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Dear Sirs and Madams

Consultation Paper on Proposed Regulations to Enhance the Resolution Regime for Financial Institutions in Singapore

The International Swaps and Derivatives Association, Inc. (“ISDA”)¹ welcomes the opportunity to provide comments on the Consultation Paper on Proposed Regulations to Enhance the Resolution Regime for Financial Institutions in Singapore (“**Consultation Paper**”) issued by the Monetary Authority of Singapore (“**MAS**”) on 16 July 2018. Individual ISDA members may have their own views on the Consultation Paper, and may therefore provide their comments to MAS directly.

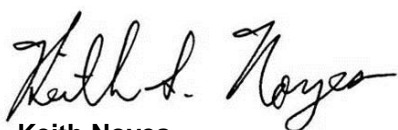
We hope that this submission will highlight certain key concerns of market participants on the effect of the proposed resolution regime on the safety and efficiency of the derivatives markets in Singapore. We look forward to furthering our dialogue with MAS on issues and practical concerns that may arise in connection with the proposed implementation of the resolution regime.

We have set out our general comments and responses to the questions raised in the Consultation Paper in the template provided by MAS. This is set out in Appendix 1 to this submission.

We are grateful to MAS for the opportunity to respond to the Consultation Paper and welcome further dialogue with MAS on any of the points raised. Please do not hesitate to contact Keith Noyes, Regional Director, Asia Pacific at (knoyes@isda.org, +852 2200 5909), Erryan Abdul Samad, Assistant General Counsel at (eabdulsamad@isda.org, +65 6653 4170), Jing Gu, Senior Counsel, at (jgu@isda.org, +65 6653 4170) or Rahul Advani, Director, Public Policy (radvani@isda.org, +65 6653 4170) if MAS has any questions or comments.

Yours sincerely,

For the International Swaps and Derivatives Association, Inc.



Keith Noyes
Regional Director, Asia-Pacific

¹ Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has more than 900 member institutions from 68 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association’s website: www.isda.org

APPENDIX 1

RESPONSE TO CONSULTATION PAPER

Please note that all submissions received will be published and attributed to the respective respondents unless they expressly request MAS not to do so. Hence, if respondents would like (i) their whole submission or part of it, or (ii) their identity, along with their whole submission, to be kept confidential, please expressly state so in the submission to MAS. In addition, MAS reserves the right to not publish any submission received where MAS considers it not in the public interest to do so, such as where the submission appears to be libellous or offensive.

Consultation topic:	Proposed Regulations to Enhance the Resolution Regime for Financial Institutions in Singapore
Name¹/Organisation: ¹ if responding in a personal capacity	The International Swaps and Derivatives Association, Inc. (ISDA)
Contact number for any clarifications:	Keith Noyes, Regional Director, Asia Pacific at (+852 2200 5909) Erryan Abdul Samad, Assistant General Counsel, Jing Gu, Senior Counsel or Rahul Advani, Director, Public Policy at (+65 6653 4170)
Email address for any clarifications:	Keith Noyes, knoyes@isda.org; Erryan Abdul Samad, eabdulsamad@isda.org; Jing Gu, jgu@isda.org; Rahul Advani, radvani@isda.org
Confidentiality	
I wish to keep the following confidential:	Not applicable <i>(Please indicate any parts of your submission you would like to be kept confidential, or if you would like your identity to be kept confidential. Your contact information will not be published.)</i>

General comments:

The International Swaps and Derivatives Association, Inc. (**ISDA**)² is grateful for the opportunity to respond to this Consultation Paper.

Consistent with our mission, we are primarily concerned in this submission with the effect of the proposed resolution regime on the safety and efficiency of the derivatives markets in Singapore, by considering the impact of the proposals on the rights of parties under derivatives transactions with failing financial institutions and other market counterparties. Any terms not defined herein have the meaning set out in the Consultation Paper.

Implementation Timeframe

As a general query, ISDA and its members would be grateful if the Monetary Authority of Singapore (**MAS**) can provide an indication of when the resolution framework is intended to come into force, and would request that MAS provide a transitional period for the implementation of these proposals.

Some of these proposals – in particular, those concerning contractual recognition of the temporary stays, contractual provisions for bail-in instruments and the disclosure requirements for bail-in instruments, would require significant lead time and resources to implement.

The industry would require time to draft and agree on standard language, to identify the relevant contracts that require amendments, and to reach out to clients and counterparties regarding the amendments. In many cases, Asian counterparties may be dealing with affected financial institutions (**FIs**) on their standard terms of business which may not be Singapore law governed, and the FIs will have to notify the counterparties in writing and may need the counterparty to countersign and agree to the amendments (this being the most certain way of guaranteeing the required legal enforceability). Time would also be required to educate counterparties, who may not be familiar with the concepts behind the temporary stay and bail-in.

With respect to contractual recognition requirements set out in regulation X1 under Annex B of the Consultation Paper in particular, we note that since a financial institution becomes a “qualifying pertinent FI” only after it has been issued a direction by MAS under section 43(1) of the Monetary Authority of Singapore Act, Chapter 186 of Singapore, the financial institution should be given sufficient time from the date of the issue of the direction to comply with the requirements. In addition, if the contractual recognition requirements set out in regulation X1 under Annex B of the Consultation Paper affect existing transactions and contracts (please see our comments under question 1(a) under “Application of contractual stay requirements”), we urge that MAS considers the time required for repapering.

As discussed with MAS, ISDA would be happy to consider and discuss the preparation of an industry solution in order to assist market participants to comply with these requirements. As MAS is aware, ISDA has worked together with regulators and market participants globally to publish the following protocols:

² Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has more than 900 member institutions from 68 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org

- (a) The ISDA 2015 Universal Resolution Stay Protocol (this replaced the ISDA 2014 Resolution Stay Protocol);
- (b) The ISDA 2016 Resolution Stay Jurisdictional Modular Protocol and the accompanying jurisdictional modules;
- (c) The ISDA 2016 and 2017 Bail-in Article 55 BRRD Protocols; and
- (d) The ISDA 2018 US Resolution Stay Protocol published in July 2018 and which is expected to be open for adherence soon.

Accordingly, ISDA and its members would like to request an adequate transitional period before the proposals take effect. We would be happy to discuss this further with MAS.

Question 1a: MAS seeks comments on the draft regulations in relation to the temporary stays on termination rights.

Definition of "financial contract"

ISDA and its members would like to seek clarification on the definition of a "financial contract" under Annex B of the Consultation Paper, as the Monetary Authority of Singapore (Control and Resolution of Financial Institutions) Regulations 2013 do not have a regulation 32 at the moment. Will this be defined in the same manner as in regulation 3 of the Monetary Authority of Singapore (Safeguards for Compulsory Transfer of Business, and Exemption from Moratorium Provisions) Regulations 2018?

We therefore would like to seek clarification that the definition of "financial contract" for the regulations described above would be consistent and that, for example, spot FX and securities-related FX transactions are included within the scope of "financial contracts". We note for example that Regulation 3(1)(d) of the Monetary Authority of Singapore (Safeguards for Compulsory Transfer of Business, and Exemption from Moratorium Provisions) Regulations 2018 includes spot contracts in the definition of "financial contract".

We also received feedback that if "securities contracts" (as defined in the Monetary Authority of Singapore (Safeguards for Compulsory Transfer of Business, and Exemption from Moratorium Provisions) Regulations 2018) are included within the scope of financial contracts, this may capture, for instance, offering documents of securities and it may not be feasible to amend these terms to include contractual recognition provisions. Some members would like to seek clarification from MAS whether disclosure in the offering document would suffice without positive consent from investors.

Application of contractual stay requirements

ISDA notes that paragraph 3.7 of the Consultation Paper states, "the contractual recognition requirement will have **prospective effect** [*emphasis added*] and apply to new financial contracts which are governed by foreign law".

We note that regulation X1 of the Draft Insertions to Part III of the MAS (Control and Resolution of Financial Institutions) Regulation 2013 in relation to Temporary Stay on Termination Rights as set out in Annex B of the Consultation Paper (**Temporary Stay Regulation**) applies where a qualifying pertinent financial institution enters into any specified contract. Unlike the contractual recognition provisions for bail-in as set out in regulation X2 of the Draft Insertions to Part III of the

MAS (Control and Resolution of Financial Institutions) Regulations 2013 in relation to the Statutory Bail-in Regime provided in Annex C of the Consultation Paper, there is no specified commencement date for the Temporary Stay Regulation. We would therefore like to seek clarification whether this is only intended to affect new financial contracts that are entered into after the regulations come into force, as set out in paragraph 3.7 of the Consultation Paper or whether this is intended to affect both existing and new financial contracts entered into after the regulations come into force.

If this regulation is only intended to affect new contracts, we would like to seek further clarification on what may constitute a new contract. In particular:

- (a) we note that the ISDA Master Agreement is a master agreement with numerous underlying transactions. The ISDA Master Agreement is a single agreement together with Confirmations evidencing the individual transactions, and this is a concept that is important in ensuring enforceability of close-out netting provisions. This raises a question of whether, in a situation where an ISDA Master Agreement has been entered into before the commencement of the contractual stay provisions, the contractual stay would affect new transactions entered into under that particular ISDA Master Agreement. If so, this may necessitate either a bifurcation in treatment of transactions under the ISDA Master Agreement (which may have implications for netting enforceability), or may require the entire ISDA Master Agreement to be repapered, notwithstanding that the ISDA Master Agreement was entered into before the commencement date. The same consideration would also apply to other types of master agreements (including certain standard terms and conditions);
- (b) we would like to query whether amendment agreements to a specified contract would be considered a new contract that would trigger the contractual stay requirements; and
- (c) we would like to query whether long form confirmations, which incorporate an ISDA Master Agreement by reference, would be within the scope of a "specified contract".

In providing our comments above, we have also considered the scope of sections 83 and 84 of the Monetary Authority of Singapore Act (as amended by the Monetary Authority of Singapore (Amendment Act) 2017).

Scope of related entities

ISDA and its members note that "related entities" and "group" are not defined in the Temporary Stay Regulation. ISDA would like to confirm that "related entities" would be limited to "related corporations" as defined in section 6 of the Companies Act, Chapter 50 of Singapore – that is, corporations that are the holding company or subsidiary of another corporation. Similarly, ISDA would like to seek confirmation that "group" refers to the group of companies that are deemed to be related under section 6 of the Companies Act.

ISDA also notes that the contractual stay requirements apply to related entities where the obligations of the entity under the contract are guaranteed or otherwise supported by the qualifying pertinent financial institution. We would request clarification on what constitutes support – for instance whether an intra-group agreement would be in scope (and whether these would only be in scope for back to back arrangements, rather than say, intra-group services agreements) or whether only direct contractual arrangements between the affiliate and the

underlying client are in scope. We would welcome further guidance on this and would be grateful if MAS is able to clarify this possibly either by way of guidelines or FAQs.

Criteria for enforceability

ISDA and its members would like to seek further guidance on the MAS' expectations concerning what steps an FI would need to undertake to ensure that the provisions are enforceable. For instance, would the MAS require the FI to obtain a legal opinion, and if so, would the opinion need to be refreshed on an ongoing basis? ISDA would also note that legal opinions would be subject to standard qualifications, and there may be impediments to enforceability under certain circumstances. ISDA would also like to seek clarification on whether a single legal opinion over contractual provisions for a class or classes of contracts would be sufficient evidence of enforceability.

Resolution and Recovery (R&R)

We understand the MAS will consult on further R&R rules at a later stage. Our members would be happy to engage MAS on this topic and therefore hope the MAS will invite comments on the full set of recovery and resolution rules, as part of MAS's consultation process.

Question 1b: MAS seeks comments on the scope of qualifying pertinent financial institutions.

Our members would be grateful if the MAS could:

- (a) confirm that merchant banks are not within scope of the definition of "qualifying pertinent financial institutions", as they do not constitute "banks", which are defined under the Monetary Authority of Singapore Act to mean banks licensed under the Banking Act, Chapter 19 of Singapore; and
- (b) clarify whether the temporary stay on termination rights only applies to financial contracts entered into by the qualifying pertinent financial institution as principal and not to contracts that the qualifying pertinent financial institution entered into as agent.

We would also note that at the moment, "pertinent financial institution", as defined under regulation 8 of the Monetary Authority of Singapore (Control and Resolution of Financial Institutions) Regulations 2013 does not include some of the entities set out under definition of a "qualifying pertinent financial institution" – namely, financial holding companies, insurers or a depository under the Securities and Futures Act, Chapter 289 of Singapore. As such, the categories of "qualifying pertinent financial institution" is wider than the category of institutions that have to produce recovery or resolution plans under section 43 of the MAS Act. ISDA would like to seek clarification on whether this is MAS's intention, and ISDA and its members would welcome further opportunities to consult with MAS on this point and to discuss possible resourcing constraints.

Question 1c: MAS seeks comments on whether this contractual recognition requirement should also apply to FIs which operate as branches in Singapore that are required by MAS to perform recovery and resolution planning, and if not, the reasons for this.

We do not believe that the contractual recognition requirement should be extended to FIs which operate as branches in Singapore. We note that the draft regulations at the moment do not extend to FIs that operate as branches.

As many jurisdictions have implemented or are in the process of implementing resolution regimes, such branches are likely to be subject to their home jurisdiction resolution regimes, which may conflict with or unintentionally extend the potential stay period that a counterparty may otherwise be subject to, if the resolution stay imposed by the MAS and the home regulator do not run concurrently. This is a material risk as the MAS' resolution stay only takes effect upon the MAS providing notice to the affected institution. In addition, the branches may end up with multiple contractual recognition clauses in their contracts, which creates legal uncertainty and confusion, and may undermine the single point of entry principle in respect of G-SIBs.

Capturing Singapore branches would also have the result that end clients of a multi-branch institution could be contacted multiple times in order to sign stay recognition documentation that has been imposed by, for instance, the home regulator as well as the regulators of each branch. Implementation of a branch-specific regime would also have significant challenges, including how to identify which clients are in-scope for the branch, trade blocking processes and controls relating to this. It is impractical to require such foreign entities, which are likely to apply foreign law to their underlying documentation, to amend a majority of the documents used in Singapore. This may have the unintended effect of discouraging FIs from transacting through their Singapore branches and reduce liquidity providers in Singapore.

We also note that application of the contractual stay requirement to branches would be inconsistent with Article 55 of the EU Bank Resolution and Recovery Directive, where EU branches of foreign institutions are not caught by virtue of having branches in the EU.

Question 2a: MAS seeks comments on the draft regulations in relation to the statutory bail-in regime.

Scope of institutions

We note that the scope of institutions subject to the bail-in regime is slightly different than the scope of institutions subject to the temporary stay, and would like to query whether it is the policy intention to have different types of institutions for the bail-in proposals and the temporary stay proposals.

Scope of eligible instruments

We note that the second column of the Fifth Schedule under Annex C of the Consultation Paper sets out the list of eligible instruments that are subject to bail-in.

It is not clear whether each of sub-paragraph (a), (b) and (c) would be eligible instruments, or whether an eligible instrument is one that fulfils all the criteria in sub-paragraphs (a), (b) and (c).

Regulation X2 under Annex C of the Consultation Paper states that "each corresponding instrument set out in the second column of that Schedule which has been entered into on or after [commencement date of amendments] is an eligible instrument for that Division 4A financial institution", while the descriptions set out in sub-paragraphs (a), (b) and (c) suggest that each sub-paragraph is intended to be a different instrument. However, the second column is labelled "eligible instrument" (in the singular).

ISDA and its members would like to seek clarification on this point, as the policy intention stated in earlier consultation papers was to subject unsecured, subordinated debt and loans, as well as contingent convertible instruments, but sub-paragraph (a) refers to equity instruments (which are not required to be subordinated).

If the intention is for each of the instruments in sub-paragraphs (a) to (c) to be eligible instruments (i.e. it is not necessary for an instrument to meet all of the criteria in sub-paragraphs (a) to (c) in order to qualify as an eligible instrument), ISDA and its members would note that, on a plain reading, these definitions could be wide enough to capture derivatives.

In sub-paragraph (a), “equity instruments” is widely defined and can include instruments that confer or represent a legal or beneficial ownership interest in a Division 4A FI. A physically-settled derivative that references shares or ownership interests of a Division 4A FI (such as an equity option, swap, forward or futures) may be regarded as an instrument that confers a legal ownership interest in the FI.

Similarly, sub-paragraph (c) applies to instruments which contain terms that provide for the instruments to be written down, cancelled, modified, changed or converted into shares or other instruments of ownership. There is a question of whether derivatives with a right to physical delivery of shares or instruments of ownership are instruments that are “changed” or “converted” into shares, or whether derivatives over convertible instruments may fall within this definition.

ISDA and its members would therefore like request for an express carve out for derivatives contracts, as these may potentially fall within the instruments set out in sub-paragraph (a) or (c), in particular, those referencing shares, stocks or other instruments that confer or represent a legal or beneficial ownership interest in a Division 4A FI.

ISDA would submit that powers of bail-in over the underlying shares, stocks or other ownership interests should be treated as distinct from the *derivative* itself (for instance, the swap, option, forward or futures contract). If the bail-in powers of MAS apply instead to the *derivative* and not the underlying instrument, this would enable MAS to cancel, modify, convert or change the derivative contract. This would create significant uncertainty as to the enforceability of such derivatives and cause significant disruption to the derivatives industry.

We note from MAS’ response to the Consultation Paper on Proposed Enhancement to Resolution Regime for Financial Institutions in Singapore dated 29 April 2016, that the proposed bail-in powers are intended to cover any equity instrument that is not in the form of share capital. We understand this to mean that the bail-in powers are intended to capture equity instruments that are ownership interests but which do not take the form of shares, and that this is not intended to capture *derivatives* of such equity instruments. However, given that the definitions in sub-paragraphs (a) and (c) are drafted widely, ISDA and its members would be grateful if the MAS could provide express wording carving out derivatives from the scope of eligible instruments.

Question 2b: MAS seeks comments on the proposal to require Singapore-incorporated banks and bank holding companies to disclose, on the front cover of any offering document related to an eligible instrument, the consequences of a bail-in to debt holders for liabilities within the scope of MAS’ statutory bail-in powers.

We do not have specific comments on this question, but please refer to our responses to question 2a.

Question 3: MAS seeks comments on the draft regulations in relation to the creditor compensation framework.

We do not have specific comments on this question.

Question 4a: MAS seeks comments on the draft regulations to safeguard covered bond programmes.

We do not have specific comments on this question.

Question 4b: MAS seeks comments on whether securitisations or other similar arrangements not covered under the existing safeguards should be protected during a partial transfer of business.

We do not have specific comments on this question.

Question 5: MAS seeks comments on the new Regulations to be issued under the Deposit Insurance and Policy Owners' Protection Schemes Act.

We do not have specific comments on this question.