ISDA®

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September 10, 2007

Ms Lim Yam Poh
General Counsel, Legal Division
Perbadanan Insurans Deposit Malaysia
Level 19, 1 Sentral, Jalan Travers,
Kuala Lumpur Sentral
50470 Kuala Lumpur

Dear Yam Poh,

Re: MDIC Consultation Paper

ISDA notes that in paragraph 6 of the 'Policy Statement' sub-titled ***'Consent to the Mutual Set-off of Amounts Due and Payable Under Outstanding Transactions Under Any Eligible Financial Agreements or Transactions Between an 'Affected Person' and Any Other Party'*** in relation to paragraph 17(1)(e)(iv) of the Third Schedule of the Malaysia Deposit Insurance Corporation Act 2005 (Act 642, Malaysia)("Act"), the Corporation proposes to reserve *"its right to enforce or repudiate any of the 'Eligible Financial Agreements' or transactions within [a reasonable time] after the appointment of the conservator if the Corporation determines that the 'Eligible Financial Agreement' or transaction is burdensome and the disaffirmance or repudiation will promote the orderly administration of the 'Affected Person's' affairs"*. ISDA wishes to highlight certain concerns it has in relation to this reservation.

ISDA understands that the Corporation has inserted this reservation on the basis that this reservation mirrors certain provisions of the Federal Deposit Insurance Act ("FDI Act") 12 U.S.C. 1821 as amended by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") that are applicable under the laws of the United States of America to insured depository institutions (as defined therein). Those provisions are intended to apply in relation to a

failed banking institution's outstanding transactions with the following underlying policy objectives:

1. To limit potential losses under the federally-funded deposit insurance program; and

2. To manage systemic risk which may arise from the insolvency of a large bank.

ISDA understands that in the first instance the deposit insurance program is protected by allowing the FDIC to pursue the most cost-effective resolution strategy, while in the second counterparties are protected by knowing that their contracts are (and will remain) enforceable during an orderly unwinding of the failed bank's positions.

ISDA appreciates that the FDI Act as amended by FIRREA has these underlying objectives, which are intended to carefully allow for management of the failed bank's positions. However, ISDA notes that the same underlying policy objectives are not served or assisted by imposing the reservations in the context of 'affected persons' that are *not* deposit-taking banks and the unwinding of whose transactions will therefore not impact on demands made on the Corporation's deposit insurance scheme. ISDA believes that there is an important distinction between the insolvency of a member institution and that of a non-bank 'affected person'. As defined under the Act, 'affected persons' include parties owing liabilities to a member institution; it follows therefore that the policy objectives arising from the treatment of outstanding transactional obligations under Eligible Financial Agreements in the context of the conservatorship of *that* affected person are clearly different from the treatment of the outstanding positions under Eligible Financial Agreements of a failed member institution itself.

ISDA is also concerned that there is no clarity in relation to the potential exercise of a right to repudiate Eligible Financial Agreements. The FDI Act and FIRREA provisions were enacted a long time ago and have had a chance to develop a body of learning around them. The Federal Deposit Insurance Corporation ("FDIC") has over the years issued a number of Policy Statements and Advisory Opinions of General Counsel that greatly assist in clarifying the treatment of 'Qualified Financial Contracts' and other categories of transactions. By these means, market practitioners have developed familiarity with how they operate. FDIC has also demonstrated through its treatment of various failed bank insolvencies that it is not predisposed to favour any particular party and will treat both depositors and counterparties alike. This culture and the

attendant body of experience had over the years inspired confidence among market practitioners there, who are now comfortable with its provisions.

On the other hand, the insertion of such a reservation into a new, untested, statutory regime such as conservatorship of an 'affected person' in Malaysia could foreseeably and understandably give rise to concerns among ISDA members about how it is to be implemented. In a relatively new market such as Malaysia, the imposition of even a reasonable time requirement might dissuade foreign counterparties from entering into transactions if there will be uncertainty about whether, when and if the foreign party will be able to close out its positions.

ISDA understands that the Corporation will be undertaking a review of the Act in the light of experiences with comparable legislation in the United States of America and elsewhere. To reiterate, the original purpose behind the issuance of the Policy Statement is to provide assurance to the market as to how the Corporation will exercise its powers under the Act. ISDA urges the Corporation to do so in the context of the Act as it now stands. Before the completion of a thorough study and analysis of comparable legislation as well as longer and broader consultation about how best to implement any reservations of powers, if at all, ISDA respectfully submits that it would be premature to include the proposed reservation in the Policy Statement. Therefore, ISDA wishes to urge the Corporation to proceed with the issuance of the Policy Statement but to delete the language of the reservation from the Policy Statement.

Sincerely yours,

David Geen
European General Counsel
Europe

Bay Way Yee
Director of Policy
Asia Pacific