Changes to legislation: *There are outstanding changes not yet made to Commission Delegated Regulation (EU) 2018/344. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details)EUR 2018 No. 344 may be subject to amendment by EU Exit Instruments made by the Bank of England under powers set out in The Financial Regulators' Powers (Technical Standards etc.) (Amendment etc.) (EU Exit) Regulations 2018 (S.I. 2018/1115), regs. 2, 3, Sch. Pt. 3. These amendments are not currently available on legislation.gov.uk. Details of relevant amending instruments can be found on their website/s. (See end of Document for details) View outstanding changes*

Commission Delegated Regulation (EU) 2018/344 of 14 November 2017 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria relating to the methodologies for valuation of difference in treatment in resolution (Text with EEA relevance)

COMMISSION DELEGATED REGULATION (EU) 2018/344

of 14 November 2017

supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria relating to the methodologies for valuation of difference in treatment in resolution

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

Having regard to Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 on establishing a framework for the recovery and resolution of credit institutions and investment firms[(1)], and in particular Article 74(4) thereof,

Whereas:

(1) It is appropriate to have rules establishing a methodology for carrying out valuations aimed at determining whether there is any difference between the actual treatment of shareholders and creditors in respect of which resolution action or actions have been effected, and the amount that those shareholders and creditors would have received had the institution or entity as referred to in points (b), (c) or (d) of Article 1(1) of Directive 2014/59/EU ('entity') been subject to normal insolvency proceedings at the date on which the decision to resolve that entity was adopted according to Article 82 of Directive 2014/59/EU.

(2) Any difference in treatment resulting in greater losses in resolution for particular shareholders and creditors should entitle those shareholders and creditors to compensation from the resolution financing arrangements, pursuant to point (e) of Article 101(1) of Directive 2014/59/EU.

(3) The *ex post* valuation is to be carried out by the required independent person meeting the conditions set out in Article 38 of Commission Delegated Regulation (EU) 2016/1075[(2)] ('valuer'), as soon as possible after the resolution action or actions have been effected, even though its completion could take some time. That valuation should be based on available information relevant to the date when the decision to resolve an entity is adopted, in order to adequately reflect specific circumstances, such as distressed market conditions, existing at that resolution decision date. Information obtained after the resolution decision date should only be used where it could reasonably have been known at that date.

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(4) In order to ensure that a comprehensive and credible valuation is carried out, the valuer should have access to any appropriate legal documentation, including to a list of all claims and contingent claims against the entity, classified according to their priority under normal insolvency proceedings. The valuer should be allowed to enter into arrangements to obtain specialist advice or expertise as required by the circumstances.

(5) For purposes of determining the treatment that shareholders and creditors would have received had the entity been put under normal insolvency proceedings, the valuer should determine the expected timing and amount of net cash flows that each shareholder and creditor would have received from the insolvency proceedings without assuming any State aid, discounted at the relevant discount rate or rates. In determining such estimate, and where available and relevant, the valuer could also refer to information on recent past experiences of insolvency of similar credit institutions.

(6) The actual treatment received by shareholders and creditors in resolution should be determined having regard to whether such shareholders and creditors have respectively received compensation in the form of equity, debt or cash as a result of the adoption of the resolution action.

(7) This Regulation is based on the draft regulatory technical standards submitted by the European Banking Authority (EBA) to the Commission.

(8) 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 1093/2010 of the European Parliament and of the Council[(3)],

HAS ADOPTED THIS REGULATION:

Article 1

General provisions

1 For the purposes of determining the treatment of shareholders and creditors under normal insolvency proceedings, the valuation shall only be based on information about facts and circumstances which existed and could reasonably have been known at the resolution decision date which, had they been known by the valuer, would have affected the measurement of the assets and liabilities of the entity at that date.

For the purposes of this Regulation, 'resolution decision date' means the date on which the decision to resolve an entity, is adopted pursuant to Article 82 of Directive 2014/59/EU.

2 For purposes of determining the actual treatment of shareholders and creditors in resolution, the valuer shall rely on available information concerning facts and circumstances existing as of the actual treatment date or dates at which shareholders and creditors receive compensation ('actual treatment date or dates').

3 The reference date of the valuation shall be the resolution decision date, which may differ from the actual treatment date. Insofar as the valuer deems the impact of any discounting

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of the proceeds to be negligible, the undiscounted proceeds at the date the resolution action has been implemented may be directly compared with the discounted amount of hypothetical proceeds that shareholders and creditors would have received had the entity entered normal insolvency proceedings at the resolution decision date.

Article 2

Inventory of assets and claims

1 The valuer shall establish an inventory of all identifiable and contingent assets owned by the entity. Such inventory shall include assets for which the existence of associated cash flows is demonstrated or can reasonably be expected.

2 A list of all claims and contingent claims against the entity, shall be made available to the valuer. That list shall classify all claims and contingent claims according to their priority levels in normal insolvency proceedings. The valuer shall be allowed to enter into arrangements for specialist advice or expertise as regards the consistency of the ranking of claims with the applicable insolvency law.

3 Encumbered assets and claims secured by those assets shall be identified separately by the valuer.

Article 3

Steps of the valuation

For the purposes of determining whether a difference in treatment as referred to in Article 74(2) of Directive 2014/59/EU exists the valuer shall assess:

(a) the treatment that shareholders and creditors in respect of which resolution actions have been effected, or the relevant deposit guarantee scheme, would have received had the entity, entered normal insolvency proceedings at the resolution decision date, disregarding any provision of extraordinary public financial support;

(b) the value of the restructured claims following the application of the bail-in tool or other resolution powers and tools, or of other proceeds received by shareholders and creditors as at the actual treatment date or dates, discounted back to the resolution decision date if deemed necessary to enable a fair comparison with the treatment referred to in point (a);

(c) whether the outcome of the treatment in point (a) exceeds the outcome of the value referred to in point (b) for each creditor in accordance with the priority levels in normal insolvency proceedings as identified according to Article 2.

Article 4

Determination of the treatment of shareholders and creditors under normal insolvency proceedings

1 The methodology for conducting the valuation pursuant to point (a) of Article 3 shall be limited to determining the discounted amount of expected cash flows under normal insolvency proceedings.

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2 Expected cash flows shall be discounted at the rate or rates reflecting, as appropriate, the timing associated with expected cash flows, prevailing circumstances as of the resolution decision date, risk-free interest rates, risk premia for similar financial instruments issued by similar entities, market conditions or discount rates applied by potential acquirers and other relevant characteristics of the element or elements being valued ('relevant discount rate'). The relevant discount rate shall not apply where particular rates, if relevant for the purposes of the valuation, are specified in applicable insolvency law or practice.

3 The valuer shall take the following into account in the determination of the discounted amount of expected cash flows under normal insolvency proceedings:

a applicable insolvency law and practice in the relevant jurisdiction, which may influence factors such as the expected disposal period or recovery rates;

b reasonably foreseeable administration, transaction, maintenance, disposal and other costs which would have been incurred by an administrator or insolvency practitioner, as well as financing costs;

c the information on recent past insolvency cases of similar entities, where available and relevant.

4 For assets traded in an active market, the valuer shall use the observed price, except where specific circumstances hamper the marketability of the assets of the entity, such as concentration, saturation and depth of the market.

5 For assets not traded in an active market, the valuer shall consider a number of factors when determining the amount and timing of expected cash flows, including:

a prices observed in active markets where similar assets are traded;

b prices observed in normal insolvency proceedings or otherwise distressed transactions involving assets of a similar nature and condition;

c prices observed in transactions involving the sale of business or the transfer to a bridge institution or an asset management vehicle in a resolution context relating to similar entities;

d the likelihood of an asset generating net cash inflows under normal insolvency proceedings;

e expected market conditions within a given disposal period, including market depth and the ability of the market to exchange the relevant volume of assets within that period; and

f the length of a given disposal period shall reflect the implications of the applicable insolvency law, including the expected length of the liquidation process, or the characteristics of the relevant assets.

6 The valuer shall consider whether the financial condition of the entity would have affected the expected cash flows, including through restrictions on the administrator's ability to negotiate terms with potential purchasers.

7 Where possible, and subject to any applicable provision of the relevant insolvency regime, the cash flows shall reflect the contractual, statutory, or other legal rights of creditors or normal insolvency practices.

8 The hypothetical proceeds resulting from the valuation shall be allocated to shareholders and creditors in accordance with their priority level under the applicable insolvency law, as provided for in Article 3.

9 For the purpose of determining any unsecured amount of derivatives claims in insolvency, the valuer shall apply methodologies set out in Commission Delegated Regulation (EU) 2016/1401[(4)], to the extent consistent with insolvency law and practice.