

SHEARMAN & STERLING_{LLP}

BROADGATE WEST | 9 APPOLD STREET

LONDON EC2A 2AP

WWW.SHEARMAN.COM | T +44.20.7655.5000 | F +44.20.7655.5500

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Via Email DP-2012-02@eba.europa.eu

European Banking Authority
Tower 42 (Level 18)
25 Old Broad Street
London EC2N 1HQ
United Kingdom

Response to the EBA's Discussion Paper on a template for recovery plans

Dear Sirs,

We welcome this opportunity to respond to the discussion paper reference "EBA/DP/2012/2" published on 15 May 2012 (the "**Discussion Paper**") by the European Banking Authority (the "**EBA**"), which seeks views on the proposed template for recovery plans for financial institutions.

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Our Response

Our response to certain of the questions raised in the Discussion Paper primarily focuses on certain key legal and regulatory issues raised by the Discussion Paper, in particular on the impact of the proposals on institutions operating in both the U.S. and European markets.

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Question 6: Should the recovery plan include scenarios and assumptions as possible points of reference for testing the various recovery options? What role should they play within the recovery plan and with respect to the possibility to consider per se the various triggers and negative impacts?

Recovery plans should, in our view, include specific scenarios and assumptions to serve as a guideline for national competent authorities ("NCAs") to test the recovery options proposed by financial institutions in their recovery plans. The EBA could assist NCAs in producing a non-exhaustive, suggestive list of scenarios and assumptions that would be expected to be contained in recovery plans. The list of scenarios and assumptions might address various events, such as the reduction of Tier 1 capital below a certain threshold, or significant falls in the value of stock market indices. This would give NCAs a common starting point from which to assess recovery plans and also to cooperate with one another in assessing cross-border financial institutions.

However, this list should not be exhaustive, nor in any way prescribe responses to such events, as the legislative framework adopted for recovery plans must provide NCAs with sufficient flexibility to assess the viability of a financial institution's recovery plan in the relevant specific context. Even requiring a "menu of options", as suggested in the Discussion Paper, may be overly restrictive, and prevent financial institutions and NCAs from taking bespoke action to deal with specific and wide-ranging contexts.

Question 11: Have you got any remarks or concerns related to the confidential nature of the information provided in the recovery plan? If so, please elaborate.

Recovery plans will include detailed confidential and commercially sensitive information relating to a financial institution's legal and organisational structure and its systems and processes. The Discussion Paper and the European Commission's legislative proposal for a directive establishing a framework for the recovery and resolution of credit institutions and investment firms published on 6 June 2012 (the "**Commission Proposal**") envisages cross-border coordination between NCAs and the European Commission to assess the suitability of cross-border financial institutions' recovery plans. Therefore, it is likely that confidential and commercially sensitive information relating to financial institutions will be distributed across NCAs in various Member States, as well as to the EBA.

Such dissemination increases the risk of such information falling into the wrong hands or being disseminated outside the NCAs. Information shared between NCAs and the EBA must, in our view, be subject to a robust and effective professional secrecy requirement. Any breach of confidentiality by NCAs or the EBA, as well as personnel and former personnel of NCAs and the EBA, should be subject to tough sanctions. The EBA should, in our view, scrutinise and approve national regimes in this regard designed to prevent and deter unlawful dissemination of confidential information contained in recovery plans. Such requirements should help to address any concerns from financial institutions that confidential and commercially sensitive information could be disseminated inappropriately.

International context

In our view, the Commission Proposal on recovery plans fails to address one of the key failures of regulation during the financial crisis. The lack of coordination by international regulators, including U.S. and other international regulators, contributed to disorderliness in the aftermath of certain events such as the Lehman insolvency. During the Lehman collapse, EU and U.S. regulators failed to cooperate effectively before Lehman Bros entered into insolvency in part due to having competing and divergent interests in protecting different sets of creditors.

Unless there is coordination with U.S. and other international regulators, there is a real danger that the EU's work on recovery plans, which includes the EBA's proposed template and the Commission Proposal, could be wasted, and such recovery plans could prove to be ineffectual in future crises. Crises involving financial institutions that have substantial EU, U.S. and other international businesses (which includes all G-SIFIs, or Globally Significant Financial Institutions) will leave international financial markets as vulnerable as before if there is a lack of integrated regulatory action at the recovery (as well as the resolution) stage.

Therefore, we believe the EBA should seek to coordinate its proposals with international regulators in the U.S. and elsewhere. The EBA should consider how its template would work relative to recovery plans in other jurisdictions. It still remains unclear how U.S. regulators and EU regulators would work together in the event of a recovery plan having to be used. If a regulator outside the EU were to act before the EBA (or another regulator within the EU) with respect to a rapidly deteriorating global bank, it is easy to see how a recovery plan based on the EBA's template could be rendered inadequate and ineffective very quickly. The EBA should therefore also focus efforts on establishing a framework in which it can coordinate its approach to failing financial institutions with U.S. and other international regulators, which should include determining the events that would trigger coordination with such regulators.

Conclusion

We generally agree with the approach adopted in the Discussion Paper. However, our main concern is that a myriad of rules emanating from various international regulators relating to recovery plans will not achieve a harmonised international framework. Financial institutions, particularly those operating in both the U.S. and Europe, may be faced with conflicting rules and multiple regulatory authorities competing with one another. This would have an adverse, rather than positive, impact on recoverability and resolvability, and therefore threaten, rather than improve, international financial stability. We suggest the EBA should, to the greatest extent possible, coordinate its consultation with other regulators in the U.S. and elsewhere.

We are grateful for the opportunity to respond to the Discussion Paper. Please do not hesitate to contact us should you have any queries. Please address any queries to either Barney Reynolds (barney.reynolds@shearman.com) or Azad Ali (azad.ali@shearman.com) at the London office of Shearman & Sterling.

Yours faithfully,

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