

**Model clause for the
contractual
recognition of bail-in
under Article 55 BRRD**

September 2015



IMPORTANT NOTICE

The AFME Article 55 Model Clause for Debt Liabilities (the “Model Clause”) has been prepared for the Association for Financial Markets in Europe for use by issuers of debt securities organized in the United Kingdom that are subject to the requirements of Article 55 of Directive 2014/59/EU,¹ as transposed in the United Kingdom. The Model Clause is for use in debt securities of such issuers that are governed by New York law.² Whilst every care has been taken in the preparation of this Model Clause, use of the Model Clause is subject to the following terms.

No representation or warranty is given by AFME, its advisors, or any of the participants of its working group, including without limitation:

- as to the suitability of the Model Clause for any particular transaction or purpose;
- that the Model Clause will cover any particular eventuality;
- as to the accuracy or completeness of the contents of the Model Clause for the agreement or instrument in question.

In particular, users of the Model Clause should satisfy themselves as to the regulatory and commercial implications of its use, and consult with local counsel, both in New York and the United Kingdom, whether the Model Clause is appropriate for the terms of the commercial transaction. When considering use of this Model Clause, the particular nature of a given transaction or offering, the commercial considerations, the governing law of the instrument, the legal framework governing the jurisdictions where the parties are incorporated and carry out business activities, and interactions of such governing laws and regimes will determine the ultimate form and substance of the provisions governing the contractual recognition of bail-in.

The Model Clause is not intended for use with master agreements sponsored by a trade association or similar group, such as master agreements published by the International Swaps and Derivatives Association, the International Capital Markets Association, the International Securities Lending Association, or the Securities Industry and Financial Markets Association. Parties should consult with the sponsor of any such master agreement with respect to compliance with Article 55 and related requirements.

Neither AFME nor its advisers are liable for any losses suffered by any person as a result of any contract or agreement made using the terms of the Model Clause or which may arise from the presence of any errors or omissions in the Model Clause, and no proceedings shall be taken by any person against AFME or its advisers in relation to such losses.

¹ [Directive 2014/59/EU](#) of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms (the “BRRD”)

² Model clauses aimed at debt instruments issued by UK issuers under other third-country governing laws, and issued by other issuers in other EU jurisdictions subject to Article 55 and governed by New York and other third-country law, are also being developed by AFME.

AFME Article 55 Model Clause for Debt Liabilities

(UK issuer of New York law governed debt liabilities)

Agreement and acknowledgement with respect to the exercise of the UK Bail-in Power

Notwithstanding any other term of the [Securities / Notes] or any other agreements, arrangements, or understandings between the Issuer and any [securityholder / noteholder], by its acquisition of the [Securities / Notes], each [securityholder / noteholder] (which, for the purposes of this clause, includes each holder of a beneficial interest in the [Securities / Notes]) acknowledges, accepts, consents³ and agrees to be bound by:

- a. the effect of the exercise of the UK bail-in power by the relevant UK resolution authority, that may include and result in any of the following, or some combination thereof:
 - i. the reduction of all, or a portion, of the Amounts Due;⁴
 - ii. the conversion of all, or a portion, of the Amounts Due on the [Securities / Notes] into shares, other securities or other obligations of the Issuer or another person (and the issue to or conferral on the [securityholder / noteholder] of such shares, securities or obligations), including by means of an amendment, modification or variation of the terms of the [Securities / Notes];⁵
 - iii. the cancellation of the [Securities / Notes];
 - iv. the amendment or alteration of the maturity of the [Securities / Notes] or amendment of the amount of interest payable on the [Securities / Notes], or the date on which the interest becomes payable, including by suspending payment for a temporary period;⁶
- b. the variation of the terms of the [Securities / Notes], if necessary, to give effect to the exercise of the UK bail-in power by the relevant UK resolution authority.

For these purposes, the “Amounts Due” are the principal amount of [or outstanding amount]⁷, together with any accrued but unpaid interest, due on the [Securities / Notes]. [References to such amounts will include amounts that have become due and payable, but which have not been paid, prior to the exercise of the UK bail-in power by the relevant UK resolution authority.]⁸

Bail-in definition

For these purposes, the “UK bail-in power” is any write-down, conversion, transfer, modification, or suspension power existing from time to time under, and exercised in compliance with, any laws, regulations, rules or requirements in effect in the United Kingdom, relating to the transposition of

³ Although the final draft RTS eliminated the term “consent,” the Model Clause retains this term in order to satisfy section 316(b) of the Trust Indenture Act

⁴ Reflecting Article 63(1)(e), as per the requirement in Article 3(b) of the final report RTS

⁵ Reflecting Article 63(1)(f) as per the requirement in Article 3(b) and (c) of the final report RTS

⁶ Reflecting Article 63(1)(j) BRRD, as per the requirement in Article 3(b) of the final report RTS

⁷ **Note to issuer’s counsel:** Inclusion of “outstanding amount” will depend on the type of instrument being issued. “Amounts Due” should reflect all amounts due under the instrument, including amounts additional to outstanding principal and interest, such as tax gross-ups. Ordinarily, a definition including principal, or outstanding amount, and accrued but unpaid interest, will be sufficient

⁸ Relevant for AT1 and Subordinated Tier 2 issuances

Directive 2014/59/EU establishing a framework for the recovery and resolution of credit institutions and investment firms (the “BRRD”) as amended from time to time, including but not limited to the Banking Act 2009 as amended from time to time, and the instruments, rules and standards created thereunder, pursuant to which:

- a. any obligation of a regulated entity (or other affiliate of such regulated entity) can be reduced, cancelled, modified, or converted into shares, other securities, or other obligations of such regulated entity or any other person (or suspended for a temporary period);⁹ and
- b. any right in a contract governing an obligation of a regulated entity may be deemed to have been exercised.¹⁰

A reference to a “regulated entity” is to any BRRD Undertaking as such term is defined under the PRA Rulebook promulgated by the United Kingdom Prudential Regulation Authority, as amended from time to time, which includes, certain credit institutions, investment firms, and certain of their parent or holding companies.

Payment of interest and other outstanding amounts due

No repayment or payment of Amounts Due on the [Securities / Notes], will become due and payable or be paid after the exercise of any UK bail-in power by the relevant UK resolution authority if and to the extent such amounts have been reduced, converted, cancelled, amended or altered as a result of such exercise.

Event of default

Neither a reduction or cancellation, in part or in full, of the Amounts Due, the conversion thereof into another security or obligation of the Issuer or another person, as a result of the exercise of the UK bail-in power by the relevant UK resolution authority with respect to the Issuer, nor the exercise of the UK bail-in power by the relevant UK resolution authority with respect to the [Securities / Notes] will be an event of default.¹¹

Notice to [securityholders / noteholders]

Upon the exercise of the UK bail-in power by the relevant UK resolution authority with respect to the [Securities / Notes], the Issuer will provide a written notice to the [securityholders / noteholders] through [DTC / the clearing system] as soon as practicable regarding such exercise of the UK bail-in power.¹² The Issuer will also deliver a copy of such notice to the [trustee / fiscal agent] for information purposes.

⁹ **Note to issuer’s counsel:** Where the clause is developed in countries subject to the SRM, the definition may need to be amended accordingly to refer to the SRM regulation

¹⁰ Reflecting section 48B(1)(c) of the Banking Act 2009

¹¹ **Note to issuer’s counsel:** Capitalize “event of default” if the term is defined in the terms and conditions

¹² **Note to issuer’s counsel:** Revise as appropriate to reflect the notices clause in the terms and conditions

Trust Indenture Act¹³

By its acquisition of the [Securities / Notes], each [securityholder / noteholder]], (which, for the purposes of this clause, includes each holder of a beneficial interest in the [Security / Note]), to the extent permitted by the Trust Indenture Act, will waive any and all claims, in law and/or in equity, against the trustee for, agree not to initiate a suit against the trustee in respect of, and agree that the trustee will not be liable for, any action that the trustee takes, or abstains from taking, in either case in accordance with the exercise of the UK bail-in power by the relevant UK resolution authority with respect to the [Securities / Notes].

Additionally, by its acquisition of the [Securities / Notes], each [securityholder / noteholder] will acknowledge and agree that, upon the exercise of the UK bail-in power by the relevant UK resolution authority:

- i. the trustee will not be required to take any further directions from the [securityholders / noteholders] with respect to any portion of the [Securities / Notes] that are written-down, converted to equity and/or cancelled under Section [●] of the Indenture, which section authorizes holders of a majority in aggregate outstanding principal amount of the [Securities / Notes] to direct certain actions relating to the [Securities / Notes]; and
- ii. the Indenture will not impose any duties upon the trustee whatsoever with respect to the exercise of the UK bail-in power by the relevant UK resolution authority,

; provided, however, that notwithstanding the exercise of the UK bail-in power by the relevant UK resolution authority, so long as any [Securities / Notes] remain outstanding, there will at all times be a trustee for the [Securities / Notes] in accordance with the Indenture, and the resignation and/or removal of the trustee and the appointment of a successor trustee will continue to be governed by the Indenture, including to the extent no additional supplemental indenture or amendment is agreed upon in the event the [Securities / Notes] remain outstanding following the completion of the exercise of the UK bail-in power.

By its acquisition of the [Securities / Notes], each [securityholder / noteholder] acknowledges and agrees that neither a cancellation or deemed cancellation of the principal or interest (in each case, in whole or in part), nor the exercise of the UK bail-in power by the relevant UK resolution authority with respect to the [Securities / Notes] will give rise to a default for purposes of Section 315(b) (Notice of Default) and Section 315(c) (Duties of the Trustee in Case of Default) of the Trust Indenture Act.

By purchasing the Securities/Notes, each [securityholder / noteholder] (including each beneficial owner) shall be deemed to have authorized, directed and requested DTC and any direct participant in DTC or other intermediary through which it holds such [Securities / Notes] to take any and all necessary action, if required, to implement the exercise of the UK bail-in power with respect to the [Securities / Notes] as it may be imposed, without any further action or direction on the part of such [securityholder / noteholder].

¹³ **Note to issuer's counsel:** These provisions are only necessary if the relevant instrument is subject to the Trust Indenture Act. Please – consult issuer's counsel to determine whether necessary

ABOUT AFME

The Association for Financial Markets in Europe (AFME) is the voice of Europe's wholesale financial markets. We represent the leading global and European banks and other significant capital market players. We focus on a wide range of market, business and prudential issues and offer a pan-European perspective, bringing to bear deep policy and technical expertise and constructive influence with European and global policymakers. For more information please visit the AFME website, www.afme.eu