

European Banking Authority
20 Avenue André Prothin
92400 Courbevoie
Paris
France
Submitted via online portal

1 July 2021

Re: Response to EBA/CP/2021/15 – Draft Regulatory Technical Standards on disclosure of investment policy by investment firms under Article 52 of Regulation (EU) 2019/2033

Dear Sir/Madam,

ICI Global¹ appreciates the opportunity to provide feedback on the European Banking Authority’s (“EBA’s”) consultation paper (“CP”) on the draft Regulatory Technical Standards (“RTS”) on disclosure of investment policy by investment firms under Article 52 Regulation (EU) 2019/2033 on the prudential requirements of investment firms (“IFR”).² Many of our member firms are part of global regulated fund complexes that include UCITS and other entities that receive portfolio management services from MiFID-licensed firms subject to the IFR.

We appreciate that the EBA has developed the draft RTS in accordance with its mandate under Article 52(3) IFR. Although we generally believe that the draft RTS are consistent with this mandate and represent a reasonable exercise of the EBA’s authority, we have concerns with a few elements of the CP. In response, we recommend that the EBA:

- Redefine “indirect” holdings to include only applicable shares held by a controlled undertaking of an in-scope investment firm where the investment firm directs the voting of those shares;
- Remove shareholder proposals from the disclosure requirements because they are outside the EBA’s mandate; and
- Require that disclosures be made at the group level only.

¹ [ICI Global](#) carries out the international work of the [Investment Company Institute](#), the leading association representing regulated funds globally. ICI’s membership includes regulated funds publicly offered to investors in jurisdictions worldwide, with total assets of US\$40.7 trillion. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of regulated investment funds, their managers, and investors. ICI Global has offices in London, Brussels, Hong Kong, and Washington, DC.

² Available at:

https://www.eba.europa.eu/sites/default/documents/files/document_library/Publications/Consultations/2021/Consultation%20on%20draft%20RTS%20on%20disclosure%20of%20investment%20policy%20by%20investment%20firms/972104/CP%20Draft%20RTS%20on%20disclosure%20of%20investment%20policy%20by%20investment%20firms.pdf

We elaborate on each recommendation below.

I. “Shares Held Indirectly” Should Be Redefined to Include Only Applicable Shares Held by Controlled Undertakings Where the Investment Firm Directs Voting

Articles 46(1) and 52(1)(a) IFR impose a requirement to publicly disclose (on an annual basis) the proportion of voting rights attached to shares held “directly or indirectly” in relevant investee companies by in-scope investment firms.³

As the EBA notes at Section 5.1.C (paragraph 27) of the CP, the exact meaning of the term “held indirectly” is not specified further in the IFR. To that end, the EBA proposes a broad interpretation of this term to capture not only shares held by subsidiaries of an in-scope investment firm but also other undertakings, where the investment firm exercises “significant influence” or “control” over such undertakings, or where “close links” exist.

As cited in the CP, the terms “significant influence,” “control,” and “close links” are defined in relevant EU sectoral directives and regulations.⁴ Although control is generally understood to mean a parent/subsidiary relationship, the concepts of significant influence and close links have a much broader reach.

Specifically, Article 2(13) of the EU Accounting Directive 2013/34/EU (as amended) defines “significant influence” as follows:

“An undertaking is presumed to exercise a significant influence over another undertaking where it has 20 % or more of the shareholders' or members' voting rights in that other undertaking;”

“Close links” is defined in Article 4(1)(35) of the Markets in Financial Instruments Directive 2014/65/EU as:

“a situation in which two or more natural or legal persons are linked by:

- (a) participation in the form of ownership, direct or by way of control, of 20 % or more of the voting rights or capital of an undertaking;
- (b) ‘control’ which means the relationship between a parent undertaking and a subsidiary, in all the cases referred to in Article 22(1) and (2) of Directive 2013/34/EU, or a similar relationship between any natural or legal person and an undertaking, any subsidiary undertaking of a subsidiary undertaking also being considered to be a subsidiary of the parent undertaking which is at the head of those undertakings;
- (c) a permanent link of both or all of them to the same person by a control relationship;”

³ In-scope investment firms are investment firms that do not meet the conditions for qualifying as small and non-interconnected investment firms set out in Article 12(1) IFR (Class 2 investment firms), with balance sheet assets on average greater than EUR 100 million over the four-year period immediately preceding a given financial year.

⁴ Article 2(13) of Directive 2013/34/EU, Article 4(1)(37) of Regulation (EU) No 575/2013, and Article 4(1)(35) of Directive 2014/65/EU.

As is apparent from their definitions, both concepts capture a broad set of relationships with no territorial limitation, such that a close link and significant influence could exist between European Economic Area (“EEA”) and non-EEA undertakings.

In the context of Article 52 IFR, the adoption of such terms could result in an investment firm (and to the extent an investment firm is subject to prudential consolidation under the IFR, the consolidating entity) making disclosures in respect of entities with which the firm may hold only a participating interest (i.e., at least 20% but less than 50%) or may be closely linked by virtue of being controlled by the same person, but whose affairs and voting behaviour the firm does not in fact control or have the ability to monitor. This result would be wholly disproportionate and inappropriate to the Article 52(3) IFR mandate. As the EBA acknowledges at Section 5.1.C (paragraph 27) of the CP, the “primary purpose of Article 52 is to allow stakeholders to better understand the *influence of investment firms over the companies* in which they hold directly or indirectly shares to which voting rights are attached” (emphasis added).

Instead, the EBA should focus on the actual voting authority that an in-scope investment firm could have over relevant investee companies,⁵ and not merely on the presence of significant influence or close links (as defined in relevant EU directives and regulations) that represent more attenuated connections. Indeed, there are many instances where (notwithstanding the presence of significant influence or close links) an in-scope investment firm may not in fact exercise *any* influence over the voting behaviour of a related undertaking with respect to an investee company. This is likely to occur in complex group structures with, for example, multiple asset managers, some of whom may be investing (on behalf of multiple clients) in relevant investee companies, independent of the influence of a related investment firm.

Accordingly, the EBA should delete the references to “significant influence” and “close links” from the proposed definition of “held indirectly.” Further, the EBA should limit this definition to applicable shares held by a controlled undertaking of an in-scope investment firm where the investment firm directs the voting of those shares. In other words, an in-scope investment firm should not be required to disclose the proportion of voting rights attached to shares held by a controlled undertaking where that controlled undertaking exercises the voting rights independently from the in-scope investment firm.

This recommendation is consistent with the EU’s long-held approach to shareholder engagement and disclosures under the EU Transparency Directive (“EU TD”).⁶ Specifically, the EU TD requires aggregated shareholding disclosure at the group level only with respect to a controlling person and its subsidiaries (Article 10(e) EU TD). The EU TD does not impose an aggregation requirement between subsidiaries when neither subsidiary is controlling the other (e.g., aggregation is not required where one subsidiary holds participating interests in another, or the two are otherwise closely linked by virtue of being under common ownership).

⁵ We welcome the EBA’s clarification, at the public hearing on 6 May 2021, that in-scope investment firms need not comply with the Article 52 IFR disclosure requirements with respect to voting rights retained by discretionary investment management clients.

⁶ Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (as amended).

Moreover, Article 12(5) EU TD exempts a parent undertaking of a MiFID investment firm carrying on portfolio management services from aggregating its holdings under Articles 9 and 10 EU TD where (among other things) the investment firm exercises its voting rights independently from the parent undertaking. Similarly, market makers are exempt from the major shareholder notification requirement under Article 9 EU TD on the condition that (among other things) they “neither intervene[] in the management of the issuer concerned nor exert[] any influence on the issuer to buy such shares or back the share price” (Article 9(5)(b) EU TD).

II. Disclosure Requirements Should Not Be Extended to Shareholder Proposals

Article 52(1)(b) IFR requires in-scope investment firms to disclose (among other things) the ratio of proposals put forward by the investee company’s administrative or management body that the investment firm has approved. The EBA is mandated to develop, in consultation with ESMA, draft RTS to specify templates for disclosure under Article 52(1) IFR.

Neither the IFR (more generally) nor Article 52 IFR impose—or grant a mandate to the EBA to impose—a requirement on in-scope investment firms to disclose the ratio of proposals put forward by *shareholders* of a relevant investee company. The EBA justifies the proposed extension as being “crucial” to show a comprehensive picture of investment firms’ voting behaviour, such that “stakeholders are able to understand whether the ratio of approved proposals may be different depending on who puts them forward.”⁷

The EBA’s proposal in this regard exceeds the mandate given in the Level 1 text. Moreover, a draft RTS should not entail making policy choices. Instead, this policy extension should be introduced at Level 1 by the Commission, European Parliament and Council.

III. Disclosure Requirements Should Be Applied at the Group Level Only

Unless a prudential waiver has been granted, the IFR applies to investment firms on an individual and on a consolidated basis. There is therefore a risk of duplication of reporting of the Article 52 IFR disclosures, as more than one entity within a consolidation group may be required to comply with the disclosure requirements (e.g., the consolidating entity and the investment firm, where different, on the basis that both entities would be considered to indirectly hold shares in the relevant investee company).

We support the disclosure of relevant information being aggregated (as we recommended above) and delivered only at the group level. This should give investors and regulators more appropriate and comprehensive data on the voting behaviour and influence of investment firms over relevant investee companies.

Such approach would be consistent with that adopted under the EU TD. Specifically, Article 12(3) EU TD exempts an undertaking from making a notification where the notification is made by its parent undertaking or, where its parent undertaking is itself a controlled undertaking, by its own parent undertaking. As ESMA explains in its Q&A⁸ on the EU TD,

⁷ Section 5.1.C (paragraph 28) of the CP.

⁸ Question 25, ESMA Questions and Answers on Transparency Directive (2004/109/EC) (09 November 2020 | ESMA31-67-127).

“the basic principle of [this approach] is to treat groups as a single investor and to require only a single notification in a case of groups.”

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We appreciate your consideration of our views on the CP. If you have any questions, please contact Jennifer Choi, Chief Counsel, at +1 (202) 326-5876 or jennifer.choi@ici.org; Matthew Thornton, Associate General Counsel, ICI, at +1 (202) 371-5406 or matthew.thornton@ici.org; or Nhan Nguyen, Assistant General Counsel, ICI, at +1 (202) 326-5810 or nhan.nguyen@ici.org.

Yours sincerely,

/s/ Jennifer S. Choi

Jennifer S. Choi
Chief Counsel, ICI
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