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Department of Finance
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Attn. Ann Nolan cc: Aidan Carrigan

20 November 2009

National Asset Management Agency Bill 2009 (the “NAMA Bill”) – partial property transfers

Dear Ms Nolan

1. General

We refer to your letter of 5 November 2009, received by us on 16 November. We note your comment that NAMA is not being empowered by the NAMA Bill to interfere with the rights of parties under agreements governed by non-Irish laws. However, it seems to us that:

- (a) this statement is not clearly supported by the terms of the NAMA Bill and, whereas your comments in this regard are helpful, they do not provide the level of legal certainty required by ISDA Members from the perspectives of risk management and regulatory capital;
- (b) as regards whether a bank asset constituting over-the-counter derivative, or other financial, transactions may be affected by a partial property transfer, there is no reason to distinguish between bank assets solely on the basis of the contractual governing law of the agreement constituting the relevant bank asset; and
- (c) further steps are required to be taken to ensure legal certainty in this regard, so that the potential negative impact of this aspect of the NAMA Bill on participating institutions, as outlined in our letter of 30 October 2009, is avoided.

2. NAMA Bill

The NAMA Bill does not include any express statement to the effect that nothing contained in it shall affect the rights of parties under agreements governed by non-Irish laws and, whereas the provisions of Section 91(3)¹ of the NAMA Bill refer to circumstances in which “the law governing the transfer or assignment of the foreign bank asset” may or may not permit the transfer of the foreign bank asset, we note that:

- (a) Section 91(3) does not provide that, if such law prohibits the transfer or assignment of the foreign bank asset, NAMA may not purport to effect such a transfer as a matter of Irish law. Instead, it appears to address perfection requirements relating to a proposed transfer;
- (b) the reference in Section 91(3) to “the law governing the transfer or assignment of the foreign bank asset” will not necessarily be the same as the law expressed, by the terms of the contract constituting the bank asset, to be the governing law of that contract. The determination of this law involves an application of private international law (conflict of law) rules, on which we understand there is limited relevant Irish judicial authority. However, we understand that:
 - (i) the contractual aspects of such a transfer would generally (subject to various limitations) be governed by the contractual governing law of the transfer or assignment (which will not necessarily be the same as the contractual governing law of the contract constituting the bank asset the subject of that transfer); and
 - (ii) proprietary aspects of such a transfer would generally be governed by the law of the *lex situs* (location) of that asset (which, again, will not necessarily be the same as the law governing the contract constituting that asset), although the law governing the contract constituting the asset may also be taken into consideration.

On this basis, it does not appear to us that Section 91(3) can be considered definitively to prohibit NAMA from interfering with the rights of parties under agreements governed by the laws of a jurisdiction other than Ireland.

3. Governing law of contract constituting bank asset as determining factor

There seems to us to be no reason, as regards whether a bank asset constituting over-the-counter derivative, or other financial, transactions may be affected by a partial property transfer, to distinguish between bank assets solely on the basis of the contractual governing law of the agreement constituting the relevant bank asset. In this regard you might note that:

- (a) whereas the most commonly used agreements published by ISDA is drafted on the basis that it would be governed by the laws of either England or New York, it is not unusual for the parties to amend the agreement to provide for Irish law as the contractual governing

¹ Which provides:

“To the extent that a bank asset proposed to be acquired by NAMA is or includes a foreign bank asset—

- (a) if the law governing the transfer or assignment of the foreign bank asset permits the transfer or assignment of that asset, the participating institution shall if NAMA so directs do everything required by law to give effect to the acquisition, or
- (b) if the relevant foreign law does not permit the transfer or assignment of the foreign bank asset, the participating institution shall if NAMA so directs do all that the participating institution is permitted to do under that law to assign to NAMA the greatest interest possible in the foreign bank asset.”

law, in circumstances where both parties to the agreement are incorporated in, and acting for the purposes of the agreement out of, Ireland. We understand that the Irish Banking Federation has, for the benefit of such of its members as are also ISDA Members, obtained an extension opinion to the standard ISDA netting opinion regarding the enforceability of netting in these circumstances;

- (b) whereas ISDA's concern has focussed on the potential implications for its members of the NAMA Bill in the context of arrangements transacted pursuant to ISDA's published documentation, ISDA is also aware that certain ISDA Members transact with certain categories of customers pursuant to bespoke netting/collateral arrangements. We are aware that this approach may be taken by an ISDA Member when it is dealing with a customer that is neither a professional dealer nor a sophisticated end-user. ISDA is also aware of other circumstances that are likely to dictate the use of Irish law netting agreements. For example, the central bank of a jurisdiction would generally seek to provide that its netting and other contractual arrangements in respect of financial transactions, whether transacted for monetary policy or other purposes, are governed by the laws of the jurisdiction in which it is established. We note, in this regard, that the Master Repurchase Agreement published on the website of the Central Bank and Financial Services Authority of Ireland² is expressed to be governed by Irish law.

It seems to ISDA that the issue of whether the rights of a counterparty to a participating institution under a netting agreement can be interfered with should not be dependant on whether the contractual terms of that agreement are governed by the laws of Ireland or those of another jurisdiction.

4. Conclusion - proposal regarding Ministerial Direction

As previously advised, the ability to effect close-out netting, and related collateral arrangements, with a high degree of legal certainty and with no unduly restrictive assumptions or material qualifications, is essential to ISDA Members. Currently such opinions are available in respect of many potential participating institutions (within the meaning of NAMA)³ in respect of many industry close-out netting and collateral agreements (including those the subject of ISDA publications). Our concern is that, unless this issue is clarified, the level of qualifications and assumptions that would need to be included in opinions would be such as to render them unsatisfactory from a risk management and/or regulatory capital perspective.

We would strongly recommend that all possible steps be taken to clarify that a partial property transfer cannot be effected. We note your comments regarding guidelines and directions, as provided for in Sections 13 and 14 of the NAMA Bill. We believe that it would assist in ensuring that satisfactory opinions can be given if a direction would be given by the Minister to NAMA along the following lines:

"WHEREAS it appears to the Minister for Finance that it would further the achievement of the purposes of the National Asset Management Agency Act 2009, in exercise of the powers conferred on him pursuant to Section 14 of that Act, the Minister for Finance hereby directs as follows:

NAMA shall ensure that each:

² See Chapter 9 of:

<http://www.centralbank.ie/data/site/Docs%20on%20Monetary%20Policy%20Instruments%20and%20Procedures%202009.pdf> .

³ Insofar as a participating institution constitutes a subsidiary of a credit institution designated by the Minister for Finance under section 67 of the NAMA Bill, once enacted, whether it would be encompassed by available opinions would depend on the jurisdiction of incorporation, its legal form and regulatory status.

- (a) acquisition of a bank asset, and
- (b) disposal of an acquired bank asset,

by NAMA or any NAMA group entity shall, to the extent that such bank asset or acquired bank asset encompasses any right or obligation of:

- (i) a participating institution (in the case of a bank asset), or
- (ii) NAMA or any NAMA group entity (in the case of an acquired bank asset),

under an agreement to which any of the legislative provisions set out in Section 217 of the National Asset Management Agency Act 2009, effect an acquisition or disposal, as the case may be, of all of the rights and obligations of the participating institution, NAMA or the relevant NAMA group entity, as the case may be, under the relevant agreement to a single person.”⁴

It seems to ISDA that the issue of a direction (with which NAMA is required to comply), rather than a guideline (to which NAMA need only have regard), would be preferable as regards obtaining the level of legal certainty required.

We would also suggest that, to the extent that the Minister prescribes, by regulation as eligible banks assets pursuant to Section 69(4) of the Bill, derivatives or other financial transactions typically subject to netting arrangements, it would also be useful if such prescription could be expressly stated to be subject to the direction referred to above.

We outlined in our letter of 30 October the possible negative commercial and financial implications for potential participating institutions of failing to address this partial property transfer concern. We noted the possibilities that:

- (A) supervised institutions would be constrained in their ability to extend credit, or otherwise incur exposures, to participating institutions; and
- (B) supervised participating institutions themselves would find their own ability to conduct business constrained by much heavier capital requirements and their access generally to liquidity would be impaired.

ISDA believes that the issue of a direction as outlined above, and the suggested clarification to relevant regulations prescribing eligible banks assets, would greatly assist in removing the partial property transfer concern and avoiding these negative implications.

We would be happy to discuss this issue with you if that would be helpful. Please contact the undersigned if we can be of any assistance.

Yours sincerely,

Dr Peter M Werner, Director Policy, pwerner@isda.org

⁴ We note your comment that Section 217 was not introduced to address the partial property transfer issue and we appreciate this. However, as our particular concern relates to agreements that will benefit from one of the statutory protections referenced in Section 217, it seems to us that this is a useful way of describing the relevant bank assets.

