

**BY E-MAIL**

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Ladies and Gentlemen

**Financial sector resolution: broadening the regime**

The International Swaps and Derivatives Association, Inc. (ISDA)<sup>1</sup> is grateful for the opportunity to respond to HM Treasury's consultation document "Financial sector resolution: broadening the regime" (the **Consultation Document**). As you know, we have been an active participant in past discussions with HM Treasury on reform of the law relating to deposit-taking institutions and investment firms responding to issues arising out of the financial crisis, including in the context of our participation in the Banking Liaison Panel. For example, we responded in some detail in our letter to you of 16 March 2010 to your consultation document "Establishing resolution arrangements for investment banks" (December 2009).<sup>2</sup> We are, of course, also actively involved in the international and European projects referred to in the Consultation Document on the resolution of banks and other systemically important financial institutions.

We limit our comments in this letter to issues arising in the Consultation Document with a direct relevance to the safety and efficiency of the derivatives markets. There are, of course, many important issues discussed in the Consultation Document that go beyond that scope, and we defer, in relation to those issues, to other financial market respondents with greater expertise and/or a more relevant focus (for example, in relation to the technical detail of non-central counterparty financial market infrastructures (non-CCP FMIs) and in relation to the insurance market aspects).

The Consultation Document stresses the importance of coordination of any UK legislation with the international and European work, but is concerned that those processes are taking too long and therefore proposes that the UK should move ahead in implementing relevant legislation, for example, on the resolution of investment firms and central counterparties (CCPs). We do not oppose this in principle, provided that the need for international and European coordination is always kept in view.

In relation to investment firms and parent undertakings, discussed in part 2 of the Consultation Document, we agree for the sake of legal certainty that that all investment firms should be

<sup>1</sup> Information regarding ISDA is set out in Annex 1 to this response.

<sup>2</sup> See [http://old.isda.org/speeches/pdf/UK\\_ISDA\\_response\\_HMT\\_investment\\_firm\\_consultation\\_Mar10.pdf](http://old.isda.org/speeches/pdf/UK_ISDA_response_HMT_investment_firm_consultation_Mar10.pdf).

within scope, subject to the relevant authority making a judgment in relation to a specific investment firm that is failing as to whether it is 'systemic' and therefore whether stabilisation powers should be exercised. In other cases, it may be sufficient to put the relevant firm into the special administration regime (SAR). Of course, the SAR may be used as part of a resolution of a systemic investment firm in addition to the exercise of other stabilisation options and powers.

Regarding the inclusion of parent undertakings in scope, we can see the argument for expanding the current options in relation to parent undertakings of deposit-taking institutions (as is proposed in the Consultation Document) as well as including parent undertakings of investment firms within a broader resolution regime.

In relation to both investment firms and parent undertakings, our principal concern of direct relevance to the safe and efficient operation of the derivatives market is that safeguards comparable to those in place in relation to deposit-taking institutions against a disruptive use of the partial property transfer power are extended to investment firms and parent undertakings *mutatis mutandis*. We therefore welcome the Treasury's expressed intention to do this in paragraph 2.29 of the Consultation Document.

We note that the UK government intends to defer inclusion of a bail-in power in the resolution regime for investment firms and parent undertakings until the time comes to implement the proposed European Resolution and Recovery Directive (RRD), which is expected to provide for such a power in relation to deposit-taking institutions and other systemically important financial institutions. We agree that it is important that implementation of such an important resolution power be coordinated at European level and therefore support the UK government's approach in this regard. We also agree that it makes sense to defer implementation of a power to transfer assets to an asset management vehicle until the European work on the RRD is completed.

We think it makes eminent sense to extend the existing Banking Liaison Panel in its current form but with relevant additional constituencies represented to advise on the effect of the intended regime for investment firms rather than having a separate body for this purpose or no such body.

In relation to CCPs, discussed in part 3 of the Consultation Document, we do not comment in detail in this paper. We have been involved in extensive discussions on these issues in other fora with international, European and UK officials on the myriad difficult issues raised by implementation of the G20 commitment to clear all standardised OTC derivative contracts. We are not, however, opposed in principle to the development of a resolution regime for CCPs, and we agree, of course, with the Treasury's view set out in the Consultation Document that appropriate safeguards must be extended to counterparties dealing with a CCP where stabilisation powers are exercised in relation to a failing CCP.

Again, we think it makes good sense to extend the existing Banking Liaison Panel to include advising the Treasury on the effect of any future resolution regime for CCPs.

Regarding non-CCP FMIs discussed in part 4 of the Consultation Document, we do not oppose further work being done on whether a resolution regime is necessary for one or more of the types of FMI listed in paragraph 4.1 of the Consultation Document. A great deal of technical work is likely to be necessary before it is clear that a resolution regime is needed and, if so, in what form, with what powers and so on. At this stage, while we remain open-minded, we are sceptical that there is a need for a resolution regime in any such case, but what is necessary for a payment system is likely to be radically different from what is necessary for a trading platform or a trade repository. This point is made in paragraph 4.11 of the Consultation Document, and we merely therefore underline our agreement.

In relation to insurers, discussed in part 5 of the Consultation Document, we defer to other financial market respondents with a mission to represent the interests of insurance market stakeholders, and therefore offer no specific comments. Part 5 does not raise any derivatives-specific issues, as far as we can see, although insurance companies do constitute a very important set of market participants in the derivatives markets. Therefore, we may have views on any legislation that is developed in relation to insurers at a subsequent stage of public consultation.

We have reviewed the draft legislative provisions and explanatory notes issued in relation to this consultation but have no specific comments on those.

We would, of course, be pleased to discuss any of the issues arising out of the Consultation Document with you, should you wish to receive further input from a derivative market perspective. In the meantime, please do not hesitate to contact either of the undersigned if we can be of assistance in relation to these issues.

Yours faithfully,

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## **ABOUT ISDA**

Since its founding in 1985, the International Swaps and Derivatives Association has worked to make over-the-counter (OTC) derivatives markets safe and efficient.

ISDA's pioneering work in developing the ISDA Master Agreement and a wide range of related documentation materials, and in ensuring the enforceability of their netting and collateral provisions, has helped to significantly reduce credit and legal risk. The Association has been a leader in promoting sound risk management practices and processes, and engages constructively with policymakers and legislators around the world to advance the understanding and treatment of derivatives as a risk management tool.

Today, the Association has over 840 members from 59 countries on six continents. These members include a broad range of OTC derivatives market participants: global, international and regional banks, asset managers, energy and commodities firms, government and supranational entities, insurers and diversified financial institutions, corporations, law firms, exchanges, clearinghouses and other service providers.

ISDA's work in three key areas – reducing counterparty credit risk, increasing transparency, and improving the industry's operational infrastructure – show the strong commitment of the Association toward its primary goals; to build robust, stable financial markets and a strong financial regulatory framework.

More information about ISDA is available from our website at <http://www.isda.org>, including a list of our members, the address of our head office in New York and other offices throughout the world and details of our various Committees and activities, including our work in relation to financial law and regulatory reform.