

**Close-out Netting Enforceability and China's Financial Market Opening-Up
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Scott O'Malia, Chief Executive, ISDA – Opening Remarks

终止净额结算的可执行性与中国金融市场的改革开放

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ISDA首席总裁Scott O'Malia的开幕致辞

Good morning. I'd like to extend a warm welcome to all of you, and thank you for coming.
早安。热烈欢迎各位的到来，感谢大家光临本次大会。

I would like to thank our very distinguished keynote speakers – Ms. Guan Li of the Supreme People's Court, Ms. Cai Jiangting of the China Banking and Insurance Regulatory Commission and Professor Ba Shusong of HKEx. We are honored to have you join us here today.

特别感谢今天将为我们作主旨发言的几位贵宾，他们是：中华人民共和国最高人民法院民二庭关丽庭长、中国银行保险监督管理委员会蔡江婷主任、香港联交所巴曙松教授。群贤毕集，不胜荣幸。

I would also like to take this opportunity to thank our partners, ASIFMA and HKEx, for helping us to put on this event, and Barclays for hosting us.

我也借此机会由衷感谢我们的合作伙伴——亚洲证券投资基金市场协会（ASIFMA）和香港联交所，感谢你们协助ISDA举办本次盛会，还有巴克莱银行的热情款待。

This is an opportune moment to discuss Chinese market reforms and the importance of a predictable and robust legal framework, including enforceable close-out netting rules. The progress China has made to liberalize its market and currency has been unmistakable, and foreign investors are participating more actively in the country's economic growth. China is also now an energetic player in the global economy, thanks to projects such as the Belt and Road Initiative and the Asian Infrastructure Investment Bank.

我们在此讨论中国市场的变革、法律机制（包括净额结算规定的可执行性）的可预见性和完善性及其重要性，可谓恰逢其时。中国对其市场与货币的开放进程是确定无疑的，外国投资者对于中国经济增长的活跃度也是日益提高。随着“一带一路”、亚洲基础设施投资银行（AIIB）等越来越多重大项目的落地和深化，中国现在亦成为全球经济体中极富活力的参与者。

With regulators making this push toward greater openness, we now need to consider the infrastructure and legal framework that is required to support further growth and liberalization. In particular, the legal enforceability of close-out netting will be critical in the next stage of this journey.

随着中国监管机构继续推动开放的进程，我们也需要认真考虑金融基础设施和法律框架的发展模式，以支持进一步的发展与开放。特别值得一提的是“终止净额结算”机制的法律可执行性将在今后的进程中发挥至关重要的作用。

In my remarks today, I will highlight three areas where China is taking important steps to expand participation and facilitate global access to liquidity in its cash and derivatives markets. First, I will explore China's market reforms. Then, I will highlight the important progress that has been made on enforceable close-out netting. Finally, I will touch on the development of a resolution regime for systemically important financial institutions in China.

我今天的开幕致辞将主要从三个方面来谈一下中国鼓励和促进全球参与者接入其货币和衍生品市场流动性问题上所做出的重要努力。首先，是中国市场的改革历程；其次，是中国在终止净额结算可执行性问题上所取得的重大进步；最后，让我们一起展望中国系统重要性金融机构处置机制的发展前景。

ISDA and other trade associations are very supportive of China's reforms to open up the financial sector, internationalize the RMB, improve financial stability and develop a safer and more cost-effective banking system.

ISDA与其他交易组织积极支持中国金融板块的改革开放，积极支持人民币国际化进程，积极支持中国金融稳定性工作的开展，积极支持中国建立更安全和更具成本效益的银行业环境。

We believe a transparent and predictable legal framework is crucial for China to implement these reforms successfully. According to an ISDA survey of Asia-Pacific derivatives market participants that we published last year, the growth and development of financial centers depends on the depth and breadth of financial market infrastructure, a sound legal and regulatory framework, and netting certainty.

我们相信，兼具透明性和可预测性的法律框架对于中国成功实施这些改革而言具有至关重要的意义。ISDA去年发布的亚太衍生品市场参与者调查报告显示，金融中心的成长与发展依赖于金融市场基础设施建设的深度与广度，良好的法律与监管框架以及净额结算的可确定性。

We agree with that. In fact, we think close-out netting is the single most important risk-mitigation tool in derivatives markets and other markets like repo. By allowing parties to combine their obligations into a single payment, netting mitigates the credit risk associated with derivatives, repo and other transactions and promotes financial stability. It also encourages active participation by both foreign and domestic participants, supporting more liquid and efficient capital markets.

我们对此表示同意。事实上，我们甚至还认为终止净额结算机制是衍生品市场、回购市场及其他类似市场中最为重要的风险缓释工具，没有之一。净额结算允许市场参与者将其债务整合为一笔单一的付款金额，能够减少衍生品交易、回购交易和其他类型交易中的信用风险，为金融稳定性保驾护航；净额结算还能鼓励境内外参与者之间的积极良性互动，为建立更具流动性和效率性的资本市场添砖加瓦。

The importance of netting has been recognized at the highest level by global regulatory bodies. For example, the Basel Committee on Banking Supervision and the International Organization of Securities Commissions have developed capital and margin rules that provide clear advantages for firms in jurisdictions where netting is legally enforceable.

净额结算的重要性已经得到全球监管机构最高级别的认可。例如，关于银行监管问题的巴塞尔委员会（Basel Committee on Banking Supervision）与证券委员会国际组织（International Organization of Securities Commissions）已就资本及保证金监管制定规则，使得在净额结算具有法律可执行性的国家或地区内成立的机构更具全球竞争力。

To ensure the safety and soundness of these markets, along with the best risk management and cost efficiencies, we must now work together to ensure the recognition of netting.

为确保这些市场以安全、良性的方式运作，具备最优的风险管理机制和成本效益，我们必须携手并进，保障净额结算机制在法律上得到全面的认可。

Market Reforms

市场改革

The progress China has made on liberalization and market reform in recent years has been very encouraging. China's bond market is now the world's second largest. It is already the largest in terms of green bond issuance. Reflecting the importance of this sector, Chinese government and policy bank bonds were included in the Bloomberg Barclays Global Aggregate Bond Index last year, with other indices set to follow suit, which will likely encourage more foreign investment flows.

近年来，中国在开放和市场改革方面取得的进展令人欢欣鼓舞。中国的债券市场的规模现在已位列世界第二，而单就绿色债券的发行量而言，中国已排全球第一。彭博巴克莱全球综合指数去年将中国政府债券和政策性银行债券纳入其中，其他指数也将步其后尘，足以彰显中国在全球债券领域举足轻重的地位，这可能会鼓励更多外国投资资本的流入。

Last September, we saw increased access to the domestic market, following a decision to scrap investment quota limits on stocks, bonds and other securities via the qualified foreign institutional investor (QFII) and RMB qualified foreign institutional investor (RQFII) schemes. Along with the Stock Connect and Bond Connect initiatives, which allow foreign investors to trade Chinese securities electronically via Hong Kong, there are now more avenues for overseas participants to access China's financial markets than ever before – which means significant potential for further growth.

去年9月，在取消了合格境外机构投资者（QFII）和人民币合格境外机构投资者（RQFII）在股票、债券和其他证券的投资额度之后，我们观察到国际投资者对于中国内地市场的参与度明显提高。随着沪港通、深港通和债券通项目的实施，外国投资者可以采用电子方式通过香港参与中国的证券交易，如今，海外参与者进入中国金融市场的途径空前丰富，为中国金融市场的进一步增长带来巨大潜力。

As China's debt market continues to grow, so too will the demand for derivatives as a means of managing and hedging risk exposures. Derivatives are an important risk management tool, used by both foreign and domestic institutions to hedge foreign exchange risk and interest rate exposures and to lock in financing costs. We hope China will further increase the accessibility of hedging instruments for both domestic and foreign institutional investors, as well as harmonize derivatives trading rules so they are the same irrespective of the platform or program investors use to access China's markets.

随着中国债券市场的持续增长，以衍生品来管理和对冲风险敞口的需求也将随之增长。金融衍生品作为重要的风险管理工具，大量地被国内外机构用于对冲外汇风险和利率风险，并锁定融资成本。我们希望中国能进一步为国内外机构投资者提供套期保值或风险对冲工具的可获取方式，并建立统一的衍生品交易规则，这样的话，无论投资者使用何种平台或途径进入中国市场，其适用的规则都是一样的。

Demand for triparty repo transactions in the interbank bond market will also likely increase, as bond market participants look to manage the risk associated with short-term financing. With

initial margin rules set to be implemented for smaller firms this year and in 2021, there will be increased demand to access Chinese government bonds as collateral for derivatives transactions.

债券市场参与者希望管理与短期融资相关的风险，因此银行间债券市场对三方回购交易的需求也可能会增加。随着适用于较小型机构的初始保证金要求将于今年及2021年分步实施，使用中国政府债券作为衍生品交易的信用支持品的需求将不断增加。

As firms are able to access a greater diversity of cash and hedging tools, exposures to Chinese counterparties will increase. It is important to have legal certainty on how a default will be handled, and whether firms will be exposed on a gross or a net basis. Similarly, if RMB-denominated products become eligible as initial and variation margin, we must have certainty around these assets as well.

当市场机构将能够使用各类的现金工具和对冲工具时，它们对中国交易对手方的风险敞口将随之增加。因此，如何处理违约情形，以及是按全额还是净额计收保证金，在法律上必须具有确定性，这一点极为关键。同样地，如果以人民币计价的产品成为合格初始保证金和变动保证金，那么这些资产在法律上也必须具有确定性。

Enforceable Close-out Netting **终止净额结算的可执行性**

There are currently no specific provisions addressing close-out netting in the Enterprise Bankruptcy Law and no clear judicial recognition of the concept. This lack of legal certainty acts as a brake on the development of a vibrant and liquid capital markets ecosystem.

目前，《企业破产法》中没有关于终止净额结算的特别规定，也缺乏对该概念明确的司法认可。法律确定性的缺失阻碍了充满活力和流动性的资本市场生态系统的发展。

This actually affects Chinese financial institutions the most – they face higher capital and transaction costs and a reduced pool of international counterparties to trade with. Importantly, they would also be required to post margin on a gross basis under the global margin framework for non-cleared derivatives, requiring those entities located in jurisdictions without netting to pay significantly more to hedge their risk. Ultimately, it creates an unnecessary build-up of credit risk in the financial system.

实际上，这对中国金融机构的影响最大——它们不得不面临更高的资本要求和交易成本，以及日益减少的国际交易对手。重要的是，它们在全球非清算型衍生品保证金监管框架下将被要求按全额提供保证金，使得那些在没有终止净额结算地位的司法管辖区成立的机构对冲风险的成本显著增加，以致对金融系统造成不必要的信用风险累积。

Nonetheless, there have been some developments on close-out netting. In a 2017 response to the National People’s Congress, the CBIRC expressed its view that the Enterprise Bankruptcy Law does not conflict with close-out netting in principle. While the CBIRC statement doesn’t represent a legal change that would confirm the enforceability of close-out netting, the comment is very positive.

尽管如此，中国的终止净额结算机制仍取得了相当的进步。2017年，中国银行保险监督管理委员会（“银保监会”）在对全国人民代表大会的回复中表示，《企业破产法》原则上与终止净额结算并不冲突。尽管银保监会的声明从法律上而言并不一定代表对终止净额结算的可执行性的根本改变或对其可执行性地位的完全确认，但这一回复传达了非常积极的信号。

A UK-China Netting Working Group was subsequently established to consider the issue, led by the CBIRC and China Banking Association and involving ISDA and ASIFMA. This group has helped to increase information sharing on the subject, and has made significant advances in exploring the enforceability of close-out netting in China.

随后，银保监会和中国银行业协会牵头，并邀请 ISDA 和 ASIFMA 参与成立中英净额结算工作组，专门审议这一问题。在该小组的帮助下，该议题得到了更大范围和更高层级的关注、分享和参与，并在探索中国终止净额结算的可执行性方面取得了重大进展。

The CBIRC has also been working with the Legislative Affairs Commission of the Standing Committee of the National People's Congress, the Supreme People's Court and other policy-makers in China to clarify the position of netting enforceability under the Enterprise Bankruptcy Law in respect of CBIRC-regulated entities. We would encourage the CBIRC to conduct a public consultation on the proposed solution so market participants have an opportunity to provide feedback and assess the impact in light of external legal opinions and internal risk management guidelines.

银保监会一直与全国人民代表大会常务委员会的法制工作委员会（“法工委”）、最高人民法院和中国的其他决策部门保持对话与合作，多次澄清银保监会所监管机构的净额结算可执行性在《企业破产法》下的地位。我们鼓励银保监会就拟议的解决方案公开征求意见，使市场参与者有机会结合外部法律意见和内部风险管理指引来提供反馈并评估影响。

Bank Resolution

银行的特别处置程序

In addition to this CBIRC-led effort, we believe the proposed bank resolution rules provide an opportunity to deliver greater certainty for a critical part of the market – trades involving systemically important financial institutions. The process by which China will handle resolution of these firms is critically important.

除了银保监会主导的工作外，我们认为已纳入规章制度工作安排的银行特别处置规定也将为市场中核心部分——涉及系统重要性金融机构的交易——提供更多的确定性。中国将如何就这类机构展开特别处置程序将至关重要。

China is currently working to develop a resolution regime for its systemically important financial institutions, which will help mitigate the financial stability risks associated with the failure of a large financial institution. We are very supportive of a strong, internationally consistent resolution regime for financial institutions that is aligned with the principles set out by the Financial Stability Board, and we commend the PBOC, the CBIRC and the CSRC for their work in this area.

中国目前正在为其系统重要性金融机构制定特别处置程序，这将有助于缓解与大型金融机构经营失败有关的金融稳定性风险。我们非常支持具有较强执行力、对标国际水平，符合金融稳定委员会制定的原则的金融机构特别处置程序。我们高度赞扬中国人民银行（“人民银行”）、银保监会和中国证券监督管理委员会（“证监会”）在这方面的

As Chinese authorities develop these critical rules, it is imperative that close-out netting and financial collateral arrangements are safeguarded in resolution proceedings, in line with FSB

recommendations. Towards the end of last year, ISDA, ASIFMA and ICMA jointly wrote a letter to the PBOC, CBIRC and CSRC, in which we set out some proposals for consideration. 在中国相关部门制定这些关键规则的过程中，在特别处置程序中确保终止净额结算和金融信用支持品安排能够以符合金融稳定委员会建议的方式运行和实施是重中之重。去年底，ISDA、ASIFMA和国际资本市场协会（ICMA）共同致函人民银行、银保监会和证监会，提出了一些供监管部门考虑的建议。

For instance, we think it's important that any stay on the creditors' termination rights imposed by a resolution authority should comply with the safeguards set out in the FSB Key Attributes. If the resolution is unsuccessful, a public announcement should be made before regulatory consent is given to start bankruptcy proceedings, and there should be sufficient time for counterparties to close out and net their outstanding transactions outside of bankruptcy proceedings.

例如，我们认为，处置小组对债权人终止权的任何暂缓都必须遵守金融稳定委员会发布的《金融机构有效处置核心要素》中规定的保障措施。如果处置失败，那么监管部门同意启动破产程序的决定应该在作出之前发布公告，使得交易对手能够有足够的时间在破产程序之外提前终止未完成交易，并完成净额结算。

Finally, it is important to make clear that close-out netting and enforcement of related collateral arrangements would not subsequently be made void under the Enterprise Bankruptcy Law if a systemically important entity is put into bankruptcy proceedings once a resolution fails.

最后，需要明确指出的是，一旦特别处置失败后，系统重要性金融机构将进入破产程序中。那么之前完成的终止净额结算和相关信用支持安排的强制执行不会根据《企业破产法》而成为无效行为。

Conclusion

结论

Ultimately, we would like to see greater clarity on close-out netting enforceability across the entire market. The most effective solution is to develop comprehensive legislation to provide netting certainty for all types of Chinese counterparties.

最终，我们希望终止净额结算的可执行性能够在整个市场范围内取得更大的确定性。最有效的解决方案是制定全面的立法，适用于所有类型的中国交易对手，以提高其净额结算地位的法律确定性。

Over the past 30 years, ISDA has worked with authorities all around the world to support the drafting of netting legislation. So far, we have published netting opinions on more than 70 countries, and we have developed an ISDA Model Netting Act, which provides a template for jurisdictions considering close-out netting legislation. The ISDA Model Netting Act can be a valuable guide for Chinese legislators and policy-makers and educators on the basic principles that should underlie a comprehensive statutory regime for close-out netting.

在过去的 30 年中，ISDA 与世界各地的主管部门合作，以支持净额结算立法的起草工作。到目前为止，我们已经在 70 多个国家或地区发布了净额结算法律意见书，并且已经制定了《ISDA 净额结算立法规范及指引》，为考虑终止净额结算立法的司法管辖区提供了模板。《ISDA 净额结算立法规范及指引》可以为中国立法机构、政策制定者和教育者在基本原则方面提供富有价值的指导，为构建全面完善的终止净额结算法律制度奠定基础。

We strongly believe that certainty on close-out netting will create the foundations necessary for strong, safe and efficient derivatives and repo markets. This in turn will lead to a robust and vibrant ecosystem for capital markets funding and hedging.

我们坚信，终止净额结算的确定性将成为强大、安全和高效的衍生品市场和回购市场的基石。反过来，终止净额结算机制也将为资本市场的融资和对冲活动带来健康而充满活力的生态系统。

We recognize that the liberalization of China's financial markets is a long journey and the enforceability of close-out netting is one of many market developments that are being considered. That's why events like these that bring together market participants and official-sector institutions are so important in raising awareness, promoting education on key topics and moving forward together.

我们也认识到，中国金融市场的开放之路是一条漫长的旅程，而终止净额结算的可执行性是许多市场发展正在考虑的方向之一。本次大会及类似活动能够使市场参与者和监管部门汇聚一堂，增进共识、促进关键主题的交流教育，以致共同进步，这也是本次大会及类似活动的重要旨义所在。

Thank you again to ASIFMA and HKEx for partnering with us on this event, and to Barclays for hosting. Thank you to our distinguished guests, and thank you all for coming. I hope you enjoy the conference and find it useful.

再次感谢ASIFMA和香港联交所与我们共同举办本次活动，感谢巴克莱银行的热情款待。特别感谢各位贵宾、各位同业的光临。我希望您喜欢本次大会，也希望本次大会对您有所帮助。

I'd like to finish by playing a short video that explains the benefits of close-out netting.

最后，我想通过一个简短的视频来阐释终止净额结算的好处。

Thank you.

谢谢大家。