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EBA/CP/2014/39 Consultation on Draft Guidelines on the rate of conversion from debt to equity in bail-in

INTRODUCTION

This paper is submitted by the Financial Law Committee and the Insolvency Law Committee of the City of London Law Society and the Banking Reform Working Group of the Law Society of England and Wales (the "Committees"), in response to the Consultation Paper published in July 2014.

The City of London Law Society (CLLS) represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government Departments, often in relation to complex, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees.

The Law Society of England and Wales is the representative body of over 159,000 solicitors in England and Wales. The Society negotiates on behalf of the profession and makes representation to regulators and Government in both the domestic and European arena.

The Committees submitting this paper are made up of solicitors specialising in UK and international financial and insolvency law in a number of law firms based in the City of London, who advise and act for UK and international financial institutions and businesses and for regulatory and governmental bodies on financial and insolvency law matters.

We do not comment specifically on most of the questions raised but confine ourselves to points of legal importance related to the conversion exercise.

Question 1: We are concerned that the conversion principle assumes that an accurate estimate of the likely out-turn in an insolvency for affected creditors would be available at the time of debt-equity conversion. This is unlikely. It is also unlikely that the new equity will be easy to value (it may be in a new entity which needs to build its capital structure to meet regulatory requirements, and, even if in a continuing entity, it is possible that similar consideration, plus the possible suspension of a market quotation on the write down of all the pre-existing capital, will cause valuation issues). We do not think therefore that in practice, those valuations will provide much protection against claims that the bail-in process has been carried out at inappropriate rates. Nevertheless we agree that relatively generous treatment where only some of the classes of equally

ranking creditors are subject to bail-in may be appropriate to try to reduce claims under the NCWO safeguard.

General: The guidance contemplates (as does the BRRD) that where, for example, there are two different creditors with different instruments but both with the same ranking, the resolution authorities have the ability to offer one creditor a differential conversion rate from the other, even though both would receive the same (or zero) on liquidation. It is clear from Article 1.5v that the draft guidelines do not relate to setting differential conversion rates for classes of instruments which differ in, for example, their regulatory or accounting treatment but not in their ranking in the relevant national insolvency creditor hierarchy. We believe that this could create a significant gap and that further consideration should be given to whether, when both are being converted, the resolution authorities should have total freedom to treat creditors of equal insolvency ranking differentially.

Members of the Working Party:

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