JULY 29, 2015

BY EMAIL

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Dear Sirs

Consultation Paper on Proposed Enhancements to Resolution Regime for Financial Institutions in Singapore

Introduction

The International Swaps and Derivatives Association (**ISDA**)[1] is grateful for the opportunity to respond to the Consultation Paper on Proposed Enhancements to Resolution Regime for Financial Institutions in Singapore issued by the Monetary Authority of Singapore (**MAS**) in June 2015 (the **Consultation Paper**).

The issues considered in the Consultation Paper are of great importance to the safety, efficiency and stability of the financial markets in Singapore, including the over-the-counter (**OTC**) derivatives markets. We are supportive of a strong, internationally consistent resolution regime for financial institutions and one that is aligned with the Financial Stability Board's (**FSB**) Key Attributes of Effective Resolution Regimes (the **Key Attributes**). The release of the Consultation Paper is a significant step made by Singapore in implementing the Key Attributes to contain the risks posed to financial stability by a non-viable financial institution without exposing the taxpayer to the risk of loss. As such, ISDA appreciates MAS' efforts in this area and in particular, supports MAS' considered approach in strengthening Singapore's resolution regime in line with the Key Attributes.

We also hope that our comments in this submission will assist the MAS with the preparation of the legislation that will set out the implementation details of the resolution regime. ISDA hopes to continue the constructive ongoing dialogue between MAS and derivatives market participants to consider, for instance, the practical concerns and risks surrounding the implementation of the policy proposals set out in the Consultation Paper.

[1] Since 1985, ISDA has worked to make the global over-the-counter (OTC) derivatives markets safer and more efficient. Today, ISDA has over 800 member institutions from 67 countries. These members include a broad range of OTC 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 including exchanges, clearinghouses 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 web site: www.isda.org.

Scope of Submission

In this submission, we primarily address the issues of bail-in, the proposed temporary stay and cross-border recognition of resolution actions, although we also take the opportunity to make some observations about issues raised in other parts of the Consultation Paper such as resolution and recovery plans and creditor safeguards. While we agree that the issues dealt with throughout the Consultation Paper are closely interrelated, we believe, given our focus on the OTC derivatives markets, that other respondents, in particular, other international financial trade associations with a broader and less sector-specific focus and mission than ours, may be better placed to comment in detail on other parts of the Consultation Paper.

Our membership includes the leading global, regional and national financial institutions as well as leading end-users and many other important financial market participants. Our leading financial institution members are members of the other international financial trade associations to which we refer above, and their views on those other issues may be represented to you through those associations. Our members may also choose to make their own individual submissions to MAS.

Consistent with our mission, we are primarily concerned in this submission with the effect of the proposed resolution tools and powers on the safety and efficiency of the derivatives markets in Singapore, by considering the direct impact of the proposals on the rights of a market counterparty under its derivatives transactions with a failing financial institution (**FI**) and under related netting and collateral arrangements. It is necessary to balance the need for the resolution powers in order to allow the MAS to resolve distressed FIs and preserve the stability and efficiency of the Singapore market, while ensuring that such powers do not adversely impact market participants. In particular, we are concerned with the legal uncertainty that will be created if the proposed resolution powers are not adequately defined and circumscribed and if any related safeguards are not clearly defined in terms of their scope or effect, as well as the need for consistency with the approach adopted under the Key Attributes and other jurisdictions, to ensure that Singapore FIs are on the same footing as FIs in other jurisdictions.

General Comments

We have also set out certain general observations and comments which we hope would be useful in providing the necessary context to our more specific responses as well as to provide you with an idea as to certain key concerns which we may have.

Responses to Specific Questions

We set out our detailed responses to the proposed amendments contained within the Consultation Paper in Appendix 1 of this submission. Any terms not defined in Appendix 1 are as defined above or in the Consultation Paper.

ISDA thanks MAS for the opportunity to respond to the Consultation Paper and welcomes 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, at +852 2200 5909) or Erryan Abdul Samad, Counsel, Asia at (eabdulsamad@isda.org, at +65 6653 4170) if you have any questions.

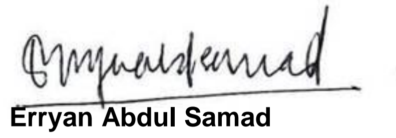
ISDA®

Yours sincerely,

For the International Swaps and Derivatives Association, Inc.

Keith Noyes

Regional Director, Asia-Pacific



Erryan Abdul Samad

Counsel, Asia

MAS Consultation Paper on Proposed Enhancements to Resolution Regime for Financial Institutions in Singapore – 23 June 2015

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General Comments		
	General Comments	We thank the MAS for the opportunity to comment on the proposals set out in this Consultation Paper. Before going into our responses to individual questions, we would set out the following high level observations and comments in respect of the resolution regime as a whole. *Transparency and Certainty* Legal certainty must be ensured. In order to analyse the risks associated with dealing with a financial firm, including the credit and legal risks, a market counterparty needs to know in advance and with sufficient certainty whether the FI will, if it gets into difficulties to the point of non-viability, potentially be subject to a resolution regime, even if, within that regime, there is a choice of tools and approaches that could be applied by the resolution authority. The market would also need to know with sufficient certainty what the effects of such resolution would be on the FI. In this regard, we would strongly caution that an increase of flexibility on the part of the resolution authority's powers would necessarily come at the sacrifice of such certainty. While we understand the need for a resolution authority to ensure that its powers are sufficiently broad to ensure the effective resolution of a distressed FI, we also note that ensuring the certainty in a resolution regime would likely enforce its effectiveness by inspiring confidence in market participants that they are being dealt with fairly and in a predictable manner consistent with their expectations. Conversely, a lack of certainty would affect an FI's ability to manage its risk effectively, and may potentially lead to disorganisation and inefficiency during the resolution process. As noted in Key Attribute 5.1, there should be an assessment of the extent to which an FI's resolution is likely to cause disruptions in domestic or international financial markets, for example, because of lack of confidence or uncertainty effects. Accordingly, we would stress the need to determine the scope of the resolution regime on transparent and objective grounds, to ensure that the MAS' powers of resolution are clear and market counterparties

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		have clarity on the effects of resolution. In particular: (a) the resolution regime should be clear and transparent as to the institutions within its scope and as to the effects of the resolution; (b) as far as possible, private law contractual and property rights must be respected by the inclusion of appropriate safeguards. The ambit and scope of such safeguards should be as clear as possible; (c) the effects of the resolution regime and the scope of the MAS' power must be made clear. Where it is considered necessary to suspend or otherwise affect any private law right, there is clearly a balancing that needs to occur. Any such suspension or other effect should be the absolute minimum necessary to achieve the policy goal of the relevant resolution tool or power. This is particularly crucial where there is intervention by the MAS that affects the FI's counterparties. This principle is particularly relevant to our discussion below of the proposed temporary stay on contractual early termination rights; and (d) the remedy for a breach of safeguard must also be clear, and it must not be a purely administrative remedy, for example, one requiring an application to an authority, a period for determination by the authority and, if the application is granted, the payment of compensation or award of other relief only at the end of that period. The remedy must be immediate and self-executing. For example, a netting safeguard should ensure that netting is enforceable notwithstanding the transfer by the resolution authority of some but not all of the rights or obligations under a master netting agreement. Similarly, in relation to security, the safeguard should provide that a transfer of secured obligations is legally ineffective unless the related security arrangement together with the security assets are also transferred to the transferee (being the new obligee). *Preservation of Netting and Set-off* Close-out netting is an essential component of the hedging activities of financial institutions and other users of derivatives. For swap dealers, which specialise in bringing counterparties together for transferring risk, the need for netting stems from the dealer's central role in risk intermediation. Each

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		time a dealer enters into a transaction with a counterparty, the dealer takes on exposure to the transferred risk. The dealer does not normally wish to retain the exposure, however, so it enters into offsetting hedge transactions. By maintaining a matched book—or more accurately, balanced book—of offsetting transactions, the dealer avoids unwanted exposure to movements in interest rates, currencies, and other sources of market risk. The result of this hedging activity is that, over time, the aggregate of derivatives activity includes a large number of inter-dealer and other hedge transactions that function largely to adjust risk positions and limit exposure to market movements. Indeed, the trillions of dollars of derivative notional amounts outstanding are largely the result of this ongoing hedging and rebalancing process. Dealer hedge transactions involve many counterparties, all of which pose some risk of default. If a counterparty were to default, the dealer can no longer assume its exposures are hedged. The dealer will consequently find itself exposed to unanticipated market movements. In order to neutralise the exposures, the dealer needs to adjust its portfolio to bring it back into balance by either replacing the defaulted transactions or by unwinding the offsetting hedge transactions or both. Netting and collateral facilitate this rebalancing process, netting by reducing the exposure that needs to be rebalanced and collateral by providing resources that can be offset against replacement costs. Even when derivatives are cleared through a central counterparty, it is necessary to balance market risks: if a default occurs under clearing, close-out netting is essential to the ability of the clearing house to manage its risks through rebalancing. Similar considerations apply to users of derivatives. In contrast to dealers, derivatives users such as corporations or hedge funds do not maintain a matched book, yet they do seek to attain a desired risk profile. A corporation, for example, might use derivatives to control its exposure to currency fluctuations, while a hedge fund might use derivatives in arbitrage or relative value trades. If a dealer were to default, these counterparties would need to replace the defaulted transactions in order to return to their desired risk positions. As with dealers, netting would facilitate returning to the desired exposures. *Developments in Singapore*

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		It is clear from parliamentary debates and the MAS' responses to previous consultations that the policy intention is for Singapore to be a good netting jurisdiction. The Monetary Authority of Singapore Act, Chapter 186 of Singapore (the **MAS Act**) confers resolution powers on the MAS to deal with (among others) banks, insurance companies and other financial institutions in the event of their insolvency. We note that these powers do not make any direct reference to netting or set-off arrangements. However, the MAS conducted a public consultation in December 2012 (in the Consultation Paper on Proposed Amendments to the Monetary Authority of Singapore Act) before these resolution powers were introduced, and received feedback that these powers were too broadly worded and could affect bilateral netting arrangements that parties had legitimately entered into. In response to such concerns, the MAS stated (in the Response to the Consultation on Amendments to the MAS Act, dated 5 February 2013): "*MAS will also provide in the MAS(A) Bill, a general power to prescribe safeguards to the exercise of the resolution powers.* ***This would enable the Minister to expressly provide in subsidiary legislation that bilateral netting arrangements, as well as other similar arrangements warranting carve-out, will not be affected by the exercise of resolution powers under the MAS Act.***" (emphasis added) The concerns surrounding the potential impact on bilateral netting arrangements were recognised in Parliament. During the second reading of the Monetary Authority of Singapore (Amendment) Bill, the importance of enforceability of bilateral netting arrangements was raised. Ms. Tan Su Shan, Nominated Member of Parliament was quoted as saying: *"First, enforceability of bilateral netting arrangements. I appreciate and thank the Deputy Prime Minister for bringing this up in a speech earlier and as I had earlier mentioned about net and gross exposures, it is useful to point out -- as he had rightly pointed out -- that most industry players here use the ISDA Master Agreement to enforce bilateral netting arrangements.* *Many industry players are also concerned that the proposed resolution powers may affect the enforceability of such arrangements. As the proposed powers are broad and it appears that they may in some instances defeat existing contractual rights. If this leads,*

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		for example, to "cherry picking" of which transactions to close out, then this could lead to counterparty losses. Section 30A(am) [sic] may also give the MAS powers to override the institution's existing contractual obligations. If this is the case, FIs around the world will have to re-assess their exposure to Singapore FIs. ***And this would affect our status as a good "netting" jurisdiction and increase the cost of doing business here****.* ***<u>We welcome subsidiary legislation to ensure bilateral netting arrangements will be carved out</u>*** *and ask that this be extended to cover the Banking Act and Insurance Act too."* In response, Mr. Tharman Shanmugaratnam acknowledged the validity of this concern, and confirmed that carve-outs for bilateral netting arrangements would apply across all financial institutions: *"Let me now respond to a few of the specific points which Ms Tan has raised. First, Ms Tan has expressed a valid concern over the impact of the proposed resolution powers on the Bill on bilateral netting arrangements. This is an important point.* *I can assure Members that the carve-outs through subsidiary legislation that we will make, as provided for in the Bill, will include specific provisions for bilateral netting arrangements.* ***<u>I can also confirm that the carve-outs for bilateral netting arrangements will apply across all financial institutions, including banks and insurance companies</u>****.* *The approach we are taking is essentially similar to that being taken in the United Kingdom where they have adopted a Special Resolution Regime, and the carve-outs that the European Union has now directed its members to put in place when designing their resolution frameworks. It is a system where you put in place the basic provisions and the powers that a regulator needs, but you have carve-outs to ensure that contractual obligations* ***and specifically, bilateral netting arrangements, are not defeated****."*

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		Such parliamentary debates may, pursuant to section 9A(3) of the Interpretation Act, Chapter 1 of Singapore, be considered in the interpretation of provisions of the MAS Act to confirm that the meaning of the provisions is the ordinary meaning conveyed by the text of the provision taking into account its context and its underlying purpose or object, or to ascertain the meaning of the provisions where they are ambiguous or obscure or where the ordinary meaning conveyed by the text of the provision taking into account its context, or underlying purpose or object leads to a result that is manifestly absurd or unreasonable. The MAS amended the proposed legislation to include a new section 30AAZN, which makes specific provision for the enactment of regulations exempting set-off arrangements or netting arrangements from the provisions of Part IVB of the MAS Act (dealing with resolution of financial institutions). In addition, the MAS has general powers of exemption, such as section 41C of the MAS Act, which allows the MAS to, by regulations (though no such regulations have yet been passed) or upon application, exempt persons from certain provisions of the MAS Act. Given the statements made in Parliament and by the MAS in its response to the consultation paper, as well as the specific provision for the passing of regulations to exempt bilateral netting arrangements, it is clear that, although the proposed regulations have not been released as of yet, the policy intent is to uphold proper bilateral netting arrangements across all financial institutions, including banks and insurance companies. Therefore, in considering the implementation of the resolution powers, it is important to ensure the netting and set-off rights are safeguarded, while balancing this against the need to prevent netting and set-off from hampering the effective implementation of resolution. This would be consistent with the Key Attributes, particularly Key Attribute 4.1. *Consistency with International Standards* In line with Key Attribute 2.3, the duty to consider the potential impact of its resolution actions on financial stability in other jurisdictions should be explicitly added as a resolution objective under the proposed resolution regime. To this end, we strongly support a coordinated and cooperative approach to the resolution of a cross border firm is critical to protect financial stability across home and host

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		jurisdictions. It is therefore crucial to ensure that the resolution regime in Singapore is consistent with international standards. We are strongly supportive of the MAS' approach in aligning the Singapore resolution regime with the Key Attributes, and have highlighted in our specific responses below where consistency with international standards would be crucial in ensuring that Singapore FIs are not placed in a weaker position than their counterparts in other jurisdictions, and to ensure that Singapore is in a position to achieve a coordinated approach to the resolution of cross border FIs. *Cross-border groups* The Singapore regime must allow for resolution strategies for cross-border groups to be set at a group level and intervention at a local level independent of the home resolution authority of a cross-border group must be kept to a minimum and be used in exceptional cases only. Co-operation between home and host authorities at the point of failure will be key to the successful resolution of a cross-border group and Key Attribute 7.1 urges such co-operation as far as possible. It is imperative that home and host jurisdictions provide for transparency over processes that would give effect to foreign resolution measures. Any alternative has the potential to descend into a disorderly break up and significant value destruction across multiple jurisdictions. *Consultation on Subsidiary Legislation* We are grateful to the MAS for the opportunity to comment on this Consultation Paper which addresses MAS' policy considerations in this area. Looking forward, we welcome the MAS' intention to consult on the legislative amendments and would request that adequate time be provided to industry participants to consider the consequences of the proposals and to provide feedback, particularly so as the detail in the proposals will be critical in ensuring that the resolution regime is effective both in resolving a distressed FI and ensuring market stability and efficiency during the resolution process. As the proposed changes would have a substantive impact on financial institutions and their operations, we request that the MAS provide a longer transition period for industry participants to put in place the necessary frameworks and controls to ensure compliance.
Recovery and Resolution Plans (RRPs)		

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1.	MAS seeks views on the proposal for legislative amendments that will subject notified financial institutions that are systemically important or maintain critical functions, to the requirements in paragraph 2.2(a) to (e).	In general, the Key Attributes provide that any FI that could be systemically significant or critical if it fails should be subject to a resolution regime, and at least all domestically incorporated global systemically important FI (**G-SIFIs**) should have an RRP. However, the Key Attributes stress that the regime should be clear and transparent as to the FIs within its scope. We outline below some considerations that should be taken into account in determining the scope of FIs that are subject to this requirement: (a) **Cross-border groups.** Resolution of cross-border groups should be achieved via home authorities. Cooperation between home and host authorities at the point of failure will be key to the successful resolution of a cross-border group. In most cases, G-SIFIs incorporated outside Singapore would have comprehensive recovery and resolution plans that are closely monitored by their respective home regulators. Leveraging these plans to facilitate resolution being undertaken by a home authority or support a local resolution would be, in our opinion, the most efficient and effective way to deal with local FIs that are branches or subsidiaries of G-SIFI's. In order to facilitate resolution undertaken by home authority, branches and subsidiaries of foreign financial institutions could be brought within the scope of the proposed regime. Failure to recognise the actions of a home resolution authority on the other hand, can result in a real risk that some groups reduce their footprint in such host jurisdiction. In this respect, we note that the Key Attributes state that G-SIFIs should have an overall group plan and the resolution for such an entity should be led by the home regulator. As a result, in respect of country level plans, where there are group plans in place, there should not be a separate requirement for country level plans, or country level plans should be kept to a minimum. Accordingly, for local branches and subsidiaries of FIs that are part of a broader international group, we would urge MAS to consider the resolution plan at the holding company level of such banks and work with the relevant group to ensure that exercise of local resolution powers are not in contradiction to the group's resolution plan. Similarly, local branches that have a group level plan in place should not be required to formulate separate country level plans; (b) **Defining systemically important or maintaining critical functions.** We would also request

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		further detail on what metrics the MAS would use to ascertain whether an FI would be "systemically important or maintain critical functions" and particularly whether this would extend to FIs which are not domestically systemically important banks. We are sceptical as to whether it will be possible to define the scope of future resolution regimes solely by reference to systemic significance, as the systemic significance of a financial institution will depend not only on intrinsic characteristics of the institution but also on extrinsic factors in the financial markets and in the broader economy. We therefore think that it may make more sense to determine the scope of the regime on transparent and objective grounds; (c) **Financial market infrastructures (FMIs)**. We note that footnote 5 as set out on page 4 of the Consultation Paper includes, among others, central clearing counterparties (**CCPs**) within MAS' scope of financial institutions to which the proposed legislative amendments would apply. We have also received feedback from members that they are supportive of CCPs being required to prepare an RRP. In relation to FMIs that are CCPs, ISDA believes the recovery of a CCP is preferable to its closure.[2] As a result, recovery efforts should continue so long as the CCP's default management process is effective, even if pre-funded resources have been exhausted. In the event that the default management process is unsuccessful in re-establishing a matched book – signalled by a failed auction – the CCP may have to consider the closure of the clearing service. At this point, it is likely that resolution authorities will be evaluating whether this is a trigger for resolution. However, our members have also raised the view that any participation by the members of a CCP to loss absorption should be capped, and clearing members should be aware of all the actions that might be taken in this type of scenario. ISDA, together with other trade associations, has made submissions in respect of the FSB consultation document on *Application of the Key Attributes of Effective Resolution Regimes to Non-Bank Financial Institutions* and the CPSS-IOSCO consultative report, *Recovery of financial market infrastructures* in which we discussed key principles regarding FMI resolution in detail.[3]

[2] ISDA published a position paper titled "CCP Default Management, Recovery and Continuity paper" in November 2014 that sets out a proposed recovery and continuity framework for CCPs. See http://www2.isda.org/news/isda-proposes-ccp-recovery-and-continuity-framework.

[3] See response to the CPSS-IOSCO consultative report *Recovery of financial market infrastructures* (Oct. 11, 2013) and Response to FSB Consultation on *Application of the Key Attributes of Effective Resolution Regimes to Non-Bank Financial Institutions* (October 15, 2013), available at http://www2.isda.org/functional-areas/risk-management/page/2

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		We would highlight that the European Commission is set to come out with a proposal on the recovery and resolution of CCPs either later this year or early next year. We would also request further detail on the details on the requirements on the development and maintenance of RRPs and kindly request the MAS allow adequate time to comment on the supporting regulations.
2.	MAS seeks views on the proposal to impose the responsibility for ensuring compliance with RRP requirements on the financial institution's board and executive officers, with contravention by the financial institution and/or any of its board members and executive officers constituting an offence with penalties.	Penalties for non-compliance by board and executive officers should be aligned to those of other regimes and not be too punitive. More details for this would be required – and in particular, we would seek clarity on how the MAS would assess non-compliance and whether there would be varying levels of non-compliance. We would submit that it is key that such penalties should be fair and proportionate to the offence, and that the MAS should allow for remediation of the issues before imposing penalties. We would also submit that imprisonment of the individual would be a particularly heavy penalty. We would also seek clarification on whether the "board and executive officers" as referred to in the Consultation Paper would also include the management committee of the Singapore branch of foreign institutions.
Temporary Stay		
3.	MAS seeks views on the proposal to introduce statutory powers to stay early termination rights of counterparties to financial contracts, in particular:	*General comments* One preliminary point we would make is that it is not necessarily currently the case that exercise of recovery or resolution powers would, of itself, trigger early termination rights in most financial contracts. Only that aspect of the resolution regime that could be characterised as either a form of liquidation or reorganisation proceeding for the benefit of all creditors or related or preparatory acts would normally be caught by existing "bankruptcy" events of default, such as the Bankruptcy Event of Default in Section 5(a)(vii) of the ISDA Master Agreement. Thus, the exercise of a resolution power to transfer the shares of a troubled bank into temporary public ownership or to a private sector purchaser would not, of itself, trigger an Event of Default under either the 1992 or the 2002 version of the ISDA Master Agreement, at

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		least as far as the standard form as published by ISDA is concerned. Of course, parties are free to contractually amend the existing provisions of the ISDA Master Agreement and to supplement it as they see fit. In order to address developments in resolution regimes and powers granted to authorities under such regimes, it may well be the case that parties will need to consider additional early termination rights specifically to address the exercise of resolution powers beyond the commencement of special bank liquidation, administration or other reorganization procedures. The first point to note, which is essentially a technical point in relation to the scope of the proposed suspension, is that the stay should only relate to the right of a counterparty under a derivatives master agreement, such as the ISDA Master Agreement, with a failing FI subject to the resolution regime to terminate transactions early as a result of the triggering of the resolution regime against the FI. Early termination of transactions is the essential first step in the process of close-out netting, the other steps being valuation of the terminated transactions and then determination of the net balance owing by or to the defaulting party under the close-out provisions. Every master netting agreement operates on this basis, even if the details of the close-out mechanism vary. It is not necessary, in other words, to suspend a counterparty's "right to enforce" or "rights to close-out netting". Nor is it, in our view, necessary or desirable, to stay the rights and obligations of the parties under the relevant contract, subject to some qualifications discussed below. During the period of the temporary stay, the market counterparty's rights and the failing firm's obligations (and, of course, vice versa) under the master agreement should not otherwise be affected. Throughout this period, the counterparty should (bearing in mind the necessity to protect the enforceability of close-out netting) be permitted to consider its exposure to the failing FI to be fully net. In that important sense, the proposed suspension should not "suspend" close-out netting. At most, it should simply stay temporarily the initiation of the close-out netting process, namely, the early termination of transactions following an event of default. Also, where a master agreement is collateralised, it should be clear that the temporary stay has no effect on the obligations of each party under the collateral arrangement. Collateral calls should be

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		capable of being made and should be complied with in the agreed manner, including the operation of any relevant dispute resolution mechanism. Thus, a failure by a FI to make a payment that is due during the period of the temporary stay or an intervening (non-resolution) insolvency event should constitute an event of default (assuming the appropriate notice has been given and any relevant cure period elapsed), and the other party should be free to exercise its early termination rights in relation to that event of default notwithstanding the temporary stay. *Safeguards* We strongly support FSB Key Attribute 4 and the related guidance in Annex V, which was developed after a careful and detailed consultation with all relevant stakeholders, including ISDA and its members. If such a power to suspend early termination rights is to be included in Singapore's regime for financial institution resolution, we believe that it must be made subject to certain conditions, namely that: (a) the stay only applies to early termination rights that arise for reasons only of entry into resolution or in connection with the use of resolution powers; (b) the ability of the resolution authority to suspend early termination rights is strictly limited in time (ideally for a period not exceeding 24 hours and should not exceed two business days in all circumstances); (c) where the relevant contract permits a counterparty to the FI not to perform as a result of a default or potential event of default in relation to the other party (as is the case, for example, under Section 2(a)(iii) of the ISDA Master Agreement), that provision should be unaffected by the stay; (d) the relevant master agreement and all transactions under it are transferred to an eligible transferee as a whole or not at all, together with any related collateral (there is no possibility of “cherry-picking” of transactions or parts of transactions or divorcing the collateral from the obligations secured or

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		supported by it); (e) the proposed transferee is a financially sound entity with whom the counterparty would prudently be able to contract in the normal course of its business (including a bridge institution backed by appropriate assurances from the resolution authority and its government) and the transferee should be subject to the same or a substantially similar legal and tax regime so that the economic (apart from the issue of credit quality) and tax position of the counterparty is not materially affected by the transfer; (f) the early termination rights of the counterparty are preserved as against the FI entering resolution in the case of any default by the FI occurring during the period of the stay that is <u>not</u> related to the exercise of the relevant resolution power (for example, a failure to make a payment, as discussed above, or the failure to deliver or return collateral, in either case, on a due date occurring during the period of the stay); (g) the early termination rights of the counterparty are preserved as against the transferee in the case of any subsequent independent default by the transferee; and (h) the counterparty retains the right to close out immediately against the failed financial institution should the authorities decide not to transfer the relevant master agreement during the specified transfer window. We note that most of these conditions are acknowledged in the Consultation Paper save for (e), which should be expressly provided for. In relation to condition (b), we have discussed this in detail in our response to question 3(b) below. In relation to condition (d), we have set out further comments under our response to question 3(c). *Automatic or discretionary operation* With respect to whether a stay should be discretionary or automatic, our view is that we should consider this from the principal point that a stay should be clear and certain in its operation. The advantage,

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		however, may lie on the side of a discretionary stay, as this can be used in a thoughtful and targeted way, backed, as proposed in the Consultation Paper, by a public announcement by the resolution authority. The discretionary stay would avoid possible unintended consequences of an automatic stay. The making of a public announcement would provide a clear signal to the market and therefore, potentially, greater certainty as to the commencement of the stay than might be the case with an automatic stay. (This depends, in turn, on whether the trigger of the automatic stay is itself public and clear as to timing.) Where parties have included in their contractual arrangements, automatic early termination provisions, such as Automatic Early Termination under an ISDA Master Agreement, they will wish to consider whether it applies in relation to the exercise of a resolution tool and, if so, whether it should be amended, for the sake of certainty, to accommodate the principle of a temporary stay. It will only be possible for parties to do this effectively once the precise scope and operation of such a stay under a specific resolution regime are known. *ISDA's discussion with policymakers on a contractual stay of early termination rights* As you may be aware, ISDA has been discussing with policymakers and OTC derivatives market participants issues related to the early termination of OTC derivatives contracts following the commencement of an insolvency or resolution action. We have developed and shared papers that explore several alternatives for achieving a suspension of early termination rights in such situations. One of those alternatives, which is supported by a number of key global policymakers and regulatory authorities, would be to amend ISDA derivatives documentation to include a standard provision in which counterparties agree to a short-term suspension. While there are limitations on what may be achieved contractually, ISDA believes that it is important that supervisors and the private sector should maintain a dialogue on these critical issues. We would welcome the opportunity to discuss this topic with MAS. As a result, ISDA released the Resolution Stay Protocol (**Protocol**) in 2014[4]. The Protocol enables parties to amend the terms of their ISDA Master Agreements and any related credit support

[4] Available online: http://www2.isda.org/functional-areas/protocol-management/protocol/20

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		arrangements between, or provided for the benefit of, adhering parties to the Protocol by opting in to resolution regimes that stay and, in certain cases, override certain cross-default and direct-default rights included in derivatives contracts that arise upon the entry of a bank, or certain of its affiliated entities, into receivership, insolvency, liquidation, resolution or similar proceedings. In addition, the Protocol introduces similar stays and overrides under certain US insolvency regimes where none exist. In short, it prevents derivatives counterparties that have adhered to the Protocol from immediately terminating outstanding derivatives contracts, giving regulators time to resolve the troubled institution in an orderly way. Contractually, 18 major banks have also signed up to the Protocol in the event of a resolution action, thereby mitigating the risk of a run by derivative counterparties as the firm goes through resolution.
(a)	the scope of financial contracts to be subject to the stay;	We note that the MAS has considered the scope of financial contracts set out under Canadian and US legislation. We request additional clarity on: (a) whether the MAS would be including collateral arrangements (including title transfer arrangements) and netting agreements in the scope. We note that swap contract/agreements are captured, and would query whether this is intended to be a catch-all for netting agreements generally, and would highlight that other jurisdictions (specifically, under the EU Banking Recovery and Resolution Directive (**BRRD**)) expressly distinguish between the two; (b) what is defined to be "swap agreements"; and (c) if the financial contracts are only those which are entered into by banks licensed under the Banking Act, Chapter 19 of Singapore.
(b)	the proposed duration of the stay and the circumstances in which it may be necessary to extend the duration of the stay in order to achieve an effective	We submit that the stay should be <u>strictly limited in time</u>, ideally for a period not exceeding 24 hours and should not exceed two business days in all circumstances, and are strongly opposed to the proposal to extend the duration of the stay. This is in line with Key Attribute 4.3 which provides that the stay should be strictly limited in time.

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	resolution or to support the stability of the financial system;	We recognise the importance of implementing an effective stay on early termination to prevent the close out of financial contracts in significant volumes upon a financial institution's entry into resolution. However, such a stay effectively renders early termination rights unenforceable for the duration of the stay. This poses the following issues for financial institutions: (a) **exposure to market risk.** The longer the duration of the stay, the longer market participants are exposed to market risks, especially if a failure were to occur during a period of market instability. The consequences of such exposure can be severe, and would put Singapore financial institutions in a worse position than their counterparts in overseas jurisdictions where the stay is strictly limited with no option to extend; (b) **compromising an FI's ability to manage its risk.** The discretionary ability to lengthen the stay would give rise to uncertainty on the part of an FI as to whether it would be able to exercise its early termination rights in a timely manner upon its entry into resolution (or its counterparty's entry into resolution). As noted in our general comments at the outset, legal certainty is crucial. A lack of certainty would make it difficult for the FI to properly assess and manage its risk and exposure to the counterparty. In addition, non-defaulting parties would have incentives either to cut back or terminate transactions with troubled counterparties earlier, in an attempt to avoid the uncertainty of the resolution stay; and (c) **compromising the enforceability and effectiveness of close-out netting.** In many cases, FIs have to satisfy themselves that close-out netting would be enforceable for risk management purposes. If close-out netting were not enforceable, market participants would need to assume that gross exposure, not net exposure, is the relevant measure of counterparty risk. Furthermore, FIs seeking regulatory capital relief on the basis of net exposures would often have to satisfy their regulator that their close-out netting rights are enforceable in a timely manner. The inclusion of a stay compromises the enforceability of close-out netting for the duration of the stay. This is mitigated by the fact that the stay is limited in time. By further including a discretionary ability to extend the stay, this severely dilutes the effect of such mitigation, to the point that this may be assessed by FIs and regulators as fatal to the enforceability of close-out netting. If Singapore were to become a non-netting jurisdiction this would increase capital requirements for derivative exposures under Basel III

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		and thereby increase the cost at which parties could transact and negatively affect liquidity. As mentioned in our general comments to question 3 above, it is clear from the parliamentary debates that Singapore regards itself as a good netting jurisdiction, and that the policy intention is to uphold proper bilateral netting arrangements. Therefore, we would re-iterate the need for the stay to be strictly limited in time, ideally for a period not exceeding 24 hours and should not exceed two business days in all circumstances, and are strongly opposed to the proposal to extend the duration of the stay. In this respect, we note that the existence of a limited power of the US resolution authority, the Federal Deposit Insurance Corporation (**FDIC**), to suspend contractual early termination rights for 24 hours has not prevented supervised institutions from obtaining, in relation to US banks subject to the FDIC regime, legal opinions that are sufficiently robust to comply with current requirements for recognition of close-out netting for regulatory capital purposes. We stress that any regime implementing the power of suspending early termination rights must clearly limit such power in order to maintain the necessary legal certainty of netting for regulatory capital purposes. As mentioned above, where it is considered necessary to suspend or otherwise affect any private law right, there is clearly a balancing that needs to occur. Any suspension should be the absolute minimum necessary to achieve the policy goal of the relevant resolution tool or power. We note that the US has successfully operated its resolution regime for US banks for many years with a 24-hour suspension period and that this is reflected in the resolution provisions of the Dodd-Frank Act (in relation to the Orderly Liquidation Authority) which cover other systemically important financial institutions. Accordingly, we would strongly oppose the extension of the stay beyond two Business Days. *Timing of Stay* The Key Attributes provide that there should be clarity as to the beginning and end of the stay. In this regard, we would submit that the stay should run from the point at which the FI enters into resolution. In any case, the timing of commencement of the stay should be made clear, particularly where the exercise of the stay is discretionary and not automatic.

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<tr><td></td><td></td><td>Notification

Consideration would also have to be accorded to how the market as a whole will be notified of decisions by the MAS in relation to resolution actions. We would submit that public and timely dissemination of such information is important, as there would be potential issues where counterparties may not have ready or equal access to information, thereby creating uncertainty and confusion in the market.

In particular:

(i) we note that written notice will be provided when a contract will not be transferred (paragraph 3.7(b)). We would submit that such notice should be made to the market as a whole and should not be limited to FIs whose contracts will not be transferred. FIs whose contracts will be transferred should also be notified such that there is no uncertainty as to whether and when the transfer is effected; and

(ii) where transfer or restructuring is completed prior to the end of the two Business Day period for a stay of early termination rights, thereby bringing the stay to an end, the completion of transfer or restructuring should be notified or announced publicly. If such information is not readily available, this may potentially allow those parties that are related or connected to the failing institution to be able to exercise their termination right ahead of others.</td></tr>
<tr><td>(c)</td><td>the proposed safeguards to be introduced in connection with the stay as set out in paragraph 3.9 and whether any additional safeguards should be provided for; and</td><td>Scope of Safeguards

As mentioned in Key Attribute 4.1, the legal framework governing set-off rights, contractual netting, collateralisation agreements and the segregation of client assets should be clear, transparent and enforceable during the resolution of a FI. We would welcome greater detail as to how safeguards to ensure this would be framed. Experience with existing resolution regimes has already shown that the detail of the safeguards is crucial.

As mentioned in our general comments to question 3 above, we note that there should be an express</td></tr>
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		safeguard that the proposed transferee is a financially sound entity with whom the counterparty would prudently be able to contract in the normal course of its business (including a bridge institution backed by appropriate assurances from the resolution authority and its government) and the transferee should be subject to the same or a substantially similar legal and tax regime so that the economic (apart from the issue of credit quality) and tax position of the counterparty is not materially affected by the transfer. In relation to the condition set out under paragraph 3.9(b) (the "**No Cherry Picking Condition**"), we would submit that this should expressly provide that a master agreement and all transactions under it are transferred to an eligible transferee as a whole or not at all, together with any related collateral. We would further note that the term "master agreement" should be taken to include a cross-product master agreement, that is, a netting agreement providing for a further netting of amounts due under individual master agreements. These are also sometimes called "umbrella" or "master-master" netting agreements. We also note in relation to the No Cherry Picking Condition that under the US regime the US resolution authority, the FDIC, must transfer all "qualified financial contracts" (**QFCs**) to a transferee or none, regardless of whether the QFCs are linked by a common master agreement. In addition, it must transfer all QFCs not only of the counterparty but also all QFCs of all of that counterparty's affiliates with the failing firm. Although these requirements may restrict the flexibility of the authorities in relation to the restructuring of the failing firm's business, there are clearly risk management advantages to both of these additional features, which maximise available set-off rights (subject to some legal uncertainty about the full enforceability of cross-affiliate set-off). Additionally, we would submit that there should be express provision that the MAS cannot modify transferred contracts. *Remedies for safeguards* We note that the Consultation Paper is silent on the remedy for any breach of a safeguard by the MAS and would welcome further detail and the chance to consult with the MAS on this. The remedy for a breach of safeguard must be clear – this has implications for the effectiveness of the safeguard as the

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		certainty of its application. Such a remedy must not be a purely administrative remedy, for example, one requiring an application to an authority, a period for determination by the authority and, if the application is granted, the payment of compensation or award of other relief only at the end of that period. The exercise of such rights and the time required to resolve the review would generate uncertainty as to the counterparties' position in the meantime. The remedy must be immediate and self-executing. For example, a netting safeguard should ensure that netting is enforceable notwithstanding the transfer by the resolution authority of some but not all of the rights or obligations under a master netting agreement. Similarly, in relation to security, the safeguard should provide that a transfer of secured obligations is legally ineffective unless the related security arrangement together with the security assets are also transferred to the transferee (being the new obligee). The remedies should also be tailored for specific safeguards. For instance, for breaches of safeguards against partial property transfers, it may be necessary to consider that a remedy here should be that the transfer must not be void, while for a breach of a safeguard against contractual modification, the remedy should be that the modification should be void.
(d)	whether the exercise of statutory powers to stay early termination rights for financial contracts of a distressed financial institution traded, cleared, settled or reported on a capital market infrastructure (**CMI**) or DPS, as the case may be, will compromise the safe and orderly operations of the relevant capital market infrastructure or DPS and if so, how this may be mitigated.	In order to maintain the safe and orderly operation of a CCP, members have expressed a view that an express exemption should be provided for CCPs from the stay in order to allow for the porting of financial contracts from a distressed FI to a substitute FI pursuant to the usual default rules of the relevant CCP. It is worth noting that Article 71(3) of the BRRD also provides for such an exemption. Article 71(3) provides that "[a]ny suspension under paragraph 1 or 2 (of Article 71) shall not apply to systems or operators of systems designated for the purposes of Directive 98/26/EC, central counterparties, or central banks". We would be happy to discuss this further with MAS. We believe that how, precisely, a temporary stay would operate (if at all) in relation to transactions, for example, cleared through a CCP requires more detailed study and discussion. We would submit that exercise of stay on early termination rights for financial contracts of a distressed financial institution traded, cleared or, settled on a CMI or DPS must be subject to: (a) the list of safeguards, especially the safeguard that the stay only applies if early termination rights arise by reason only of entry into resolution (i.e. if there are other grounds for invoking early

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		termination rights, such as failure to provide collateral or meet payment obligations, then early termination rights should be able to be exercised); and (b) any early termination of financial contracts traded, cleared, settled on a CMI or DPS or any default of the failed FI towards the CMI or DPS should be dealt with in accordance with the default, loss allocation and mutualisation rules and procedures of the relevant CMI or DPS. Financial contracts that are reported (but not traded, cleared or settled) on a CMI should not be included in the scope of the exercise of statutory powers to stay early termination rights.
Preservation of Continuity of Essential Services and Functions		
5.	MAS seeks feedback on the proposal to introduce powers to ensure continuity of essential services and functions by suspending the termination rights of non-financial contracts, or requiring these contracts to be performed on the same terms and conditions that were in place prior to the resolution. Views are invited, in particular, on – (a) the scope of non-financial contracts to be subject to such powers; and (b) the potential implications on existing and future non-financial contracts.	Our preference would be that the disruption of privately negotiated rights should be avoided as far as is possible. It would be important to provide sufficient clarity and certainty on which contracts will be included and the length of any possible suspension of termination rights. We would submit that this should be limited to those which govern the provision of critical services which the regulator needs to continue through a resolution of the relevant entity, such as IT services defined as a “critical system” under MAS Notice 644 to Banks (Notice on Technology Risk Management). The potential implications of effecting such a proposal on existing agreements contractually should also be carefully considered – this may require renegotiation of existing agreements, which could be quite labour intensive and may involve protracted negotiations and non-standard amendments, and thereby increase costs.

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Bail-in		
6.	MAS seeks views on the proposal to introduce statutory bail-in powers under the MAS Act and for the bail-in powers to be first applied to Singapore-incorporated banks and bank holding companies.	We support the principle of statutory bail-in within resolution as this will align the regime in Singapore to the regimes in the US, United Kingdom and European Union, provided that it only applies as a last resort after all other feasible measures to rescue the failing firm (that is, to prevent it from reaching the point of non-viability) have, in the reasonable determination of the relevant authorities, been exhausted. Its scope of application must also be clear and its basis legally certain. Numerous legal issues will need to be addressed in some detail, including (but not necessarily limited to) company, securities, property, insolvency, commercial and private international law issues. There will also, of course, be issues as to the interaction between the bail-in resolution tool and other resolution tools, change of control provisions in contracts entered into by the FI and regulatory restrictions on investors. For example, a regulated fund that has previously invested in debt obligations of the FI could find itself in breach of its own investment restrictions following a statutory conversion of that debt to equity. Also, very careful attention needs to be paid to the cross-border aspects and the relative responsibilities of home and host country. As a general principle, bail-in should only be exercised by the authority with primary responsibility for resolution of the entity, for example, the home authority in relation to a parent FI. Accordingly, we would not expect MAS bail-in requirements to apply to Singapore branches of foreign incorporated FIs since home rules on bail-in should apply to these entities and welcome the proposal to limit the statutory bail-in to Singapore incorporated banks and bank holding companies in the first instance. However, if the MAS subsequently intends to extend these powers to local branches, it would be necessary to consider how this bail-in would tie in with the resolution regime applicable to the parent FI. As noted earlier in this submission, the Singapore regime must allow for resolution strategies for cross-border groups to be set at a group level and intervention at a local level independent of the home resolution authority of a cross-border group must be kept to a minimum and be used in exceptional cases only. Co-operation between home and host authorities at the point of failure will be key to the successful resolution of a cross-border group and Key Attribute 7.1 urges such co-operation as far as possible. Any alternative has the potential to descend into a disorderly break up and significant value

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		destruction across multiple jurisdictions. A statutory bail-in regime should respect the principle of "no creditor worse off than in liquidation", should provide an appropriate mechanism for compensation where this principle can be shown to be breached and should provide for expedited judicial review of bail-in decisions, where appropriate (but in a manner that does not interfere with the speed or flexibility of the use of the tool that the authorities will need when implementing an actual resolution). We assume that the MAS will be considering the final standard on Total Loss Absorbing Capital (**TLAC**) to be released by the Financial Stability Board later this year. In line with these requirements we would expect any Singapore TLAC requirements to apply only to material subsidiaries and that the MAS would be co-operative with home regulators if they are planning on triggering any pre-positioned bail-in debt.
7.	MAS seeks views on the proposal to apply the statutory bail-in regime to unsecured subordinated debt and unsecured subordinated loans, issued or contracted after the effective date of the relevant legislative amendments implementing the bail-in regime.	We believe that bail-in must respect, as far as possible, *pari passu* treatment of creditors and the statutory order of priorities. In relation to the application of bail-in, recapitalisation should be effected by starting at the bottom of the capital structure, that is, with the equity level and then moving up the structure in reverse order of priority. Senior debt should only be subject to statutory bail-in after exhaustion of subordinate levels of capital. And, of course, senior debt should only be bailed in to the extent necessary to recapitalise a FI or, as the case may be, the portions of its business transferred to a bridge institution, at a reasonable level. Accordingly, we welcome the proposal to apply the statutory bail-in regime only to unsecured subordinated debt and unsecured subordinated loans issued or contracted after the effective date of the relevant legislative amendments. It is not clear, however, whether the bail-in regime would include the following: (a) intra group debt; (b) derivatives transactions; and (c) short term liabilities such as bank borrowings; and

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		(d) contributions to the deposit insurance scheme. It is worth noting at this juncture that this is an issue which is still being considered. A preliminary point to note here is that including contributions to deposit insurance schemes may result in an increase in the premiums for deposit insurance schemes. We would be grateful for further clarification by the MAS on the foregoing, including the parameters for defining short term liabilities or interbank liabilities as mentioned in paragraph 6.5 and 6.8 of the Consultation Paper. In particular, derivatives transactions give rise to specific concerns, which we have described below. For MAS' further consideration, it would appear that the scope of instruments subject to the bail-in regime appears to be narrower than under the bail-in regimes in other jurisdictions. We expect that this could be as a result of MAS' observation in the Consultation Paper that Singapore-incorporated banks are well-capitalised and are already subject to capital standards that are stricter than Basel standards. *Derivatives market impact* In relation to the specific impact of a statutory bail-in power on the derivatives markets, there are two aspects: (1) First, there is the question of the impact of bail-in on a FI equity or debt instrument that is the subject of or referenced by a derivative transaction. The principal concern of market participants in this regard is to ensure that there is sufficient clarity and certainty as to the rules that will apply and as to the full legal and tax effects, as mentioned above, so that market participants can analyse the market and other risks of the transaction, structure and document it properly, price it accurately and hedge it effectively and reliably. It is also important, in relation to any actual exercise of such a power by a resolution authority, that there is clarity and transparency as to the timing and effect of the exercise. Market participants should be notified promptly of the exercise via an appropriate market information mechanism with details of the terms of the exercise so that parties to a transaction referring to the securities of the failing firm are quickly in a position to assess the impact

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		of the exercise, determine their rights under the relevant contract and take any appropriate actions, for example, in relation to any hedge positions to protect their financial and commercial interests. This clarity and transparency is important not merely to the individually affected market counterparties but to the market as a whole, as any shock caused by uncertainty as to the timing or effect of the exercise could have contagion effect and/or could result in market counterparties taking unnecessary actions (for example, liquidating hedge positions or establishing new ones) based on inaccurate or incomplete information. (2) Secondly, there is the question of whether and, if so, how statutory bail-in could be applied to a derivative transaction itself as a form of debt of a FI. This is part of the more general question as to the scope of the application of the statutory bail-in power. *Should derivative transactions be within the scope of a statutory bail-in power?* There are a number of cases of liabilities of a FI where the beneficial effect of the application of statutory bail-in may be outweighed by negative effects for the FI itself (particularly in terms of its access to credit and liquidity), for counterparties to FIs and for systemic stability. Potential special cases include (but are not necessarily limited to) deposits (in particular, retail deposits), inter-bank borrowings, foreign exchange transactions, liabilities relating to unsettled securities trades (that is, securities trades initiated and still in the course of settlement), trade debt and liabilities under derivative transactions. As a general rule, liabilities of a party to a derivative transaction are largely or wholly contingent while the transaction is outstanding. Derivative transactions contemplate both payment obligations and, where physical settlement is permitted or required, delivery obligations, that is, obligations to deliver an agreed form of asset. For present purposes it is sufficient to focus on payment obligations. While an amount may, after satisfaction of relevant conditions precedent, become due and payable on a particular payment date, for example, under a swap transaction, liabilities will remain contingent in relation to subsequent payment dates. The amount of any future payment obligation under the swap transaction will also potentially be subject to payment netting against any amount due on the same day by the same party and potentially also to netting against amounts due on the same day by the same

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		party under other transactions under the same master agreement. Given the foregoing and given also the wide variety of possible derivative product types (swap, forward, option, cap, collar, floor and many variations and sub-variants of these product types) as well as the wide range of possible underlying assets and other measures of value that can be used to determine the value of a derivatives transaction (including rates, prices and indices relating to interest rates, foreign exchange rates, equities, debt securities, credit risk, commodities, bullion, emissions allowances, inflation and other economic and monetary statistics, meteorological data, freight forward rates, bandwidth and so on), it is likely that there would be severe practical difficulties in applying a statutory bail-in power to a "live" derivative transaction, that is, a derivative transaction still in effect, with obligations remaining to be performed, at the time the power is exercised. The difficulties would include valuation and operational difficulties, without considering the disruptive impact on related positions (which are either hedges for or hedged by the transactions subject to the bail-in power). These difficulties would be magnified where there are dozens, hundreds or even thousands of trades between a G-SIFI, and a major counterparty. The possibility of the application of bail-in to derivative transactions still in effect would also probably have negative implications for regulatory capital that would need to be worked through very carefully. The foregoing points apply to derivative transactions of a FI that are traded "over-the-counter" or off an organised market or exchange and not cleared through a clearing house or other clearing system. Where derivative transactions are exchange-traded and cleared or traded OTC and cleared, as is increasingly required by legislative changes in effect or under way in the G20 economies and presumably in other countries as well, then additional operational and other difficulties are likely to arise in applying the bail-in power. In this respect, we note that cleared derivatives transactions are exempted from the bail-in tool under the EU BRRD. It would, of course, be considerably simpler to apply a statutory bail-in power to a net amount due under the close-out netting provisions of a master agreement, such as the ISDA Master Agreement. Such an amount, once determined, is normally simply an unconditional debt owed by the party that is "out of the money" on a net basis under the relevant master agreement, whether the party is the defaulting party or

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		the non-defaulting party. That debt is capable, therefore, of being written down or converted to equity without the difficulties and complexities referred to above in relation to applying bail-in to "live" transactions. Two points to note immediately, however, are: (1) all transactions under the master agreement would need to be terminated and valued and this is a process that can take some time depending on the nature, number and complexity of the transactions then outstanding and the state of the market at the time of close-out; and (2) the FI will not necessarily be debtor in such a case and therefore the resulting net amount following close-out might therefore not be available to be bailed in. Regarding the first point, the timing of the process of close-out is unlikely to be sufficiently rapid to meet the speed with which the authorities will want to recapitalise a FI in order to minimise disruption to the market and to allow the FI to continue trading. Regarding the second point, although in the circumstances described the net amount, being owed to the FI, would represent an asset of the FI and therefore strengthen (however, minimally) its balance sheet, the benefit of realising that asset may be outweighed by the disadvantage of losing the on-going risk protection offered by the transactions under the master agreement. Early termination for this purpose is also directly at odds with the general aim to prevent early termination occurring in the event of the exercise of certain resolution tools. In addition to the foregoing considerations, there are cogent reasons of principle why derivative transactions should be excluded from the scope of the bail-in power. Bail-in is concerned with recapitalisation. Liabilities under derivatives transactions do not form part of the capital of a FI, other than, perhaps, in the very limited case where a specific derivative transaction is closely related to a capital transaction of the FI. The vast majority of derivative transactions constituting the normal derivatives trading of the FI would not fall into this category. This is similar to the position of trade debt, and indeed for a FI liabilities under derivative transactions are functionally trade debt. We think it unlikely that G20 ministers intended that bail-in could apply to day-to-day claims such as those of a landlord under a lease of a building to a FI or of a supplier in

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		relation to the supply of goods or services to a FI. The potential application of a statutory bail-in power to trade debt could have a significant effect on a FI's ability to access goods and services on credit and on the cost to the FI of those goods and services. Similarly, the potential application of bail-in to liabilities under derivative transactions could have a disruptive effect on the availability and cost of derivatives trades to a FI. *Application of bail-in to derivatives transactions* If the statutory bail-in powers are applied to derivatives transactions, the following points should be observed: (a) a bail-in measure should only be applied in respect of the net amount following the termination of an agreement (whereby the termination, valuation and determination of the net sum are effected following the contractually agreed method) and after the application of any security. Although applying bail-in to a net sum due following termination of derivatives transactions is less complicated than applying bail-in to "live" transactions, it is not without challenges. As noted, (1) all transactions under the master agreement would need to be terminated and valued, and the timing of the process of close out is unlikely to be sufficiently rapid to meet the speed with which the authorities will want to recapitalise a FI in order to minimise disruption to the market and to allow the FI to continue trading; and (2) the benefit of realising that asset may be outweighed by the disadvantage of losing the on-going risk protection offered by the transactions under the master agreement; (b) we would consider that any liabilities arising from derivatives which are collateralised (whether as cleared or non-cleared derivative transactions) would be considered as excluded from bail-in on that basis. This would be consistent with the approach that only unsecured subordinated debt and unsecured subordinated loans will be subject to the bail-in regime. However, in the case of derivatives transactions, there is a possibility that fluctuations in the underlyings and the security can result in only a portion of the liability being secured, with excess liability above the value of that security potentially being eligible for bail-in. This will necessarily involve a valuation of the relevant security. Consideration will need to be given as to how and on what basis this valuation will be conducted. Consequently, the extent to which a liability will be excluded from bail-in cannot be

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		estimated. In order to provide certainty for market participants, it would be helpful if the MAS could clarify the method of valuation to be used, if derivatives transactions are to be included in scope.
8.	MAS seeks views on the proposal to complement the proposed statutory bail-in regime with contractual bail-in provisions for liabilities within the scope of MAS' statutory bail-in powers which are governed by the law of a foreign jurisdiction. MAS also seeks views on requiring banks to comply with the conditions set out in paragraph 6.11.	We request for further clarity on the scope of entities, instruments and liabilities that will need to comply with this requirement. Also, very careful attention needs to be paid to the cross-border aspects and the relative responsibilities of home and host country. As a general principle, bail-in should only be exercised by the authority with primary responsibility for resolution of the entity, for example, the home authority in relation to a parent FI. The following considerations should be taken into account in determining whether to complement the proposed statutory bail-in regime with contractual bail-in provisions: (a) The contractual bail-in terms should be consistent with international standards to avoid disadvantaging FIs in Singapore. (b) Contractual bail-in would require an agreement from counterparties to implement the contractual provision. This would require increased negotiation and there may not be any commercial incentive for counterparties to agree. Further, depending on the scope of the requirement, there may be large number of contracts that would need to be re-papered, which could be a significant undertaking for FIs. We suggest that the MAS note the consultation of the European Banking Authority and its final Regulatory Technical Standards (**RTS**) published on 3 July 2015. The RTS took into account a number of concerns raised in relation to contractual recognition requirements under Article 55 of the EU BRRD. These concerns included the scope of liabilities that were required to include a contractual recognition provision as well as the form of that provision and the ability of financial institutions to unilaterally impose contractual terms in certain types of liabilities. In particular, there has been extensive discussion surrounding the requirement to include contractual recognition provisions relating to operational liabilities (for instance, in the context of trade financing), contingent liabilities and membership of financial market infrastructure. These issues highlight that regulations imposing contractual recognition provisions should be carefully drafted and subject to consultation. (c) Legal opinions while useful may also vary. This has the effect of essentially putting the onus on the

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		industry to demonstrate enforceability. However, we note that contractual agreements may also be overridden by other considerations (notwithstanding the requirement of legal advice / legal enforceability), such as capacity an authority of the counterparty, mandatory insolvency laws of a particular jurisdiction (including, for instance, clawbacks) and public policy concerns of a particular jurisdiction. These factors are often out of an FI's control. We would also request the removal of the requirement to demonstrate enforceability of MAS's statutory bail-in (in paragraph 6.11(d)). The independent legal advice leading to the inclusion of those specific contractual provisions should satisfy MAS' intent. In light of the above concerns, consideration should be given to whether a legislative implementation may be better to mitigate such risks. It may be considered that an effective cross-border recognition of resolution actions should render contractual bail-in provisions unnecessary. For jurisdictions where cross-border recognition is presently not available, market participants may consider the use of the ISDA Resolution Stay Protocol to supplement the statutory regime.
9.	MAS seeks views on the proposal for banks to prominently disclose the consequences of a bail-in to debtholders for liabilities within the scope of MAS' statutory bail-in powers.	While disclosure would improve transparency and enable bondholders to price the risk, the details will need to be further consulted (for instance, what terms to disclose, the frequency of disclosure, and the methodology). We would highlight that disclosure requirements would need to be weighed against potential confidentiality concerns and potential erosion of confidence in a particular bank or branch. In particular, it is not clear what is meant by "prominently disclose the consequences", and we would submit that industry standard risk disclosure language on general consequences of bail-in would be sufficient for this purpose. Additionally, whilst it is common to have risk disclosure language in issued bond documentation, it is normally not common to include risk disclosure for subordinated loans. Another concern is that whilst general risks can be disclosed, the exact impact and consequence of bail-in may only be assessed at the time of resolution and implementation of bail-in, especially because bail-in should only be imposed to the extent of restoring the distressed or failing financial institution back to viability (and not more than that).

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		The disclosure requirement should also be subject to a materiality threshold, and limited to risks which are reasonably foreseeable by the FI at the time.
10.	MAS seeks views on the proposal for statutory powers to be introduced for MAS to either convert into equity or write down those instruments that are contingently convertible or which can be contractually bailed in, but whose terms and conditions for conversion or bail-in had not been triggered prior to entry into resolution.	We do not have specific comments in respect of this (other than as set out in our response to question 8 above), but would welcome further clarity on when this situation may arise - i.e. in what circumstances would the MAS consider applying its statutory bail-in powers where the terms and conditions for such bail-in had not been triggered prior to entry into resolution.
Cross-Border Recognition		
11.	MAS seeks views on – (a) the possibility of achieving a cooperative solution with foreign resolution authorities by giving effect to foreign resolution actions through a recognition process, subject to the considerations set out in paragraphs 7.8(a) to (c); and (b) the scenarios where a foreign resolution action may	It is important that the resolution regime in Singapore supports cooperative and coordinated approaches to the resolution of cross-border groups. We strongly support Key Attribute 8 which requires home and key host authorities of all G-SIFIs to maintain Crisis Management Groups to facilitate the planning and management of the resolution of a cross-border financial crisis. There is a growing consensus amongst all international regulators that a coordinated and cooperative resolution of a cross-border group has the potential to better protect financial stability across home and host jurisdictions. Given the global nature of the derivatives markets, the cross-border issues are crucial. We underline the importance for the derivatives markets of ensuring, in particular, that there is: (a) no ring-fencing of local assets of a foreign FI in the event of its local branch being made subject to resolution in the host jurisdiction; and (b) no discrimination against foreign creditors in the host jurisdiction.

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	not be in the interest of a local branch or subsidiary of a foreign financial institution, which MAS would need to take into consideration when deciding if it should recognise or support the foreign resolution action.	Each of these is objectionable on a number of grounds, including grounds of efficiency, equity and systemic stability in the financial market as a whole. The precise impact of each will depend on how it operates both *de jure* and *de facto* and on its scope of application. Specifically from a derivatives perspective, the existence of either in Singapore as a host jurisdiction will have a potential adverse impact on the enforceability of close-out netting and any related financial collateral arrangement entered into with a multibranch FI with a local branch in Singapore. *Need for mutual recognition* Irrespective of the model that is adopted to ensure cross border coordination, it is imperative that home and host jurisdictions provide for transparency over processes that would give effect to foreign resolution measures. Accordingly, although we note that MAS has existing resolution powers, recognition extends beyond the ability of the MAS to take supportive measures. There is a need for clarity on, amongst other things, the basis of the assessment to use local resolution powers, treatment of local creditors, treatment of assets and liabilities and/or rights and obligations located in host countries in the event a transfer to a third party or bridge institution is being considered by the home authorities, safeguards, resolution of conflicts with home and host regulators and so on. Any alternative model has the potential to descend to a disorderly break up and significant value destruction in the financial stability across multiple jurisdictions. Separately, while we appreciate that the MAS currently has various powers of control over and resolution of financial institutions which may be exercised in support of a foreign resolution action, we would ask that MAS considers the ambit of these powers with respect to a Singapore incorporated FI and a local branch of a foreign incorporated FI. For instance, the powers relating to a compulsory transfer of shares and restructuring of share capital only apply to Singapore incorporated FIs and the power relating to a compulsory transfer of business is only applicable to the business which is reflected in the books of the Singapore branch in relation to the operations in Singapore. In this regard, in order to avoid the potential for conflict with actions taken a home resolution authority, we would suggest that MAS take these into account and consider whether it is necessary to formalise a

No.	Consultation Question	Comments
		regime to recognise and give effect to foreign resolution actions. Also, although there are difficulties in achieving this in the short-term, the longer term goal must be to ensure that any action taken in a resolution is recognised as legally effective under the laws of all other jurisdictions relevant to the particular case. For example, a statutory transfer by the MAS, during the resolution of a Singapore FI, of an ISDA Master Agreement governed by New York law must be recognised as effective by the New York courts. Similarly, a temporary stay imposed by the MAS, during the resolution of a Singapore FI, on a counterparty's right to designate an Early Termination Date under an English law governed ISDA Master Agreement must be recognised as effective by the English courts. In each case, we understand that there is currently doubt about whether that would be true under the current state of the law. It may take a binding international agreement to ensure that the necessary mutual recognition is achieved not only as between the various G20 countries but also as between the many other jurisdictions, including emerging market countries, where active participants in the global derivatives market are based. There is specific concern that a discretionary "case-by-case" evaluation on whether to give effect to a foreign resolution action would result in uncertainty. Although we note the MAS' concern that recognition or support of any foreign resolution action in a group-wide resolution should not prejudice domestic financial stability, we would highlight that, conversely, a lack of transparency and certainty as to whether and to what extent foreign resolution actions would be recognised would generate uncertainty as to the position of Singapore FIs, which would in turn affect the ability of market participants to manage their risk effectively. *Home country versus host country* We would strongly recommend that the proposed regime in Singapore should allow for the recognition of resolution proceedings being undertaken in the home country as well as other third countries. This is particularly relevant where foreign-incorporated institutions adopt a "single-point-of-entry" strategy at the holding company level to minimise systemic risk and are also subject to the requirements of their home

No.	Consultation Question	Comments
		regulators. A failure to recognise resolution actions of a home authority can result in a real risk that groups reduce their footprint in such host jurisdictions. *Statutory approaches to support cross-border resolution* The FSB published a consultative document on a proposed approach to the cross-border recognition of resolution action published on 29 September 2014 (the **FSB cross-border CP**). Many of the issues raised in the Consultation Paper have been discussed in ISDA's response to the FSB cross-border CP, which we have attached at Annex 1. We would refer you to the response for a detailed analysis of the cross-border issues, and in particular, would like to highlight the following points made in the ISDA response to FSB: (a) we broadly agree with the themes of the FSB cross-border CP, including, that a contractual approach to the cross-border recognition of resolution measures has certain limitations and a legislative approach is preferable; (b) we see the need to enshrine within any legislative approach the protection of safeguards whilst ensuring transparency and clarity for the market and the resolvability of firms. The immediate and automatic recognition of any such resolution measure on a cross-border basis is preferred provided certain specified safeguards are satisfied; (c) a coordinated approach is needed between jurisdictions to identify a primary regulator responsible for resolution and also to address group questions (i.e. the risk that multiple resolution authorities implement conflicting resolution measures); and (d) we propose the exploration of alternative legislative solutions as set out in the ISDA's response to FSB which aim to achieve the immediate and automatic recognition of a resolution measure to the extent that the specified safeguards are satisfied. Existing laws in Singapore do not address the foregoing cross-border considerations, and we would submit that, aside from the MAS' final decision on whether and on what basis to give effect to a foreign

No.	Consultation Question	Comments
		resolution action, a framework should be put in place to address these considerations. We agree that it would be appropriate to set specific considerations which must be met before the local resolution regime may be used to support foreign resolution measures. However, the conditions set out in paragraphs 7.8 (a) to (c) would need to be developed further with sufficient details in order to provide the necessary certainty and transparency to market participants. For example, regarding the no-local-creditors-disadvantaged condition set out in paragraph 7.8(b), we query whether this would apply simply because the foreign resolution regime's depositor protection scheme is less favourable than Singapore's regime. We would recommend that these conditions should be tied up to the safeguards featured in the Key Attributes. Key safeguards include the following: (a) the protection of netting arrangements; (b) the protection of rights of set-off; (c) the preservation of credit support arrangements (including title transfer arrangements); (d) there is no discrimination between creditors (e.g. the resolution measure does not discriminate on the basis of the nationality of the creditor or the jurisdiction of its claim); (e) the no creditor worse off principle (i.e. the creditor's position is no worse relative to the position the creditor would have been in had normal insolvency proceedings been commenced with respect to its counterparty (including with respect to priority)); (f) appropriate procedural protections are in place (e.g. due process is observed such that, for example, affected parties are given proper notice and the opportunity to be heard); and (g) only resolution measures which have been introduced and are publicly available are recognised (e.g. a press release containing a generic summary of a confidential measure which has been

No.	Consultation Question	Comments
		implemented would be insufficient). We note that the MAS is not in favour of an automatic recognition mechanism. Although we understand that the MAS may need some discretion in assessing whether the cross-border conditions are met, market participants also need the resolution law to be clear in terms of the resolution authority's powers and the extent by which the resolution measures will be recognised on a cross-border basis. This is important to market participants as they need to understand its potential impact at inception of contract. This is necessary for various reasons, including good credit risk mitigation. There also needs to be consistency in recognition between all jurisdictions. If there is discretion in terms of how each jurisdiction gives effect to the same measure, inconsistencies may be introduced which could undermine a cross-border resolution. In this respect, we note that recognition of FI resolution regime is different to previous attempts at cross-border recognition of insolvency proceedings (where the relevant insolvency proceedings looked very different). Broadly speaking, resolution powers do look very similar (as do the nature of the safeguards), including because of an attempt by jurisdictions to be consistent with the Key Attributes. ISDA members would prefer an automatic and immediate recognition (unless clearly articulated safeguards are not satisfied) without the need for additional domestic steps to implement resolution measures. A general public policy exception to such automatic and immediate recognition should be limited in scope. We take the view that the "public interest" consideration set out in paragraph 7.8(c) is too broad and should be removed. The considerations set out in paragraphs 7.8(a) and (b) should already be sufficient to ensure that domestic financial stability is protected. Last but not the least, we would like to stress that home and host authorities collaboration is absolutely key to resolving a cross-border FI. As noted in the Consultation Paper, a coordinated and cooperative approach to the resolution of cross-border FIs has the potential to better protect financial stability across home and host jurisdictions. In this respect, we strongly support Key Attribute 8 which requires home and key host authorities of all G-SIFIs to maintain Crisis Management Groups to facilitate the planning and management of the resolution of a cross-border financial crisis. In particular, we would be grateful if the MAS could provide further clarity on: (a) how it would propose to enable a cooperative solution; and

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		(b) whether the intention is to restrict the scope of the recognition process to foreign resolution actions taken by the home resolution authorities or whether the resolution authorities of other third countries are to be included as well.
Creditor Compensation Framework		
12.	MAS seeks views on the proposal to establish a creditor compensation framework applicable to creditors of banks, merchant banks, finance companies, insurers, capital market infrastructures, DPS operators and settlement institutions, and financial holding companies regulated by MAS.	Whilst we support the no creditor worse off than in liquidation *(***NCWOL***)* principle and the importance of providing a compensation mechanism for NCWOL, we expect that a NCWOL valuation would be a complex exercise based on various assumptions (which may be subject to challenge). We are also concerned that the process of appointing an NCWOL valuer and conducting an NCWOL valuation, which should only begin after formal resolution proceedings have been initiated, may create additional uncertainties and timing delays on the resolution process. We would request more clarity on: (a) the valuation process and in particular whether the valuation process is intended to be run separately but in parallel to the bail-in valuation process and to what extent the two valuation processes could create inter-dependencies and/or knock-on impact on the resolution plan and powers. Any requirements for firms to develop capabilities to perform valuations should be consistent with those of other regimes. The implementation of these requirements involves costly system builds, therefore alignment between regimes will be beneficial; (b) the valuation principles and how these would affect different classes of contracts. General valuation principles would involve consideration of creditor hierarchy and disregarding any public source of financial assistance. In particular, we would query whether if the stay results in a delay of termination rights such that the market shifts resulting in a creditor being worse-off, this would be an item for which the creditor would need to be compensated; (c) timing - we suggest that the valuation reference date should be the date when the public notice announcing the formal commencement of resolution proceedings is issued as it is less subjective and is clearly defined compared to the date on which an FI would otherwise have entered into liquidation;

No.	Consultation Question	Comments
		(d) assumptions and qualifications; (e) process of appointment or removal of the valuer - general principles of transparency and that the valuer undertaking the valuation should be independent and not perceived to be in a position of conflict or in a position of authority should apply; (f) costs of funding of the compensation and how this is to be financed; and (g) appeal process.
13.	MAS seeks views on the features of the proposed creditor compensation framework – (a) the proposal to engage a qualified independent valuation agent to determine any creditor compensation payable and the criteria (if any) for the appointment of such a valuation agent; (b) the valuation principles that such a valuation agent should adopt; (c) the appeal process on the compensation amount determined by the valuation agent; and	Please see our response to question 12 above.

No.	Consultation Question	Comments
	(d) other features that MAS should consider including in its creditor compensation framework.	
Resolution Funding		
14.	MAS seeks views on the proposal for resolution funding arrangements to be used for – (i) costs incurred in the implementation of resolution measures; and (ii) any creditor compensation claims that may arise.	Generally, use of resolution funds to absorb losses creates moral hazards and potentially undermines the key objectives of shareholders and creditors bearing losses and instilling market discipline – the FSB Key Attributes state that effective resolution regimes should "not rely on public solvency support and not create an expectation that such support will be available" (see paragraph (iv) of the Preamble). Conceptually any resolution funds should be used for liquidity purposes. Further detail would need to be considered, particularly in respect of: (a) costs to be covered by the resolution fund; and (b) the parameters of use of the resolution fund, including size/risk proportionality and any caps on use or contributions. It is also worth reiterating here the earlier point we made with respect to MAS' consideration of the final standard on TLAC. A preliminary consideration to take note of is that if the TLAC is properly sized and calculated for, an argument could be made that this would result in less dependency on ex post recovery. Any resolution funding should be collected proportionate to the systemic importance of a particular entity as defined by reference to the risk such entity brings to the Singapore system, for example by reference to the size of the retail deposits such entity holds in Singapore. The risk associated with any non-Singapore operations should be excluded for such purposes to avoid the potential double taxation of cross-border groups.

No.	Consultation Question	Comments
15.	MAS seeks views on the proposal not to establish full ex ante funding to implement resolution measures, but to establish an ex post recovery mechanism and tap on prevailing ex ante funds.	Further detail on the mechanism and the parameters would be required. We would submit that any funding should take into account the size and risks of the relevant institution's Singapore operations, along with the FI's global group resolution presumed path (with support from overseas) thereby reflecting the FI's proportioned risk in the host jurisdiction (which could reduce its likelihood on drawing on local resolution funds).
16.	MAS seeks suggestions on the appropriate level of losses to be imposed on equity holders and unsecured creditors of the financial institution to be resolved, before resolution funding arrangements are tapped upon.	We would submit that losses may depend on the size of the FI and its operations in Singapore - particularly for branch of a foreign FI. We would also suggest that capital and bail-in liabilities should generally be exhausted in full before drawing on any resolution fund. In addition, the decision to limit bail-in to only subordinate liabilities is likely to increase the need for a fund to absorb losses. Imposing losses upon other FIs instead of the creditors of the FI in resolution will increase the interconnectedness of FIs and consequently increase the risk of contagion.
17.	MAS seeks views on the proposal to expand the use of the DI Fund to include the funding of the resolution of DI Scheme Members, but excluding any creditor compensation claims that may arise, subject to the equivalent cost criterion.	The mechanics of use of the DI Fund would need to be considered – the MAS may wish to consider making this proportionate to depositor base and subject to a cap.
18.	MAS seeks views on the proposal to apply ex post levies on all other banking entities.	This is potentially wide ranging and we would request further clarity on whether such levies would be based on the size of the FI and risks to the general industry in Singapore. The imposition of levies upon FIs in Singapore would increase the interconnectedness of FIs and therefore the risk of contagion, whilst also increasing the cost of transacting in Singapore and thereby reducing its competitiveness. We refer

No.	Consultation Question	Comments
		to our earlier comments on question 14 with respect to TLAC. We would ask that MAS considers the possibility of calibrating the TLAC calculations for locally-incorporated banks to ensure less dependency to ex post levies. It is worth noting that foreign institutions may already be GSIBs which are subject to TLAC requirements or minimum requirements for own funds and eligible liabilities (MREL).
21.	MAS seeks views on the scope of ex post recovery, i.e. the scope of entities from which costs should be recovered. In the case of a DPS operator, MAS seeks views on the recovery of funds from all direct and indirect participants of the resolved DPS operator.	For ex post recovery mechanism on failing CMIs, members of CCPs would already have funded contribution and accepted rules for loss allocation and mutualisation in case of any failures associated with the other members of CCPs or the CCP itself. To impose an additional layer of ex post recovery costs, would make the usage of CCPs by market participants even more costly and the position/exposure of the CCP members less clear. Levies on other CMIs in the same line of business or performing same functions may create contagion effect.
22.	MAS seeks views on the manner by which costs should be recovered, for example, whether this may be through levies on participants or transaction levies, and the apportionment of such levies.	

ISDA

Annex 1

ISDA Submission to FSB on Cross-Border Recognition

ISDA. Safe, Efficient Markets

BY E-MAIL

1 December 2014

Secretariat to the Financial Stability Board
Bank for International Settlements
Centralbahnplatz 2
CH-4002 Basel
Switzerland

Per e-mail to: *fsb@bis.org*

Ladies and Gentlemen

Cross-border recognition of resolution action

The International Swaps and Derivatives Association, Inc. (**ISDA**) is grateful for the opportunity to respond to the consultative document (the **Consultative Document**) of the Financial Stability Board (**FSB**) on a proposed approach to the cross-border recognition of resolution action, published on 29 September 2014. We set out in Annex 2 to this letter information regarding ISDA, our members and our activities.

Executive summary:

1. We broadly agree with the themes of the Consultative Document, including, that a contractual approach to the cross-border recognition of resolution measures has certain limitations and a legislative approach is preferable.

2. We see the need to enshrine within any legislative approach the protection of safeguards whilst ensuring transparency and clarity for the market and the resolvability of firms. The immediate and automatic recognition of any such resolution measure on a cross-border basis is preferred provided certain specified safeguards are satisfied. See Part A of this letter.

3. A coordinated approach is needed between jurisdictions to identify a primary regulator responsible for resolution and also to address group questions (i.e. the risk that multiple resolution authorities implement conflicting resolution measures). Existing laws do not provide for an appropriate cross-border recognition framework. See Part B of this letter.

4. We propose the exploration of alternative legislative solutions which aim to achieve the immediate and automatic recognition of a resolution measure to the extent that the specified safeguards are satisfied. We prefer solution 1 of the two solutions which we have proposed. See Part C of this letter.

ISDA. Safe, Efficient Markets

A. GENERAL APPROACH

Our members comprise a mix of buy-side and sell-side institutions. Sell-side institutions have the perspective both of being required to demonstrate that they are resolvable and also as a creditor of another institution potentially subject to a resolution measure. Generally, the buy-side have the perspective of being a creditor of an institution potentially subject to resolution measures.

Given the varying perspectives, objectives can therefore conflict. Our response therefore seeks to accommodate three themes important to all of these perspectives:

1. **Safeguards**: Safeguards are critical to the integrity, safety and efficiency of the derivatives market and, in principle, have been widely accepted[1]. We note that safeguards featured in the previous FSB paper relating to Key Attributes of Effective Resolution Regimes for Financial Institutions (October 2011) (the **Key Attributes Paper**). Recognition of resolution measures should therefore only be to the extent safeguards are preserved. Key safeguards include the following: (a) the protection of netting arrangements; (b) the protection of rights of set-off; (c) the preservation of credit support arrangements (including title transfer arrangements); (d) there is no discrimination between creditors (e.g. the resolution measure does not discriminate on the basis of the nationality of the creditor or the jurisdiction of their claim); (e) the no creditor worse off principle (i.e. the creditor's position is no worse relative to the position the creditor would have been in had normal insolvency proceedings been commenced with respect to its counterparty (including with respect to priority)); (f) appropriate procedural protections are in place (e.g. due process is observed such that, for example, affected parties are given proper notice and the opportunity to be heard); and (g) only resolution measures which have been introduced and are publicly available are recognised (e.g. a press release containing a generic summary of a confidential measure which has been implemented would be insufficient).

   The devil is in the detail for these safeguards. The requirement that "appropriate protections" are in place for netting agreements or that "public policy" be taken into account are insufficient and will lead to a divergence of recognition. There is a need to explicitly provide for what is protected and what will not be recognised. Examples include: (i) specifically stating that a bail-in measure can only be applied in respect of the net amount following the termination of an agreement (whereby the termination, valuation and determination of the net sum are effected following the contractually agreed method) and after the application of any security; (ii) all rights and obligations are transferred (i.e. no "cherry picking"); (iii) any security in respect of a secured obligation transfers with the secured obligation including all rights *in rem* and *in personam*; (iv) the suspension of payments runs both ways so as not to distort overall net exposure; (v) in respect of the resolution of a member of a clearing house, the clearing house rules are respected including that client transactions should continue, terminate or transfer in line with the default management processes engaged by the clearing house; (vi) the suspension of termination rights should not affect the exercise of termination rights which do not relate to the resolution measure and such suspension should be strictly limited in time, as contemplated by the Key Attributes Paper; (vii) any transferee is bound by the terms of a transferred agreement; and (viii) if a counterparty is left behind with transferor whilst substantially all the assets are transferred, the exercise of termination rights should be unrestricted. Furthermore, none of the above should be capable of being indirectly undermined (e.g. via a general power to modify contracts so as remove or alter the effect of a netting provision). We recognise that it may be very difficult to identify and agree on a definitive list. As such, we have proposed alternative solutions in Part C of this letter which do not necessarily require the safeguards to be identified.

[1] Directive 2001/24/EC on the reorganisation and winding up of credit institutions (the **Winding Up Directive**) and Directive 2014/59/EU of the European Parliament and the Council of 15 May 2014, as published in the Official Journal of the EU on 12 June 2014 (**BRRD**).

2. **Transparency/clarity for the market:** Market participants need the resolution law to be clear in terms of the resolution authority's powers and the extent by which the resolution measures will be recognised on a cross-border basis. This is important to market participants as they need to understand its potential impact at inception of contract. This is necessary for various reasons, including good credit risk mitigation.

   Furthermore, at the time of an actual resolution measure, market participants need transparency. In particular, they need quickly to be able to determine what resolution measures have been introduced, when they were introduced, the extent by which they are effective and when they are effective. This is necessary for market stability including to ensure the continuity of business where appropriate (e.g. so a new bank can continue to transact under a transferred netting agreement because it can clearly determine that the governing law of the agreement recognises the transfer).

   The remedy for breach of a safeguard should be that the resolution is ineffective to the extent of breach of the safeguard, not, for example, an administrative remedy involving a judicial review claim. By "the extent of breach" we mean for example:

   (a) if the power under the resolution law could in theory involve the splitting of netting sets, but the actual resolution measure which is invoked does not in fact involve the splitting of netting sets, then such resolution measure will be recognised in full; or

   (b) if the transfer of a branch is effected under a resolution measure in such a way so as to split netting sets because the ISDA Master Agreement covers transactions via multiple branches, then such transfer will not be recognised.

   There also needs to be consistency in recognition between all jurisdictions (rather than discretions conferred on local courts or authorities).

3. **Resolvability**: This involves ensuring that financial institutions are resolvable on a timely basis. A process which is automatic and immediate is preferable to a mechanism which instead requires fresh local proceedings or action by a domestic authority. An immediate and automatic recognition (subject to safeguards) would help to ensure that institutions are resolvable because the resolution measures can be implemented promptly.

B. RESPONSE TO SPECIFIC FSB QUESTIONS

The Consultative Document raises five specific questions. Taking each in turn:

1. ***Are the elements of cross-border recognition frameworks identified in the report appropriate? What additional elements, if any, should jurisdictions consider including in their legal frameworks?***

Themes set out in section 1.2 of the Consultative Document

There is broad agreement with the themes in section 1.2 of the Consultative Document. As stated above, however, there is a preference for automatic and immediate recognition (unless clearly articulated safeguards are not satisfied) without the need for additional domestic steps to implement resolution measures. A general public policy exception to such automatic and immediate recognition should be limited in scope. Individual counterparties should make any determination as to whether safeguards are satisfied rather than wait for a domestic authority to confirm after a period of time.

If there were not to be an automatic and immediate recognition of resolution measures, we anticipate that there could be a significant divergence in terms of : (i) the capacity of domestic authorities to give effect to, and the extent of such effect of, resolution measures; (ii) the process for giving effect to resolution measures; (iii) the grounds for non-recognition of resolution measures; (iv) the requirements as to the equality of treatment of creditors; (v) the speed of implementation of resolution measures; and (vi) the liability of the resolution authority as a result of implementing resolution measures.

A distinction needs to be made between recognition and enforcement. Recognition of the resolution proceedings, in the traditional sense, will not result in the recognition and enforcement of the **effects** (i.e. the actual resolution measure). In order for "recognition" of the resolution actions to be effective, there needs to be both recognition of the proceedings and recognition and enforcement (with appropriate safeguards) of the actual effects of those proceedings.

It is also critical to establish:

(a) a coherent process for determining the home jurisdiction of a firm and which law predominantly governs its resolution. In this respect, the home state regulator may be appropriate. The centre of main interests (**COMI**) and establishment concepts are not appropriate in the context of institutions who operate a global business as the concepts are too uncertain and subject to potential challenge; and

(b) a coordinated approach for circumstances where a group comprises various legal entities (or branches) regulated in different jurisdictions. This needs to be coordinated so different jurisdictions' resolution measures do not conflict.

It would be very helpful if the FSB criteria also encouraged ex-ante coordination between authorities in order to help provide more predictability. For example, support measures around, transfer orders and operational continuity should be planned in advance.

In addition, it would also be helpful if, where practicable, all affected regulators agreed to consult with each other prior to the implementation of any individual resolution measure.

Identification of existing frameworks

The identified statutory frameworks have various advantages and disadvantages. Each of these is considered in turn in Annex 1 below. While aspects of the identified statutory frameworks can be taken and adapted to give effect to foreign resolution measures, each can be improved from the perspective of achieving a good standard of transparency and clarity for the market, resolvability and appropriate safeguards (although it is recognised that achieving perfection would be nigh on impossible). In the corporate insolvency context, the UNCITRAL Model Law is the most appropriate comparator. While implementing an equivalent regime to the UNCITRAL Model Law for resolution is not attractive for the reasons set out below, some of the broad principles set out in the Model Law (and the Winding Up Directive) could be used by way of inspiration for an alternative solution.

Our view is therefore that the FSB should move away from the existing examples of laws relating to cross-border recognition. We propose the consideration of alternative solutions as outlined in Part C of this letter below.

2. ***Do you agree that foreign resolution actions can be given effect in different ways, either through recognition procedures or by way of supportive measures taken by domestic authority under its domestic resolution regime? Do you agree with the report's analysis of these approaches?***

If there is discretion in terms of how each jurisdiction gives effect to the same measure, inconsistencies may be introduced which could undermine any of the three themes. Importantly, there is also the potential to create additional conflicts of laws if the recognition of the resolution action requires what is effectively a local resolution procedure to perfect and give effect to the foreign resolution. See question 1.

We recognise that some of the alternative approaches suggested by us in Part C below may be difficult to achieve. In the event that they are not achieved, "recognition procedures" would be preferable to "support mechanisms" for sections 1.2.1, 1.2.2 & 1.2.3 of the Consultative Document. This is because recognition procedures increase the likelihood that a resolution is carried out in a cohesive and consistent manner (rather than the implementation of support mechanisms which may conflict with each other). However, for the reasons stated elsewhere in this response, we would have concerns that recognition procedures may not be able to cover all of the themes identified: safeguards, transparency and clarity for the market and resolvability.

3. ***Do you agree that achieving cross-border enforceability of (i) temporary restrictions or stays on early termination rights in financial contracts and (ii) 'bail-in' of debt instruments that are governed by the laws of a jurisdiction other than that of the issuing entity is a critical prerequisite for the effective implementation of resolution strategies for global systemically important financial institutions (G-SIFIs)? Is the effective cross-border implementation of any other resolution actions sufficiently relevant for the resolvability of firms that the FSB should specifically consider ways of achieving their cross-border enforceability?***

Broadly speaking, we agree. Depending on the circumstances it could be equally critical to address the recognition of:

(a) resolution measures which effect the transfer of assets, rights and liabilities of an entity to another entity; and

(b) permanent restrictions on termination rights triggered solely as a result of resolution measures.

4. ***Do you agree that contractual approaches can both fill the gap where no statutory recognition framework is in place and reinforce the legal certainty and predictability of recognition under the statutory frameworks once adopted?***

We agree with the Consultative Document that any use of a contractual solution is very much an interim measure, although it is a useful interim solution and backstop. A contractual approach has certain limitations and so a statutory approach is preferred. We have set out some of these limitations below.

(a) It requires an agreement between the parties concerned. Various market participants have expressed the view that they have no commercial incentive to agree to the resolution measures (and may have fiduciary duties meaning they cannot).

(b) We agree with the additional concern raised by the FSB that not every entity is regulated meaning the approach of compelling entities by regulation does not seem to be an optimal solution. Inconsistencies in terms of the extent by which each local regulation demands a contractual opt-in may mean the ISDA 2014 Resolution Stay Protocol published on 12 November 2014 (the **ISDA Protocol**) and other similar protocols may not be consistently adopted (e.g. if one regulator demands

recognition of stays of termination rights only, buy-side market participants in that jurisdiction would not agree to sign up to the ISDA Protocol as it goes further than this type of measure).

(c) Concerns around the lack of motivation of parties are exacerbated in derivatives and other markets (e.g. repo market) as opt-in involves changing existing master agreements so as to have a retrospective effect on existing transactions.

(d) Contractual agreements can be overridden by other considerations relevant to the recognising jurisdiction. This observation is made in the Consultative Document with respect to public policy. Other examples include on grounds of capacity, authority, recognition of a foreign composition of local law debt and insolvency clawbacks. As a contract, it is open to challenges, whereas a legislative approach could ensure certainty of outcome (but this may depend on the specifics of the approach, see discussion as to alternative proposals in Part C below).

(e) Contractual solutions may not work so as to transfer rights *in rem* (or, if they do, there may be perfection requirements, clawback periods may be reset, the secured party's priority may be changed, third party consent or action may be needed etc.). Consider, for example, an English law charge on securities held in a non-English clearing system as credit support for an English law ISDA Master Agreement with a US bank. If the US bank resolution action involves a transfer to a bridge bank, a contractual opt-in as a matter of English law under the ISDA Master Agreement may not be sufficient of itself to effect a transfer of the property rights as a matter of the law applicable to such cleared securities. This issue will be exacerbated by the move away from title transfer in respect of mandatory requirements for initial margin.

(f) Any contractual solution potentially requires thousands of new contracts which will take time (and may be subject to their own negotiations). The mere existence of an ISDA Protocol does not guarantee adherence, particularly when an attempt is made to expand potential adherents more widely, so as to cover all market participants.

(g) Whilst it is prudent for market participants to take steps to ascertain the enforceability of any contractual approach, such steps will not represent an assurance that the contractual approach will be enforceable. Legal opinions may have a role in this respect, but their use will be limited and they will invariably contain reasoning based on qualifications and assumptions, and risks will remain. A legislative approach would be better able to mitigate such risks.

5. ***Are the key principles for recognition clauses in debt instruments set out in the report appropriate? What other principles or provisions do you consider necessary to support the exercise of 'bail-in' powers in a cross-border context?***

We believe other industry bodies are better suited in providing a response with respect to bond markets.

C. ALTERNATIVE APPROACHES TO RECOGNITION

The alternative approaches suggested below are designed with the intention of accommodating all three themes relating to safeguards, transparency and clarity for the market and resolvability. They are also designed with the objective of managing the inherent conflicts between these themes. These alternative approaches involve immediate and automatic recognition of the resolution measures and proceedings without the need for fresh judicial or administrative proceedings in the recognising jurisdiction. If immediate and automatic recognition of resolution measures and proceedings is in place, clearly safeguards become critical.

We recognise there is no "silver bullet" solution to meet all three themes and we recognise that these solutions are ambitious. However, the concept of being able to provide relief in aid of a foreign insolvency proceeding to the extent available under a law other than the law of the State where the proceedings have been opened has some precedent in the Model Law. Equally, the principle that safeguards can be established by reference to the governing law of the contract has precedent in the Winding Up Directive. Furthermore, it may be helpful in terms of achieving a consensus between sovereign states that the context now is different to previous attempts at cross border recognition of insolvency proceedings (where the relevant insolvency proceedings looked very different). Broadly speaking, resolution powers do look very similar (as do the nature of the safeguards), including because of an attempt by jurisdictions to be consistent with the Key Attributes Paper.

Solution 1 is preferable to solution 2 on the basis of a comparison of their potential respective advantages and disadvantages, as outlined below.

<u>SOLUTION 1:</u> Recognition but let choice of law effect safeguards

This solution effectively provides for the immediate and automatic recognition of resolution measures and proceedings but only to the extent that any such resolution measure and proceeding could have been taken under the governing law of the relevant contract. There is some precedent for this - this approach is analogous to an interpretation of Article 25 of the Winding Up Directive. It may also be helpful to include a temporary (e.g. a 2 business day) restriction or stay on early termination rights in financial contracts arising from such resolution measure (including the exercise of any cross-default rights). This will allow some time for counterparties to map the resolution action against the equivalent resolution regime of the governing law of the relevant contract.

Advantages:

1. This solution respects the choice of law that the parties made when entering into the contract and uses it as a proxy to define the safeguards which protect creditors.

2. Most cross-border contracts are governed by New York or English law, which have robust and reasonably developed regimes.

3. This achieves the protection of safeguards which are already documented (without the need for protracted negotiation between jurisdictions as to the scope and coverage of a fresh list of safeguards).

4. Resolution regimes which are lacking will automatically fail and therefore be unattractive. This may ensure the further harmonisation of regimes with the Key Attributes Paper.

Disadvantages:

1. This approach requires a comparison between two regimes. This analysis could prove to be time consuming and difficult in some circumstances.

SOLUTION 2: Recognition mirrors contractual approach under ISDA Protocol

This solution effectively proposes the implementation of the ISDA Protocol as a legislative solution. The legislative framework, as in the ISDA Protocol, would specify six identified regimes between which there is automatic recognition of any resolution measure.

In respect of other regimes, there would be automatic recognition of resolution measures subject to the safeguards. Alternatively, the six identified regimes could: (i) collectively agree (or agree via the FSB's existing peer review programme) whether or not to admit other jurisdictions to the club of six regimes or (ii) individually agree their own recognition of such other jurisdictions on a bilateral and reciprocal basis.

Advantages:

1. This approach capitalises on the degree of political consensus already agreed between the six identified regimes which led to the development of the ISDA Protocol.

2. This approach would also encourage other regimes to implement laws that achieve the higher status afforded to such identified regimes.

3. As most derivative contracts are governed by English and New York law, this may be highly effective to the extent of rights *in personam* (because both the UK and the US are identified regimes).

Disadvantages:

1. Certain changes may need to be made in order to fit the ISDA Protocol into a legislative framework. For example, is it politically acceptable for the Annexes (which, broadly speaking, limit recognition to the extent of the current law and anticipated changes in certain laws in each of the six jurisdictions) to be reflected as a concept in a cross-border treaty? Equally, is it politically acceptable for Section 2 of the ISDA Protocol (*Limitation on Exercise of Default Rights upon U.S. Insolvency Proceedings*) to be reflected?

2. The safeguards for regimes (other than the identified regimes) need to be agreed in detail by each relevant jurisdiction

3. This is dependent on reciprocity. The identified six regimes agreeing safeguards may mean that they will recognise resolution measures implemented by other regimes but does not mean such other regimes will recognise resolution measures introduced by the identified regimes.

4. The two tier system of recognition may not be palatable for jurisdictions outside of the six identified regimes.

5. This solution may not be ambitious enough.

We hope that you find our comments useful in your continuing deliberations on the cross-border recognition of resolution action. Please do not hesitate to contact the undersigned if we can provide further information about the derivatives market or other information that would assist the FSB in its work in relation to the implementation of a legislative framework for the cross-border recognition of resolution action.

Yours faithfully,

Scott O'Malia

Chief Executive Officer

ANNEX 1

EXISTING STATUTORY FRAMEWORKS

UNCITRAL Model Law (as expanded to cover entities subject to resolution):

This statutory framework is potentially unsuitable because it cannot deliver appropriate protections for safeguards, transparency and clarity for the market and resolvability for the following reasons.

(a) It is subject to local law implementation which results in divergences in scope and approach.

(b) There is no concept of automatic recognition of proceedings. Instead, recognition is by way of court application and there can be differences in views as to what proceedings are capable of recognition.

(c) Save for an automatic, but limited, stay (see (d) below), upon recognition of the proceedings everything is discretionary before the courts, which could result in an inconsistent application of safeguards.

(d) The court process for discretionary relief (e.g. the extension of the stay, the grant of an order preventing the termination of contracts) can take an extended period of time. For example it is possible for such process to take between three to six months (although shorter periods are possible). The appeal process can also lengthen this process (e.g. *Fairfield Sentry Limited, Debtor Kenneth Krys v Farnum Place, LLC*[2] in the US and *Fibria Celulose S/A v Pan Ocean Co. Ltd & Anor*[3] in the UK).

(e) The ability to recognise the effect of a foreign law (e.g. the effects of resolution measures) is unclear. In particular, it is unclear as to whether this is possible (e.g. we understand that, broadly speaking, the position in the US is yes, whereas, the position in the UK is no) and, if so, in what circumstances and to what extent foreign law will be applied (e.g. the recognition of a foreign composition). However, the ability to provide discretionary relief in the form of **any** relief that may be available under the laws of the State that has recognised the foreign insolvency proceeding (the **Recognising State**) does provide a helpful precedent. Clearly, it contemplates a Recognising State giving effect to a foreign proceeding to the extent that the relevant measure is available under the laws of the Recognising State[4]. This principle is analogous to solution 1 of our suggested alternate approaches.

(f) The automatic stay is not very effective (and its precise scope is subject to local law implementation) as the stay's principal effect applies only in relation to commencing or continuing legal proceedings in respect of the debtor's assets and preventing the debtor from transferring or disposing of its assets. It is not a stay on contractual termination rights or other self-help steps such as the suspension of payment obligations or the enforcement of security.

(g) It does not cover financial institutions and also relies on COMI. See earlier comment on how this concept is not suitable for credit institutions.

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[2] Fairfield Sentry Limited, Debtor Kenneth Krys v Farnum Place, LLC 768 F.3d 239 (2nd Circuit 2014)

[3] Fibria Celulose S/A v Pan Ocean Co. Ltd & Anor [2014] EWHC 2124 (Ch)

[4] Although it should be noted that the scope of the relevant provision in the Model Law is untested in this context in the UK

Swiss Legislation

Based on the description contained in the Consultative Document, this statutory framework, is unhelpful in terms of delivering appropriate safeguard protections, transparency and clarity for the market and resolvability for the following reasons:

(a) the two month period for the recognition of proceedings is too long; and

(a) the issues raised are similar to those which arise in respect of non-Member States under BRRD. Please see further under "BRRD/Winding Up Directive" below.

Monetary Authority of Singapore (MAS) Act

Based on the description contained in the Consultative Document, this statutory framework, is unhelpful in terms of delivering appropriate safeguard protections, transparency and clarity for the market and resolvability for the following reasons:

(a) the exercise of power to transfer shares is subject to Ministerial approval, which creates high political risk; and.

(a) there is limited assistance as the power only relates to the transfer or issuance of shares and therefore is not wide enough.

We note, however, that as there is no need to go to a court, this is helpful for resolvability.

BRRD/Winding Up Directive

Recognition between Member States

This provides for automatic recognition between Member States (of both proceedings and, subject to exceptions, the effects of the proceedings). As such, this framework is generally helpful for resolvability, safeguards and transparency and clarity for the market. However, the devil is in the detail and, in certain respects, discretion is conferred on individual Member States. Examples of where these legislative frameworks defer to local implementation (which may diverge) include the following.

(a) There is a discretion in how the safeguards are transposed by Member States. For example, see Article 77 of BRRD.

(b) The scope of the exceptions (safeguards) in the Winding Up Directive is unclear in many aspects and in need of clarification from the CJEU and/or EFTA court. This is unhelpful from the perspective of achieving transparency and clarity for the market.[5]

[5] Broadly speaking, the Winding Up Directive sets out the basis of recognition by each member state of other member states' resolution measures. It provides for very broad recognition by one member state of another's resolution laws. There are various exceptions to this, for example, with respect to "netting agreements" (including standard ISDA Master Agreements). Article 25 of the Winding Up Directive provides that netting agreements will be governed solely by the governing law. The prevailing view, at least from English law perspective, is that, taking an example of an English law governed ISDA Master Agreement with an Italian credit institution under resolution, the use of "solely" confirms that the governing law of the contract (i.e. English law) will be unamended by the Italian reorganisation measures. It will, however, include English insolvency law assuming that the Italian credit institution had undergone the closest equivalent English proceedings or measures. The Winding Up Directive is unclear, however, and there are other views. Assuming this is the correct interpretation, broadly speaking, this means Italian resolution will be recognised via the Winding Up Directive under English law contract if you could do the same thing under for example the Banking Act 2009. See second solution in Part C below as to how this approach could be adapted.

Recognition in respect of non-Member States

In terms of recognition in respect of non-Member States, the safeguards are so broad and potentially politically biased so that it may become difficult for market participants to predict how they will be applied in practice. The result is that it is also unclear in terms of resolvability. Recognition of non-Member States resolution measures is subject to exceptions which can be construed quite broadly. The dual approach applied in BRRD of: (i) enforcement of the resolution proceedings in accordance with national law; together with (ii) ensuring that domestic resolution authorities have certain minimum powers to implement and perfect aspects of the foreign resolution in their State are bad for transparency and clarity. It also has the potential to create another conflict of laws, between the foreign law resolution measure and the domestic actions in support of the foreign law resolution measure.

ISDA. Safe, Efficient Markets

ANNEX 2

ABOUT ISDA

Since 1985, ISDA has worked to make the global over-the-counter (OTC) derivatives markets safer and more efficient. Today, ISDA has over 800 member institutions from 64 countries. These members include a broad range of OTC 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 including exchanges, clearinghouses 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 web site: www.isda.org.