

July 12, 2017

## FSB Resolution Planning Principles

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### FSB Finalizes Guiding Principles on the Internal Total Loss-Absorbing Capacity of G-SIBs and Guidance on Achieving Continuity of Access to Financial Market Infrastructures

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Last week, the Financial Stability Board (“FSB”) released final guidance on two important aspects of international regulators’ approach to more robust resolution planning for Global Systemically Important Banks (“G-SIBs”). The first, the Guiding Principles on the Internal Total Loss-Absorbing Capacity (“Internal TLAC”) of G-SIBs (“*Final Internal TLAC Principles*”),<sup>1</sup> address high-level guiding principles to assist Crisis Management Groups (“CMGs”)<sup>2</sup> in the implementation of the sections in the FSB’s November 9, 2015 Term Sheet (“*TLAC Term Sheet*”) that address Internal TLAC.<sup>3</sup>

The second, the Guidance on the Continuity of Access to Financial Market Infrastructures (“*FMI*”) for a Firm in Resolution (“*Final FMI Guidance*”), provides guidance to FMI service providers, FMI service users and the regulators of the two with respect to the continuity of access to the FMI’s services during the resolution of the FMI service user.<sup>4</sup>

Substantively, both the Final Internal TLAC Principles and the Final FMI Guidance are largely unchanged from the FSB’s consultative documents regarding Internal TLAC (the “*Proposed Internal TLAC Principles*”) and FMI continuity that were released in December, 2016, although some adjustments were made in response to comments made by financial industry participants and others.<sup>5</sup>

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#### FINAL INTERNAL TLAC PRINCIPLES

Sections 16 through 19 of the TLAC Term Sheet addressed, in summary form, the key elements of the FSB’s expectations regarding Internal TLAC,<sup>6</sup> including: (i) the identification of material sub-groups,<sup>7</sup> (ii) the respective roles of home authorities, host authorities and CMGs in determining the composition of material sub-groups, (iii) the size and scaling of the Internal TLAC requirement and (iv) the core features

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of eligible Internal TLAC.<sup>8</sup> The Final Internal TLAC Principles comprise 20 principles,<sup>9</sup> covering five aspects of the TLAC Term Sheet's Internal TLAC provisions:

- **First**, the process for identifying material sub-groups, the composition of material sub-groups, the distribution of Internal TLAC within material sub-groups and the treatment of unregulated or non-bank entities;
- **Second**, the role of home and host authorities and the factors to be considered when determining the size of the Internal TLAC requirement;
- **Third**, practical considerations relating to the issuance and composition of Internal TLAC;
- **Fourth**, features of the trigger mechanism for Internal TLAC; and
- **Fifth**, cooperation and coordination between home and host authorities in triggering the write-down and/or conversion into equity of Internal TLAC.<sup>10</sup>

Industry comments on the Proposed Internal TLAC Principles sought, in some cases, to introduce greater flexibility into the Final Internal TLAC Principles than a literal reading of the TLAC Term Sheet suggests. In other cases, the comments sought to have the Final Internal TLAC Principles moderate the implications of the TLAC Term Sheet's general language.<sup>11</sup> With limited exceptions, the Final Internal TLAC Principles reflect the FSB's decision not to respond positively to those comments. In particular:

- In a situation where the sum of the Internal TLAC requirements applicable to an entity's material sub-groups exceeds the top-tier parent's external TLAC, the industry sought confirmation that host authorities should scale down the Internal TLAC requirements on a *pro rata* basis so that aggregate Internal TLAC of material sub-groups does not exceed the parent external TLAC. Although the Final Internal TLAC Principles deleted a statement in the proposal's text accompanying principle no. 5 that "there is no presumption that host authorities would apply a lower internal TLAC requirement if the sum of internal TLAC requirements exceeds the resolution group's external TLAC,"<sup>12</sup> the Final Internal TLAC Principles retain the statement in text accompanying principle no. 6 that, in that circumstance, "the home authority should take action to ensure that the G-SIB has sufficient external TLAC (as per Section 18 of the TLAC term sheet)."<sup>13</sup>
- Although principle no. 1 includes new language specifying that "[t]he home authority should initiate and coordinate the process for identifying material subgroups," it leaves to host authorities the ultimate determination of "which sub-groups should be identified as material and therefore subject to an internal TLAC requirement."<sup>14</sup>
- The industry sought an acknowledgment that the Internal TLAC requirement applicable to a material sub-group should be limited to the low end of the 75-90% range of the amount of the external TLAC requirement that would be applicable to a similarly situated resolution entity in a host jurisdiction. However, the FSB did not include in the Final Internal TLAC Principles language, directly or impliedly, modifying the TLAC Term Sheet's Internal TLAC sizing requirements or the factors that should inform determinations of Internal TLAC requirements.
- The industry sought an express acknowledgment that it would be preferable to maximize contributable assets held at the parent level, in order to mitigate the risks that excessive pre-allocation of resources to material sub-groups through Internal TLAC would prevent the parent from having sufficient resources to recapitalize material sub-groups on an as-needed basis. The FSB declined to do so.
- The industry sought to remove any expectation that a material sub-group's Internal TLAC consist of debt liabilities in an amount equal to, or greater than, 33% of the material sub-group's Internal TLAC requirement. The FSB did not change or qualify that expectation.<sup>15</sup>

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- The industry sought to have a G-SIB's or intermediate holding company's ("IHC") commitment to provide capital support through a secured support agreement qualify as Internal TLAC, in addition to permitting collateralized guarantees to qualify as a component of Internal TLAC (which was expressly permitted by the TLAC Term Sheet and the Proposed Internal TLAC Guidelines).<sup>16</sup> All eight of the U.S. G-SIBs have implemented some form of a secured support agreement to provide capital and funding to their material entities upon the occurrence of material financial distress in response to guidance of the Federal Reserve Board of Governors and the Federal Deposit Insurance Corporation regarding the July 2017 resolution plan submissions.<sup>17</sup> The Final Internal TLAC Principles do not endorse or acknowledge the role of these secured support agreements in U.S. G-SIBs' resolution planning.

In addition, the Final Internal TLAC Principles, like the Proposed Internal TLAC Principles, list "the overall credibility and feasibility of the home authority's resolution strategy for the resolution group" as one factor that a host authority should consider in scaling the Internal TLAC requirement for material sub-groups within their jurisdiction.<sup>18</sup> Notably, however, the FSB did not include any express principle requiring host authority deference to the home authority in cases where the amount of Internal TLAC required by the host authority could actually impair the credibility and feasibility of the home authority's resolution strategy. The absence of such a principle of deference may impair international cooperation in scaling Internal TLAC requirements.

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### FINAL FMI GUIDANCE

The Final FMI Guidance is a further supplement to the guidance provided in the FSB's Key Attributes of Effective Resolution Regimes for Financial Institutions<sup>19</sup> and is intended to assist in ensuring continuity of access to FMI services during the resolution of a financial institution. The Final FMI Guidance is divided into three sections:

- The first section provides guidance to FMI service providers on how to take appropriate steps to consider and plan for the interaction between the resolution regimes of their users or members and their own risk management framework with the goal of facilitating continued FMI access whenever possible without jeopardizing the safe and sound operation of the FMI;
- The second section provides guidance to FMI service users on steps that they can take to facilitate their continued access to critical FMI services during resolution based on analysis of a firm's ability to continue to meet obligations to the FMI and on the provision of information to FMIs and regulators in advance of, and during, resolution; and
- The third section provides guidance to the relevant regulatory authorities of both FMI service providers and the users of FMI services on cooperation arrangements during the resolution of a user.

The first section's guidance for FMI service providers applies not only to FMIs themselves, but also to the intermediaries (such as clearing agents and custody banks) that provide services to third parties to facilitate the third parties' access to FMI services.<sup>20</sup> The guidance is founded on the principle that the mere commencement of resolution proceedings with respect to an FMI service user or its affiliates should not be grounds for the suspension or termination of the user's access to any FMI.<sup>21</sup> However, FMI service providers "should have objectives that place a high priority on the safety and efficiency of the FMI and explicitly support financial stability."<sup>22</sup> To that end, the Final FMI Guidance provides:

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- The rules, contracts and procedures of FMI service providers should reflect any provision of applicable law that limits or restricts the ability of the FMI service provider to terminate or suspend access to the service for reasons related to resolution of the user (e.g., stays on counterparties exercising termination rights upon entry into insolvency proceedings). Such an approach will assist in ensuring that the requirements of the resolution regimes governing the FMI service users will be given effect, even if they are governed by a law other than the law that governs the FMI service provider.
- To the extent that an FMI service provider does have the right to take action upon the commencement of a resolution proceeding with respect to an FMI service user, this right should be laid out clearly in the FMI service procedures rules, contracts and procedures.
- An FMI service provider *should* retain its right to restrict, suspend or terminate access to the services if the user does not meet its obligations as set out in the relevant legal arrangements.
- Unless necessary to safeguard the safety and soundness of the FMI, FMI service providers should not discriminate between domestic and foreign FMI service users. The guidance acknowledges that this principle depends upon a presumption that the jurisdiction governing the resolution of a foreign FMI service user contains adequate safeguards for the FMI service provider.
- FMI service providers should discuss resolution risk management actions and requirements with FMI service users, including any additional requirements that the FMI service provider may impose on the user during the resolution of the user or its affiliate, to establish a common set of expectations.
- FMI service providers should be required to test regularly the effectiveness of the arrangements that would apply if one of their users were to enter resolution.

While the second section's guidance for FMI service users, overall, suggests that FMI service providers should ensure that their legal arrangements with FMI service users provide for continuity of access to the FMI service users during resolution – a key consideration in resolution planning, the Final FMI Guidance does recognize that the ultimate burden of ensuring continued FMI service access is on the FMI service user and, therefore, focuses significantly on the steps that the service user should take to ensure continuity of access. The primary focus of the second section is the contingency plans that FMI users should have in place for continued access to critical FMI services during resolution and the related analysis of financial and informational obligations necessary to maintain such access. Key aspects of the contingency plan and related analysis include:

- The contingency plan should provide a mapping of the financial institution's use of critical FMI services to the entities, business lines and critical functions within the financial institution;
- A detailed, up-to-date repository of information regarding the anticipated financial and non-financial requirements for continued access (including any usage and size of credit facilities they may receive for access to the FMI services);
- The plan should detail operational and organizational arrangements necessary to put the contingency plan into effect;
- The financial institution's plan for addressing the informational, financial and liquidity obligations for continued access to the FMI services; and
- A high-level impact analysis should be performed on the effects of the FMI service provider terminating or denying access to the service.

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The contingency plan should be based, to the extent practicable, on information provided by the FMI service provider, derived from engagement with FMI service providers to understand, as much as possible, how each FMI service provider would expect to respond to the entry into resolution of the financial institution, its parent or affiliate.

The third section of the Final FMI Guidance recognizes that regulators will play a significant role in facilitating continuity, principally by: (i) balancing their objectives in overseeing FMI service providers and their objectives in resolution planning for FMI service users, (ii) facilitating discussions among relevant authorities, (iii) sharing information between resolution authorities and authorities responsible for critical FMI service providers to ensure that as much advance notice as possible is given of actions that may affect continued access to FMI services and (iv) maintaining arrangements to facilitate that information sharing and assessing the credibility and feasibility of plans by resolution authorities and firms to maintain continuity of access.

While much of this guidance is consistent with the guidance provided to U.S. firms in connection with their 2017 and prior resolution planning exercises, the guidance comes down firmly in favor of pressing FMI service providers to maintain access for firms in resolution, while acknowledging that safety and soundness may prevent them from doing so in some circumstances. For example, prohibiting FMI service providers from terminating or suspending access so long as users in resolution continue to comply with their obligations to the FMI effectively would apply to FMI the same limitations on remedies that are contained in the ISDA Resolution Protocol,<sup>23</sup> even though qualified financial contracts cleared or settled through FMIs are currently excluded from the requirement to implement the protocol.<sup>24</sup> However, as noted above, the guidance does acknowledge the need for national authorities to ensure that their legal frameworks are sufficient to protect the safety and soundness of FMIs that permit continued participation by users in resolution.<sup>25</sup>

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## ENDNOTES

- <sup>1</sup> FSB, Guiding Principles on the Internal Total Loss-Absorbing Capacity of G-SIBs ('Internal TLAC') (July 6, 2017), *available at* <http://www.fsb.org/wp-content/uploads/P060717-1.pdf>.
- <sup>2</sup> Under the FSB's guidance, home and key host authorities of all G-SIBs should maintain CMGs consisting of supervisory authorities, central banks, resolution authorities, finance ministries and public authorities responsible for guarantee schemes, in order to prepare for, and facilitate the resolution of, a cross-border financial crisis affecting G-SIBs. See FSB, Key Attributes of Effective Resolution Regimes for Financial Institutions, at 14 (Oct. 15, 2014), *available at* [http://www.fsb.org/wp-content/uploads/r\\_141015.pdf](http://www.fsb.org/wp-content/uploads/r_141015.pdf) (hereinafter Key Attributes).
- <sup>3</sup> See FSB, Principles on Loss-absorbing and Recapitalisation Capacity of G-SIBs in Resolution, Total Loss-Absorbing Capacity (TLAC) Term Sheet, at 17–20, §§ 16–19 (Nov. 9, 2015), *available at* <http://www.fsb.org/wp-content/uploads/TLAC-Principles-and-Term-Sheet-for-publication-final.pdf>. Under the FSB's approach, Internal TLAC constitutes the amount of TLAC committed to a G-SIB's material sub-groups, which are subsidiaries or groups of subsidiaries that meet the TLAC Term Sheet's materiality thresholds and are incorporated in a host jurisdiction (*i.e.*, outside of the G-SIB's home jurisdiction). *Id.* at 17–19, §§ 16–17.
- In contrast, the guidance issued to date by the Federal Reserve Board of Governors and the Federal Deposit Insurance Corporation applicable to U.S. G-SIBs has not distinguished between subsidiaries in home versus host jurisdictions in defining and sizing Internal TLAC. See, *e.g.*, Guidance for 2017 § 165(d) Annual Resolution Plan Submissions by Domestic Covered Companies that Submitted Resolution Plans in July 2015, at 4, *available at* <https://www.fdic.gov/news/news/press/2016/pr16031b.pdf> (hereinafter 2017 Guidance). For additional information on the Federal Reserve's rule adopting Internal TLAC requirements for U.S. IHCs of non-U.S. G-SIBs, see our memoranda to clients titled Loss Absorbency Requirements: Federal Reserve Adopts Final TLAC and Related Requirements for U.S. G-SIBs and U.S. Intermediate Holding Company Subsidiaries of Non-U.S. G-SIBs (Dec. 16, 2016), *available at* [https://www.sullcrom.com/siteFiles/Publications/SC\\_Publication\\_Loss\\_Absorbency\\_Requirements\\_12\\_16\\_16.pdf](https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Loss_Absorbency_Requirements_12_16_16.pdf), and Loss Absorbency Requirements: Federal Reserve Proposes Loss Absorbency Requirements for U.S. G-SIBs and U.S. Intermediate Holding Company Subsidiaries of Non-U.S. G-SIBs, Projects \$120 Billion Shortfall for Covered U.S. G-SIBs (Nov. 4, 2015), *available at* [https://www.sullcrom.com/siteFiles/Publications/SC\\_Publication\\_Loss\\_Absorbency\\_Requirements.PDF](https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Loss_Absorbency_Requirements.PDF).
- <sup>4</sup> FSB, Guidance on Continuity of Access to Financial Market Infrastructures ("FMIs") for a Firm in Resolution (July 6, 2017), *available at* <http://www.fsb.org/wp-content/uploads/P060717-2.pdf>.
- <sup>5</sup> See FSB, Consultative Document, Guiding Principles on the Internal Total Loss-Absorbing Capacity of G-SIBs ('Internal TLAC') (Dec. 16, 2016), *available at* <http://www.fsb.org/wp-content/uploads/Guiding-Principles-on-the-Internal-Total-Loss-absorbing-Capacity-of-G-SIBs.pdf>; FSB, Consultative Document, Guidance on Continuity of Access to Financial Market Infrastructures ("FMIs") for a Firm in Resolution (Dec. 16, 2016), *available at* <http://www.fsb.org/wp-content/uploads/Continuity-of-Access-to-FMIs-Consultation-Documents-FINAL.pdf>.
- <sup>6</sup> Sections 16–19 of the TLAC Term Sheet are attached as Annex 4 to the Final Internal TLAC Principles, *supra* note 1.
- <sup>7</sup> Under the TLAC Term Sheet, the materiality of a G-SIB's sub-group is assessed primarily using financial statement tests, namely, if a G-SIB's subsidiary (or group of subsidiaries on a sub-consolidated basis): (i) has more than 5% of the consolidated risk-weighted assets of the G-SIB group, (ii) generates more than 5% of the total operating income of the G-SIB group, (iii) has a total leverage exposure larger than 5% of the G-SIB group's consolidated leverage exposure



ENDNOTES (CONTINUED)

measure or (iv) has been identified by the G-SIB's CMG as material to the exercise of the firm's critical functions. See TLAC Term Sheet, *supra* note 3 at 18, § 17.

8 *Id.* at 17–20, §§ 16–19.

9 A comparison of the final version of the guiding principles against the draft set forth in the Proposed Internal TLAC Principles are attached hereto as Annex A.

10 Final Internal TLAC Principles, *supra* note 1, at 2.

11 See, e.g., The Clearing House et al., Comment Letter on Proposed Guiding Principles on Internal TLAC – Consultative Document, dated December 16, 2016 (Feb. 17, 2017), available at <https://www.aba.com/Advocacy/commentletters/Documents/JointCommentLettertoFSBonProposedInternalTLACGuidingPrinciples.pdf>.

12 Proposed Internal TLAC Principles, *supra* note 5, at 14.

13 See Final Internal TLAC Principles, *supra* note 1, at 9; see also TLAC Term Sheet, *supra* note 3 at 19, § 18 (“The resolution entity should issue and maintain at least as much external TLAC as the sum of internal TLAC, which it has provided or committed to provide, and any TLAC needed to cover material risks on the resolution entity’s own balance sheet. However, external TLAC may be lower if and to the extent this is due to consolidation effects only.”).

14 Final Internal TLAC Principles, *supra* note 1, at 3.

15 See Final Internal TLAC Principles, *supra* note 1, at 10–11 (“Host authorities in consultation with the home authority may consider the inclusion within the internal TLAC requirement of an expectation that internal TLAC consist of debt liabilities accounting for an amount equal to, or greater than, 33% of the material sub-group’s internal TLAC requirement.”); see also TLAC Term Sheet, *supra* note 3 at 12, § 6 (describing the long-term debt expectation regarding external TLAC).

16 See TLAC Term Sheet, *supra* note 3 at 20, § 19; Proposed Internal TLAC Principles, *supra* note 5, at 17–18.

17 See 2017 Guidance, *supra* note 3, at 11.

18 Final Internal TLAC Principles, *supra* note 1, at 8; Proposed Internal TLAC Principles, *supra* note 5, at 14.

19 See Key Attributes, *supra* note 2.

20 The guidance directed at FMI service providers does not apply to any FMI operated or owned by a central bank, but central banks “may choose to take [the guidance] into consideration.” Final FMI Guidance, *supra* note 4, at 6 n.8.

21 *Id.* at 8.

22 *Id.* at 11 (citation omitted).

23 See International Swaps and Derivatives Association, Inc., ISDA 2015 Universal Resolution Stay Protocol (Nov. 4, 2015), available at <http://assets.isda.org/media/ac6b533f-3/5a7c32f8-pdf/>.

24 See, e.g., Federal Reserve Board of Governors, Restrictions on Qualified Financial Contracts of Systemically Important U.S. Banking Organizations and the U.S. Operations of Systemically Important Foreign Banking Organizations; Revisions to the Definition of Qualifying Master Netting Agreement and Related Definitions, 81 Fed. Reg. 29,169 (Aug. 5, 2016).

25 See Final FMI Guidance, *supra* note 4, at 9–10 (“Applying the same arrangements to a foreign FMI service user is based on the presumption that the resolution framework in the jurisdiction in which the foreign participant is located provides adequate safeguards to the provider of critical FMI services. . . . These safeguards should be the subject of further development to ensure appropriate and consistent application, taking into account the applicable regulatory, supervisory

**ENDNOTES (CONTINUED)**

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and oversight requirements for FMI and the regulatory and supervisory requirements for FMI intermediaries. They are also without prejudice to the general desirability of establishing comprehensive statutory regimes for giving cross-border effect to resolution action.”) (citation omitted).



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## Annex A

### Comparison of Guiding Principles under the Final Internal TLAC Principles versus under the Proposed Internal TLAC Principles

#### I. Material sub-group identification and composition

##### *Guiding Principle 1: Material sub-group identification*

The home authority should initiate and coordinate the process for identifying material sub-groups. Host authorities should identify material sub-group(s) in their jurisdiction, in consultation with the home authority and the CMG. The home ~~authority~~ and host authorities within the CMG should ~~initiate and coordinate the process for identifying material sub-groups (and the annual review of the list of material sub-groups) with the host authorities and the CMG on an annual basis.~~

##### *Guiding Principle 2: Material sub-group composition and distribution of internal TLAC*

Host authorities of a subsidiary or subsidiaries that (together or individually) meet the criteria in Section 17 of the TLAC term sheet should determine, in consultation with the home authority and the CMG, the composition of the material sub-group and the distribution of internal TLAC ~~between~~ among the entities that form the material sub-group. The composition of the material sub-group and the distribution of internal TLAC should support the resolution strategy by facilitating the stabilisation of the relevant entities within the material sub-group through the passing of losses and recapitalisation needs to the resolution entity.

##### *Guiding Principle 3: Multi-jurisdictional material sub-groups*

Material sub-groups should only consist of entities in more than one jurisdiction where there is a single resolution regime covering those jurisdictions or a high degree of cooperation and coordination between the host authorities in those jurisdictions.

##### *Guiding Principle 4: Regulated or unregulated non-bank entities*

Regulated or unregulated non-bank entities should be designated as or included in material sub-groups only to the extent that the inclusion of such entities is necessary to ensure that the resolution strategy for the resolution group is credible and feasible, and that ~~continuation~~ continuity of the entities, or of the services they provide, cannot be achieved through alternative arrangements (e.g. a sector-specific resolution regime or other prudential framework).

#### II. Size of the internal TLAC requirement

##### *Guiding Principle 5: The role of the host authority*

Host authorities retain ultimate responsibility for setting internal TLAC requirements for the material sub-~~group(s)~~ groups in their jurisdiction, ~~but~~ and, in doing so, scaling the requirement within the 75% - 90% range consistent with the TLAC term sheet. Establishment of the requirement should ~~do so~~ be done in consultation with the home authority. ~~When setting the~~ The

internal TLAC requirement, ~~host authorities~~ should be set so as to ensure that there is sufficient internal TLAC to cover the loss-absorption and recapitalisation needs of the material sub-group and to support the agreed resolution strategy for the resolution group. Host authorities should also recognise that their requirements will have implications for the resolution group and take this into account when setting internal TLAC requirements.

*Guiding Principle 6: The role of the home authority*

To promote consistency of internal TLAC requirements across material sub-groups of the same resolution group and with a view to ensuring that internal TLAC does not exceed external Minimum TLAC, the home authority should coordinate the host authorities' assessments of internal TLAC requirements and provide information to the host authorities as necessary to support their assessments.

*Guiding Principle 7: Surplus TLAC*

~~In cases where there is TLAC at the resolution entity~~ that is not distributed to material sub-groups (~~'surplus TLAC'~~) in excess of that required to cover risks on the resolution entity's solo balance sheet, ('surplus TLAC') should be readily available to the resolution entity to recapitalise any direct or indirect subsidiary. Home authorities should consider the characteristics of the ~~correspondent~~corresponding assets ~~of~~in which such surplus TLAC is held to ensure that it is readily available to recapitalise any direct or indirect subsidiary, as required by Section 18 of the TLAC term sheet. Authorities should ensure that there are no legal and operational barriers to recapitalisation.

### **III. Composition and issuance of internal TLAC**

*Guiding Principle 8: Internal TLAC composition*

Host authorities should determine the composition of internal TLAC in consultation with the home authority. In particular, host authorities should consult with the home authority on the impact that the composition of internal TLAC relative to external TLAC could have on the credibility and sustainability of the resolution strategy and the ability of the material sub-group to effectively pass losses and recapitalisation needs to the resolution entity.

Host authorities in consultation with the home authority may consider the inclusion within the internal TLAC requirement of an expectation that internal TLAC consist of debt liabilities accounting for an amount equal to, or greater than, 33% of the material sub-group's internal TLAC requirement. In applying such an expectation, host authorities should take into account the composition of the material sub-group's existing internal TLAC instruments and the practicality of making changes to it, with a view to ensuring that the material sub-group is not required to issue additional internal TLAC beyond the requirement set by the host authority.

*Guiding Principle 9: Collateralised guarantees*

Home and relevant host authorities in CMGs may jointly agree to substitute on-balance sheet internal TLAC with internal TLAC in the form of collateralised guarantees, subject to the conditions in Section 19 of the TLAC term sheet. The host authority should satisfy itself that the

collateralised guarantee will credibly and feasibly pass losses and recapitalisation needs to the resolution entity at the Point of Non-Viability (PONV).<sup>1</sup>

*Guiding Principle 10: Internal TLAC issuance*

The issuance of internal TLAC by a material sub-group—~~whether issued directly from the relevant entity within the material sub-group to the resolution entity or indirectly through each legal entity in the chain of corporate ownership~~—should credibly support the resolution strategy and the passing of losses and recapitalisation needs to the resolution entity. If this cannot be achieved, authorities should ~~consider requiring~~require the G-SIB to make changes to their internal TLAC issuance strategies in order to improve its resolvability. For example, internal TLAC may be issued directly from the relevant entity within the material sub-group to the resolution entity or indirectly through multiple legal entities within the group. To avoid possible double counting, authorities should consider applying an internal TLAC deduction approach or an equivalently robust supervisory approach.

*Guiding Principle 11: Internal TLAC governing law*

Internal TLAC should generally be subject to the governing law of the jurisdiction in which the material sub-group entity issuing the internal TLAC is incorporated. It may be issued under or be otherwise subject to the laws of another jurisdiction if, under those laws, the application of resolution tools by the relevant resolution authority, or the write-down or conversion into equity of instruments at PONV by the relevant authority, is effective and enforceable on the basis of binding statutory provisions or legally enforceable contractual provisions for the recognition of resolution actions and statutory PONV write-down powers.

*Guiding Principle 12: Internal TLAC obstacles*

Authorities and G-SIBs should identify and address any legal, regulatory or operational obstacles that may arise from the implementation of internal TLAC mechanisms.

#### **IV. Features of trigger mechanisms for internal TLAC**

*Guiding Principle 13: ~~Contractual trigger clauses~~Trigger conditions*

~~Contractual~~ Triggers for internal TLAC should specify the conditions under which a write-down and/or conversion into equity is expected to take place.

*Guiding Principle 14: ~~Point of non-viability powers~~<sup>2</sup>*

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<sup>1</sup> As used in this guidance, PONV should be understood to refer to situations when the relevant authorities determine that a firm is 'failing or likely to fail' or 'in default or in danger of default' or other equivalent descriptions appropriate to the specific characteristics including legal frameworks of different jurisdictions.

<sup>2</sup> ~~PONV powers as used in this document refers to the ability and/or obligation of an authority to write down and/or convert to equity regulatory capital and/or other TLAC instruments when the authority determines (with the home authority's consent where this is required for non-regulatory capital TLAC instruments) that without such a write-down and/or conversion the relevant entity would become non-viable.~~

~~Where statutory PONV powers are relied on to write down and/or convert into equity internal TLAC in the form of regulatory capital instruments outside of resolution, authorities should consider if those powers should be complemented with appropriate contractual PONV triggers.~~

## V. The home-host process for triggering internal TLAC

### Stage 1 – Home and host communication prior to triggering internal TLAC

*Guiding Principle ~~15~~14: Home and host communication*

Host authorities should make home authorities aware as far as possible in advance that they are considering making a determination that the material sub-group has reached PONV. This applies regardless of whether internal TLAC is triggered through statutory powers (in the case of regulatory capital instruments) or contractual triggers.

*Guiding Principle ~~16~~15: Options to restore material sub-group viability*

Home and host authorities should consider alternative options to restore the material sub-group's viability. Internal TLAC should only be triggered as a 'last resort' option when PONV is reached and no credible alternative options to restore the material sub-group's viability are available.

### Stage 2 – Determination to trigger internal TLAC

*Guiding Principle ~~17~~16: Triggering internal TLAC*

The host authority's decision to trigger internal TLAC should be based on the determination that the material sub-group has reached ~~the point of non-viability~~PONV, and not be driven ~~solely~~primarily by resolution actions or the triggering of TLAC elsewhere in the group.

*Guiding Principle ~~18~~17: Home authority consent*

Where the consent of the home authority of the resolution entity is required to trigger internal TLAC<sup>3</sup> the host authority should – once it has reached a determination that the material sub-group has reached PONV – provide the home authority with sufficient time, for example 48 hours, to decide whether to consent to the write-down and/or conversion into equity of internal TLAC. Consistent with guiding principle ~~15~~14, communication and coordination between home and host authorities should commence as early as possible and well in advance of making a determination that the material sub-group has reached PONV.

### Stage 3 – Write-down and/or conversion of internal TLAC

*Guiding Principle ~~19~~18: Material sub-group recapitalisation*

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<sup>3</sup> Consistent with Section 19 of the TLAC term sheet, consent from the home authority of the resolution entity is required for the triggering of non-regulatory capital instruments that are used to meet internal TLAC requirements. Trigger conditions for certain regulatory capital instruments are set out in the Basel Committee's point of non-viability (PON) press release of 13 January 2011. See <http://www.bis.org/press/p110113.htm>.

The host authority should determine the capital shortfall and recapitalisation level of a material sub-group that has reached PONV. The host authority should assist the home authority with its assessment of the condition of the resolution entity and the resolution group, including any subsidiaries in the host jurisdiction.

*Guiding Principle 2019: Choice of write-down or conversion into equity*

Home and host authorities should ensure that the write-down and/or conversion into equity of internal TLAC in the form of regulatory capital instruments that are held by third parties does not (i) result in a potential change of control of the material sub-group that would be inconsistent with the resolution strategy for the resolution group or prohibited by the legal framework; or (ii) give rise to material risk of successful legal challenge.

*Guiding Principle 20: Conformance period*

G-SIBs should be expected to meet the internal TLAC requirement as from the date when they are expected to comply with the TLAC standard and implement the Minimum external TLAC requirement as provided in section 21 of the TLAC term sheet. If during the implementation period or thereafter a new sub-group is identified as material, for example due to restructurings, acquisitions, operational changes or changes in sub-group composition, the sub-group should meet the internal TLAC requirement within 36 months from the date of its identification as a material sub-group at the latest, or within an appropriate shorter period as determined by the host authority in consultation with the home authority.