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Ladies and Gentlemen

### **Encouraging company rescue**

The International Swaps and Derivatives Association (**ISDA**)<sup>1</sup> is grateful for the opportunity to respond to the consultation document “Encouraging company rescue” (June 2009) (the **Consultation Document**). ISDA follows closely law reform initiatives that may affect participants in the leading financial market centres and so, of course, legal developments in the United Kingdom are of particular interest in light of the importance of London as one of the world’s leading financial centres and the centre of the largest over-the-counter derivatives market in the world.

As you may know, we followed closely the UK consultative process relating to the Banking Act 2009 and related secondary legislation, in particular, in relation to safeguards for netting, set-off, financial collateral and security arrangements and related matters, and we are represented on the Banking Liaison Panel established under the Banking Act 2009. We are also following closely the consultative process relating to effective resolution of investment firms as well as, more generally, the impact of the collapse of the Lehmans UK entities, in particular, Lehman Brothers

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<sup>1</sup> ISDA is the global trade association representing leading participants in the privately negotiated derivatives industry, a business that includes interest rate, currency, commodity, credit and equity swaps, options and forwards, as well as related products such as caps, collars, floors and swaptions. ISDA currently has more than 800 member institutions from 56 countries on six continents. More than half of the total membership is based in the European Union and neighbouring countries and a significant portion of the rest active participants in the European financial markets as dealers, service providers or end users of derivatives. Promoting legal certainty for cross-border financial transactions through law reform has been one of ISDA’s core missions since it was chartered in 1985.

International (Europe). Naturally, of course, we are following similar developments in a large number of other countries.

The Consultation Document raises many interesting issues and puts forth various proposals that, of course, go beyond our specific areas of concern. Furthermore, we normally defer in national law reform matters to national experts in relation to the technical analysis and detail of law reform proposals. We are aware that a number of trade and professional bodies have responded to the Consultation Document. From our perspective, one of the most important responses is that prepared by the City of London Law Society Financial Law Committee (the CLLS FLC; <http://www.citysolicitors.org.uk/FileServer.aspx?oID=643&lID=0>). Most, if not all of the members of the CLLS FLC, are also law firm members of ISDA and regularly participate in the activities of our Financial Law Reform Committee. We have reviewed closely the response to the Consultation Document submitted by the CLLS FLC, and we fully support its conclusions as they relate to or potentially effect the OTC derivatives market and related financial markets.

Clearly, we believe it is important that any legislation based on the proposals in the Consultation Document should fully recognise and protect existing early termination, close-out valuation and close-out netting arrangements, as well as related set-off rights and financial collateral arrangements. The United Kingdom's European obligations in this regard under the Financial Collateral Arrangements Directive and other European legislation affecting the financial markets should be fully respected. It is clearly in the interest of the financial markets in the City of London, and therefore of the United Kingdom as a whole, that legal certainty should not be affected by these proposals and that private law rights should not be eroded nor legitimate expectations of creditors eroded.

We would be pleased to meet with you to discuss how best to reconcile the policy objectives of the Consultation Document and any subsequent proposals or policies formulated on the basis of the consultation with the protection of legal certainty and financial market creditor rights in relation to netting, set-off, security and title transfer collateral. Please do not hesitate to contact either of the undersigned if we can be of assistance in this regard.

Yours faithfully

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