<p>The EBA carefully considered the concerns expressed about the burden of the exclusion process and has reduced the number of criteria to be applied.</p> <p>The EBA has redrafted the respective provisions. The definition of the remuneration bracket has been clarified, due to this clarification the number of staff falling within the bracket has been limited. Thus, the burden of the identification process has been significantly reduced.</p> <p>Institutions should be able to consider groups of employees as a whole within the risk assessment where they can demonstrate that, by its nature, the entire group of staff does not have a material impact on the risk profile, so that those staff members would not be Identified Staff, if they have only been identified under the quantitative criteria. The additional risk assessment will be reviewed by competent authorities as part of their regular supervisory activities. The RTS establish a notification requirement for exclusions with regard to staff receiving over EUR 500 000. Exclusions of staff in the highest 0.3% of remuneration or above a threshold</p>	The criteria in the draft RTS and the impact assessment have been revised

		of EUR 750 000 require a prior approval from the competent authority. For staff receiving EUR 1 000 000 Euro or more the EBA will be involved to ensure a coherent application.	
Article 4(b)	A few respondents make the point that the amount of variable remuneration which could be awarded to the individual differs between jurisdictions. One of these respondents argues that these references are unclear and should be deleted completely, while the other respondents object particularly to the reference to remuneration which 'could' be awarded; they argue that it is hard to determine theoretically possible levels of remuneration.	The EBA has revised the concepts used regarding the variable remuneration. The RTS now refers consistently to the actual remuneration awarded. If remuneration is used as an indicator for risk taking, this indicator should be used in a way that reflects the level of risk which is associated with the remuneration paid; therefore, the levels within each country need to be considered.	The criteria in the draft RTS have been revised
5. Entry into force (Article 5)			
Article 5	<p>Several respondents raise concerns about the timing of the RTS and their entry into force, and suggest publishing the final RTS before the end of 2013 to enable institutions to apply them in 2014; other respondents suggest applying the RTS not before 2015. An implementation in the middle of the year would trigger the need to renegotiate contracts and could lead to the need to split the performance year to reflect changed contract terms and the need to consult shareholders regarding the bonus ratio.</p> <p>A few respondents emphasise more generally the need for sufficient time between publication of the RTS and their entry into force, suggesting that the 20 days which they claim is implied by Article 5 is insufficient.</p> <p>A few respondents asked for confirmation that the RTS would apply only to remuneration awarded after 31 December 2013.</p>	<p>The EBA was mandated to submit draft RTS on Identified Staff to the European Commission by 31 March 2014.</p> <p>The adoption process will take additional time. The EBA does not have the legal power to adopt the RTS. The RTS will be published in the Official Journal of the European Union and enter into force on the date specified therein.</p> <p>The EBA will publish its draft RTS once they have been submitted to the European Commission. The RTS will not, however, modify the scope of the CRD and its requirement that institutions must identify all staff whose professional activities have a material impact on the institution's risk profile.</p> <p>This is an obligation that institutions already had to comply with under the CRD III and which is maintained under the CRD IV. The legal framework will now change only slightly in that the RTS will lay down specific criteria of which the competent authorities will ensure full and</p>	No change

		<p>coherent application.</p> <p>Individual contracts should be subject to the application of national law. National laws have already included the obligation to identify all staff whose professional activities have a material impact on the institution's risk profile since 2011.</p> <p>Identification of staff is a process which has to be done at least on an annual basis.</p>	
6. Impact assessment – responses to the questions			
Questions 9–11	<p>Respondents raised the following main comments regarding additional cost drivers:</p> <ul style="list-style-type: none"> - direct costs for institutions and supervisors of the application of more complex criteria and of Article 4, as the application of quantitative criteria will lead to the identification of significant numbers of employees who are not material risk takers and will have to be excluded; - indirect compliance costs of changing/re negotiating contracts where additional staff are brought into the scope of the RTS who were not previously identified, as well as the costs/benefits of ensuring that institutions in different Member States use the same practices; - the second-order effects of implementing RTS will be an increase in fixed remuneration in the EU but also worldwide; - the costs relating to legal advice, consultancy and internal and external audit are missing; - the cost–benefit analysis does not take into account the diverse business models of institutions (investment firms), nor does it include a sufficiently broad geographical 	<p>Additional costs for the identification of staff have already been considered in the impact assessment. As a consequence of the application of binding criteria, institutions may identify additional staff members.</p> <p>All contracts need to be compliant with the regulation; costs are driven by these RTS only in so far as they may increase the number of staff identified or a different set of staff members may be identified.</p> <p>However, the aim was to harmonise the identification rules, and changing practices will inevitably lead to changed identification process results. The process-related indirect costs have already been considered in the impact assessment (original paragraph 29 and within the table summarising the costs).</p> <p>To the extent that they have not already done so, institutions will need to adjust their remuneration policies in line with the CRD requirements; this may include a reduction of excessive variable remuneration in order to avoid incentives for excessive risk taking as intended by the legislator.</p> <p>The cost–benefit analysis was based on a sample covering the whole of the EU, including small and large institutions and groups.</p>	<p>The impact assessment has been amended to take into account comments received and the changes to the draft RTS</p>

	sample.	<p>The draft RTS include criteria which can be applied to all institutions, including investment firms. Criteria which are not applicable to one institution, e.g. if no credit risk is taken, will not apply. A separate set of criteria for investment firms was not intended, as it should be remembered that credit institutions also provide such services.</p> <p>The guidelines on remuneration policies will consider specific issues regarding the application of the remuneration requirements.</p>	
<p>Question 10</p> <p>Specific points; more general aspects have been combined with responses provided under Question 9</p>	<p>Respondents state that criteria based on CET1 introduce an enormous administrative burden. CET1 is not a measure which can be easily cross-referenced to individual staff and would be extremely challenging for HR and compliance teams to monitor on a day-to-day basis. Significant work would need to be done to make this applicable at the 'staff member' level.</p> <p>Brokers are paid on a commission basis and such contracts cannot be changed. Commissions are always paid in cash and are not deferred.</p>	<p>It is not intended for such limits to be calculated and applied on a day-to-day basis. An assessment of limits and staff must be carried out at least once annually.</p> <p>The specific business model of brokers needs to be considered when the remuneration policies are applied. The EBA will issue guidelines on remuneration policies, which should deal with this issue.</p>	<p>The impact assessment has been amended to take into account comments received and the changes to the draft RTS</p>
<p>Question 11</p> <p>Specific points; more general aspects have been combined with responses provided under Question 9</p>	<p>Respondents raised the following aspects, stating that they are not appropriately reflected in the impact assessment:</p> <ul style="list-style-type: none"> - the costs of the RTS will be significantly greater than indicated in the EBA's analysis, in particular for the exclusion of staff members who are identified under the remuneration criteria but do not have a material impact on the risk profile; - the application of these RTS on a consolidated, parent and subsidiary basis will increase the costs if different tests are required, and the group list is not the sum of the individual lists; - the rationale for the choice of the criteria based on remuneration is not sufficiently clear. 	<p>The EBA has amended the impact assessment. The exclusion of staff identified under the quantitative criteria and in particular under the remuneration bracket criterion may cause additional costs. However, an exclusion possibility is needed to ensure that staff are identified only if their professional activities have a material impact on the institution's risk profile. The criterion based on variable remuneration has been deleted.</p> <p>The impact assessment refers only to the requirements laid down by the draft RTS. The application at group, parent and subsidiary level is regulated in Article 92(1) of the CRD.</p> <p>The EBA has amended the draft RTS regarding the criteria and clarified the rationale for the thresholds for</p>	<p>The impact assessment has been amended to take into account comments received and the changes to the draft RTS</p>

		criteria based on remuneration. Those criteria are set at an appropriate level taking into account both EU remuneration structures and data collected from institutions.	
--	--	--	--