Response to the consultation paper on draft regulatory technical standards on independent valuers (EBA/CP/2014/18)

Submission from Barclays

10 October 2014

Executive Summary:

Barclays supports the efforts made by the EBA in producing the detailed Level 2 Technical Standards and Guidelines for the Bank Recovery and Resolution Directive ('BRRD') and we welcome the opportunity to respond to the consultation paper on draft regulatory technical standards ('RTS') on independent valuers.

Barclays has engaged closely with the Bank of England ('BoE') and the Prudential Regulation Authority ('PRA') on resolution planning and, specifically Barclays' resolution strategy since 2009. Over this period, Barclays has submitted two resolution packs and carried out a number of workstreams to support the UK authorities' understanding of the practicalities of resolving Barclays and other financial institutions more broadly. This process has allowed significant scope for Barclays to share our views on the optimal approach to resolving a G-SIFI.

As part of the work Barclays is undertaking to support resolvability, we are actively engaged in the wider debate on valuation. Barclays is working closely with the BoE and the PRA in considering the best approach to valuing a firm in the lead up to, and during a resolution, and the likely timeframes to produce a valuation.

Overall, we support the spirit of the draft RTS, and the introduction of measures to enhance legal certainty and market confidence in the quality of the valuation during a resolution process.

However, we are concerned that the proposed preconditions for being considered an independent valuer are too stringent and may not be workable in practice, particularly for the resolution of a G-SIFI.

Requirements for the valuer to hold "sufficient human and technical resources, to carry out the valuations" without third-party support, and possess knowledge and experience in economics, accounting, finance, banking and other relevant subjects is likely to limit potential valuers to a small number of large professional services firms. This will particularly be the case for the resolution of a large, cross border bank which will require more resources and broader expert knowledge to carry out the valuation than would be necessary for a smaller and/or more specialised firm.

We note, that if a large cross border bank was to enter resolution today, it is highly unlikely that there would be any firms available which would have the operational and technical capacity to value the bank, while adhering to the strict definition[1] of independence set out in the draft RTS.

The requirements, as currently written would therefore require a potential 'independent' valuer to be identified for each large bank as part of normal business operations and for all business between the valuer and the bank, its shareholders and creditors to cease which would significantly restrict the choices and skills available to banks regarding advisory and audit services.

We are concerned that the need for the independent valuer to have sufficient knowledge and understanding of the firm has not been fully considered. This is especially important during a resolution process when the valuer will need to work to tight deadlines, and possibly under stressed market conditions.

We believe that the requirement for the valuer to carry out the valuation "without having to rely on support from third parties, in particular the resolution authorities and the institution"[2] is not

[1] I.e. not performed an audit for the bank or its affiliates over the previous year or provided any other

practical. During a resolution, the valuer would need to use the bank undergoing valuation's information and data systems as well as review previous valuation work performed by employees of the bank. As part of this process, the valuer would also need to have access to relevant SMEs across the bank that could be called upon to answer questions about the bank's data, previous valuation work and specific questions on the businesses/products being valued etc. This would be particularly important given that the suggested criteria for being considered independent would likely result in a valuer being chosen with little or no previous knowledge of the bank.

While we appreciate the need for the valuer to be perceived as independent by the market to install confidence and prevent legal challenge, this needs to be carefully balanced against the need to have a valuer with some knowledge of the bank being valued and with appropriate access to SMEs across the bank, who can be called upon throughout the resolution process.

We suggest that the EBA reconsiders the definitions of independence, given the practicalities of implementing these requirements.

Additionally, regarding Article 2 on expertise and resources, we believe that necessary qualifications, experience and knowledge in valuation should be listed as the most important skill set, rather than only economics, accounting and finance, including banking.

[2] See page 7 of the draft RTS on independent valuers.

Comments in response to specific questions

1. Do you agree that the approach followed in the draft RTS to determine and identify conflicts of interest is the appropriate one?

As stated in the executive summary, we believe that there needs to be an appropriate balance between the perceived 'independence' of the valuer and the need for the valuer to be suitably familiar with the firm under valuation's businesses and products in order to carry out a prudent valuation.

The definition for independence set out in the draft RTS i.e. the valuer has not performed an audit for the bank or its affiliates over the previous year or provided any other services which could be perceived to influence independence for the previous three years, is too strict and may not be workable in practice. This is particularly the case when coupled with the requirement that the valuer undertake the valuation without relying on the institution in resolution.

It is clear that the independent valuer would need to rely on the data of the bank in resolution as well as call on SMEs from across the bank to answer specific questions on e.g. the bank's businesses and products during the resolution process in order to carry out a prudent valuation.

The reference to a 'perception' of independence is also unhelpful and while we can see why this may be important from a market confidence perspective, it is clearly very subjective and not in keeping with the EBA's desire to apply "uniform rules" in determining independence. It is also not clear who would determine the perceived independence of the valuer and what the process would be if, for example, home and host authorities disagreed on the perceived independence of the valuer.

Further, we note that the paper lacks any details on what would constitute "material" interest in common or conflict. It would be helpful if more clarity could be provided on the circumstances under which an interest in the institution in resolution would be considered "material".

2. Do you agree that three years is the appropriate period of time for the purposes of Article 4(5)?

We question why the firm's auditors are only subject to a one year restriction before qualifying as independent, when all other firms that have had any relationship which is perceived to impact their independence require a three year restriction.

As stated in the executive summary, for a large cross-border bank, and particularly a G-SIFI this is unlikely to be workable in practice. G-SIFIs are likely to have had a number of different professional services and consulting firms working on projects throughout the Group over the three year period.

We believe it would be more appropriate to define a material conflict and then exclude potential valuation firms or individuals within those firms on the basis of the clearly defined criteria.

3. *Do you agree with the possibility to task the temporary administrator as an independent valuer, subject to the condition set forth in the above provision?*

   The independent valuer and temporary administrator would require different skill sets, so it is unlikely one individual could carry out both roles, particularly for a large cross-border bank where a large number of people would be needed to support valuation work. It is possible that the temporary administrator and the independent valuer could be sourced from the same organisation; however, it would need to be a large organisation with a diverse skill set and the capacity to act as both, restricting choice. Also sourcing both roles from the same organisation could create its own conflict of interest issues.

4. *Do you reckon there are other cases of where independence should be ruled out in any case?*

   No.

5. *Do you agree with the approach outlined in the impact assessment and more specifically, with the elements included in the assessment of costs and benefits?*

   The way the draft RTS is written creates a lot of uncertainty regarding the criteria for being considered independent and will likely reduce the potential number of firms that will be considered independent to a small number of professional services firms. This is particularly relevant for the resolution of a G-SIFI or a large cross border-bank.

   'Perceived' independence is vague, difficult to measure and could leave the choice of valuer open to legal challenge from any stakeholder who subsequently 'perceived' the valuer not to be independent. This is compounded by the lack of definitions in the RTS stipulating the types of 'services', or 'relationships' which are likely to be deemed to affect independence.

   Further, the lack of safeguards and protection for the valuer in the draft RTS would leave the independent valuer open to legal challenge on its valuation decisions. This would deter many firms from undertaking the role of independent valuer and any firms that were prepared to offer their services would likely require large fees to compensate them for the risk of litigation.