ISDA Safe, Efficient Markets

BY EMAIL

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Dear Sirs

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

Introduction

The International Swaps and Derivatives Association, Inc. (**ISDA**) is grateful for the opportunity to respond to the Consultation Paper on Proposed Legislative Amendments to Enhance the Resolution Regime for Financial Institutions issued by the Monetary Authority of Singapore (**MAS**) on 29 April 2016 (the **Consultation Paper**).

ISDA appreciates the MAS' efforts in this area and hopes that our comments in this submission will assist the MAS in the establishment of the resolution framework. ISDA hopes to continue the constructive ongoing dialogue between the MAS and derivatives markets participants in connection with the implementation of the proposals regarding the resolution regime.

Scope of Response – Areas of Focus

Our response follows from our submission (the **2015 Submission**) on the 2015 Policy Consultation on Proposed Enhancements to Resolution Regime for Financial Institutions in Singapore (the **Policy Consultation**) and focuses on the same key themes of transparency and certainty, preservation of set-off and netting and ensuring consistency with international standards. In this response, similar to our approach in the 2015 Submission, we primarily address the issues that are relevant to derivatives markets – in particular, we have focused on the proposals relating to the following areas:

(a) bail-in;

(b) temporary stay;

(c) cross-border recognition of resolution actions; and

(d) safeguards for netting and set-off arrangements.

While we agree that the issues dealt with throughout the Consultation Paper are closely interrelated, and we have included certain comments with regards to issues raised in other parts of the Consultation Paper where we have received comments from members, we believe, given our focus on the 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 members may also choose to make their own individual submissions to the MAS.

Consistent with our mission, we are primarily concerned in this letter 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 resolution powers that allow the MAS to resolve distressed FIs and preserve the stability and efficiency of the Singapore market against the need to ensure 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 FSB Key Attributes and other jurisdictions, to ensure that the treatment of Singapore-based FIs under the resolution framework is consistent with the treatment of FIs under resolution frameworks in other jurisdictions.

Responses to Specific Questions

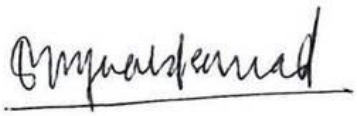
We set out our detailed responses to the proposed amendments contained within the Consultation Paper in Appendix 1 of this response letter. Any terms not defined in Appendix 1 are as defined above or in the Consultation Paper.

ISDA thanks the MAS for the opportunity to respond to the Consultation Paper and welcome further dialogue with the 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, Assistant General Counsel at (eabdulsamad@isda.org, at +65 6653 4170) if you have any questions.

Yours sincerely

For the International Swaps and Derivatives Association, Inc.

Keith Noyes
Regional Director, Asia-Pacific



Erryan Abdul Samad
Assistant General Counsel

ISDA

RESPONSE TO CONSULTATION PAPER

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

Consultation topic:	Proposed Legislative Amendments to Enhance the Resolution Regime for Financial Institutions in Singapore
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Confidentiality	
I wish to keep the following confidential:	Nil

Consultation Question	Comments
General Comments	In this response, similar to our approach in the 2015 Submission, we primarily address the issues that are relevant to derivatives markets – in particular, we have focused on the proposals relating to the following areas: (a) bail-in; (b) temporary stay; (c) cross-border recognition of resolution actions; and (d) safeguards for netting and set-off arrangements. We have also included comments on the other areas where we have received feedback from members. 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 proposals as a whole, some of which were raised in our earlier submission. (a) *Consequence of exercise of resolution powers* As a starting point, we would note that the FSB Key Attributes state that the objective of an effective resolution regime is to make feasible the resolution of FIs without severe systemic disruption and without exposing taxpayers to loss, while protecting vital economic functions through mechanisms which make it possible for shareholders and unsecured and uninsured creditors to absorb losses in a manner that respects the hierarchy of claims in liquidation. In particular, the FSB Key Attributes highlight that an effective resolution regime should, as one of its main objectives, ensure continuity of systemically important financial services and payment, clearing and settlement functions. We would submit that the MAS may consider the approach taken in the European Union's (EU) Bank Recovery and Resolution Directive (**BRRD**) and Hong Kong's Financial Institutions (Resolution) Bill (**FIRB**), which contain provisions on preservation of certain protected arrangements in case of partial transfers – these provisions serve to safeguard special arrangements such as collateralisation. We would welcome further clarity on the consequences of the MAS' exercise of its resolution powers in respect of counterparties to the FI under resolution. In particular, we would submit that an exercise of resolution powers (including the implementation of any temporary stay) should not, of itself, render an FI or a counterparty in breach of regulatory obligations such as exposure limits and loan to value (**LTV**) limits.

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	For instance, exposures may shift following a transfer of business to another FI. Similarly, a partial transfer of business may result in transactions becoming under collateralised, if collateral is not transferred. A suitable remedy period should be provided to allow parties to take steps to remedy such technical breaches that arise solely as a consequence of an exercise of resolution powers. (b) *Expanding safeguards to include collateral rights* We note that the policy discussions thus far and the proposed safeguards in Annex 8 of the Consultation Paper have centred around set-off and netting arrangements but have not touched on the issue of security interests that are entered into in connection with financial contracts that are part of set-off and netting arrangements. This raises a concern that the MAS' resolution powers, which include powers to issue directions, moratoriums and the power to stay, could (aside from their potential impact on set-off and netting) also prevent or delay the enforcement of collateral rights. As the current proposed safeguards are silent on the treatment of collateral taken by way of a security interest, we would urge the MAS to review and expand the scope of the safeguards to protect such collateral arrangements. This issue cuts across not only existing collateral arrangements but also the industry's efforts to address the EU and United States (US) non-cleared margin requirements. The US requirements are expected to take effect from September 2016, with the EU to follow thereafter. The rules impose initial margin (IM) requirements that necessitate new documentation for transactions subject to IM. There is a requirement that IM must be segregated, which means the current English law ISDA Credit Support Annex (which provides for full title transfer instead of the creation of a security interest) will not be appropriate. The new IM documentation will therefore rely on the creation of a security interest, and the rules require that IM must be available to the posting counterparty in a "**timely manner**" should the collecting counterparty default. As such, the ability to enforce collateral in a timely manner becomes an issue of key importance. If there is a lack of clarity around the ability of collateral takers to do so, this could result in global systemically important banks (G-SIBs) having to book away from Singapore branches to avoid affecting global credit support arrangements. In light of the US non-cleared margin requirements taking effect from September 2016, as well as the revised timetable from the EU, there is particular urgency surrounding this issue and we would therefore like to

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	request that the MAS prioritise its review of the proposals surrounding the safeguards, ideally with a view to amending the safeguards before September 2016. ISDA will also contact the MAS separately on this point. (c) *Remedies for breaches of safeguards* We note that the proposed legislation is silent on the remedies for breaches of safeguards. As indicated in our response to the Policy Consultation, we would submit that the remedy for a breach of safeguards should be made clear and should not simply be subject to judicial review. For instance, in the case of a transfer, there is particular concern that the possibility that an action could be made void would create substantial uncertainty as to the legal effect of the transferred business and contracts. The FSB Key Attributes have also highlighted that there should not be actions that could constrain implementation of resolution powers that result in a reversal of measures, and redress should primarily be by awarding compensation if justified. Accordingly, members have provided feedback that it should be clear that a breach of safeguards relating to transfers should not render the transfer void. (d) *Consequences of breaches of resolution tools* We have received feedback that some members are concerned about the proposal to make breaches of certain elements of the new resolution tools (such as bail-in and recognition of foreign resolution actions) subject to criminal sanction, and have queried whether civil penalties would be a more appropriate response. (e) *Central Clearing Counterparties (**CCPs**)* We note that the Consultation Paper includes certain points on CCP resolution and recovery. As you are aware, CCP resolution as well as CCP recovery give rise to different concerns from the resolution of FIs – for instance, with regards to resolution funding, there would need to be consideration of the interplay between resolution funding and the contributions that members of CCPs are already required to make under the CCP's rules. We would submit that these issues are complex and should be the subject of a separate consultation process, where they can be considered in depth. Our members are also supportive of a separate consultation process. 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 CPMI-IOSCO consultative report, *Recovery of financial market*

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	infrastructures, in which we discussed key principles regarding financial market intermediary (**FMI**) recovery in detail.[1] In addition, ISDA has also published: (i) a position paper on principles of CCP recovery[2]; (ii) 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[3]; and (iii) a white paper on the resolution framework for systemically-important CCPs (together with The Clearing House)[4]. These may serve as a starting point to set out some of the issues involved in CCP resolution. We would also note that the FSB has stated in its November 2015 report to the G20 on *Removing Remaining Obstacles to Resolvability that* it will examine the need for, and may develop proposals for further guidance to support CCP resolvability and resolution planning and to enhance pre-funded financial resources and liquidity arrangements for CCPs in resolution. We believe that these proposals for further guidance would be a logical precursor to local implementation of resolution regimes for CCPs. We have also noted particular issues relating to the impact of resolution powers on FMI memberships in our response to question 3. (d) *Outstanding issues* We note that there are a number of areas where regulations have not been proposed as yet. We look forward to the draft regulations on these outstanding items and respectfully request that the MAS allow adequate time to comment on the supporting regulations.

[1] See response to the CPMI-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

[2] See http://www2.isda.org/news/isda-launches-principles-on-ccp-recovery

[3] See http://www2.isda.org/news/isda-proposes-ccp-recovery-and-continuity-framework

[4] See https://www.theclearinghouse.org/~/media/TCH/Documents/20160523_TCH_ISDA_White_Paper_Considerations_for_CCP_Resolution.pdf

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Question 1: MAS seeks comments on the draft amendments to Part IVA of the MAS Act in relation to recovery and resolution planning.	(a) *Requirements for resolution plans for non-Singapore-incorporated banks* We note that the MAS has indicated in its response (the **Response**) to the Policy Consultation that it will review the FI's recovery and resolution plans in consultation with its parent/head office and home authorities were applicable, and MAS' requirements will not preclude an FI leveraging on its group/head office's recovery and resolution plans, provided that they adequately take into consideration the Singapore operations. We note that this principle has been raised in the context of Recovery Planning but not Resolution Planning, and would submit that the MAS should similarly emphasise this principle under Resolution Planning. The MAS has indicated in its response to the Policy Consultation that resolution and recovery planning (RRP) requirements may, where necessary, be applied on a proportionate basis to banks that are assessed to have systemic impact or that maintain critical functions. The risk associated with any non-Singapore operations should be excluded for such purposes to avoid unduly burdening cross-border groups. We note that the MAS has set out certain qualitative and quantitative measures that it will take into account in determining an FI's systemic importance or impact on the financial system. We thank the MAS for its guidance on these points. We have also received feedback from members on the following: (i) with respect to the determination of whether a bank has systemic impact or maintains critical functions, it is submitted that this should be assessed on a legal entity by legal entity basis, rather than looking at the presence of the group as a whole. As previously stated in our 2015 Submission, it may not necessarily be possible to define the scope of future resolution regimes solely by reference to systemic significance, as the systemic significance of an FI will depend not only on intrinsic characteristics of the FI but also on extrinsic factors in the financial markets and in the broader economy. We therefore think that it may be better to determine the scope of the regime on transparent and objective grounds and would be grateful if the MAS could provide more granularity on the grounds set out in the Response; and (ii) members have requested further details on the extent to which the MAS will allow a foreign bank that is assessed to have systemic impact or to

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	maintain critical functions to leverage off its global plan. Our members note that the MAS has stated in its Response that for an FI headquartered in foreign jurisdictions, the MAS will review the FI's recovery and resolution plans in consultation with its parent/head office and home authorities where applicable, and that the MAS' requirements will not preclude an FI leveraging on its group/head office's recovery and resolution plans, provided that they adequately take into consideration the Singapore operations. Our members have sought clarity on whether the MAS, in prescribing the "form and manner" of the RRP under s30AAJC (1), will take into account the "form and manner" of any global plan and would generally welcome more details on the extent to which an FI may leverage off its global plan. As previously stated in our 2015 Submission, we would submit that resolution strategies should be set at a group level and intervention at a local level must be kept at a minimum and be used in exceptional cases only. As far as possible, there should not be a separate requirement for country level plans and we would urge the MAS to consider the resolution plan at the group level, and to work with the relevant group to ensure that the exercise of local resolution powers are not in contradiction to the group's resolution plan. This is consistent with the Key Attributes which also state that at least for Globally Significant Financial Institutions (**G-SIFIs**), the home resolution authority should lead the development of the group resolution plan in coordination with all members of the firm's crisis management group (**CMG**). Host authorities that are involved in the crisis management group or are authorities of jurisdictions where the firm has a systemic presence should be given access to the RRPs and the information and measures that would have an impact on their jurisdiction.[5] This is further backed up by the Key Attributes' emphasis on sharing of information between home and host authorities, and in particular, that the sharing of all information relevant for recovery and resolution planning and for resolution should be possible in normal times and during a crisis at a domestic and cross-border level. Our members would submit that this information sharing should facilitate the leveraging off of global

[5] Key Attribute 11.8

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	plans and reduce the need for intervention at a local level. (b) *Information requirements for foreign banks* (i) We note that the information requirements are extensive and include, but are not limited to, (1) capital allocation; (2) booking arrangements; (3) intra-group guarantees; and (4) treasury function and funding arrangements. In particular, there is concern that the information requirements for foreign banks is likely to be onerous and would duplicate information that foreign banks are already required to provide in their global plans. Accordingly, it is submitted that the information requirement should be in relation to entities that are under direct regulation of the MAS (for instance, the Singapore branch of a foreign bank). It is also submitted that financial and capital dependencies should be required only of the Singapore regulated entity, and not of all of the material entities. Please refer to our response to question 2 for further specific comments. (ii) We would also request additional clarity from the MAS on how the MAS intends to address possible issues that may arise in terms of timing of submission, scope of information required, and legal, regulatory and contractual restrictions in providing such information, such as confidentiality requirements. (c) *Timelines for submission of recovery plans* Our members have suggested that timelines for submission of recovery plans and information relating to resolution planning should be flexible enough to coincide with submission of group plans and information to the CMGs, so as to relieve some of the administrative burden of global FIs in putting the information together. (d) *Power to issue directions* The proposed draft amendments introduce the ability for the MAS to issue directions to pertinent FIs. These are wide-ranging powers which may not be subject to safeguards. Members have provided feedback that the power to issue directions in respect of a foreign bank should be exercised

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	in a manner consistent with the group resolution plan. In particular, members would like to highlight that in Hong Kong: (i) there is provision to give banks time to propose their own measures; (ii) the intent is not to independently issue directions for cross-border banks; and (iii) there is an appeals process in case the direction is not proportionate. Please also refer to our response in question 8 on concerns in relation to these powers in relation to set-off and netting arrangements.
Question 2: MAS seeks comments on the draft Notice and Guidelines for recovery and resolution planning.	Please also refer to our response to question 1 for general comments on recovery and resolution planning. Members have raised the following comments in respect of the draft Notice on Recovery and Resolution Planning: (a) with regards to section IV, paragraph 4.2(c) and section V paragraph 5.1(b), members have requested for further clarity on the general process which is expected of a branch of a foreign bank. Members have queried whether, for instance, the foreign bank is expected to communicate with its home regulators before notifying the MAS. Members have raised the following comments in respect of the draft Guidelines on Recovery and Resolution Planning (the "**RRP Guidelines**"): (a) members are concerned that there may be an overlap in the definition of "local bank" and "foreign bank" under paragraph 1 of the RRP Guidelines, and have asked whether a locally incorporated bank that is a subsidiary of a foreign entity would be considered a "foreign bank"; (b) paragraphs 33 - 36 of the RRP Guidelines set out the requirements imposed on foreign banks to set out resolution planning for the branches which have a presence in Singapore. It would be helpful to understand how MAS plans to have this dovetail with other jurisdictions where resolution regimes are currently being discussed and have not been finalised. Our members have also queried if it would be possible to have a transitional period for firms which have their head office in such jurisdictions; (c) it is not clear whether the definition of "group" under paragraph 33 of the RRP Guidelines includes all of a foreign bank's subsidiaries and branches (regardless of whether they have presence in Singapore);

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	(d) it is not clear if the definition of "Group" (for instance, in sub-paragraph 35(b)(iii), is intended to be different from "group" as defined in paragraph 33; (e) it is submitted that the information requirement should be in relation to the entities under direct regulation of the MAS (for instance, the Singapore branch of a foreign bank); and (f) it is submitted that financial and capital dependencies should be required only of the Singapore regulated entity, and not of all of the material entities.
Question 3: MAS seeks comments on the draft amendments to Part IVB of the MAS Act in relation to temporary stays on termination rights.	(a) *Section 30AAZAH* We note that section 30AAZAH would, notwithstanding any contractual term, prevent a termination right from being triggered under any contract in connection with the MAS' exercise of resolution powers. Section 30AAZAI allows the MAS to institute a temporary stay by suspending parties' termination rights which arise by reason of and in connection with the MAS' exercise of resolution powers. It would appear that section 30AAZAH, which is not limited in time, contemplates a permanent stay on termination rights triggered by the MAS' exercise of resolution powers, while section 30AAZAI would allow the MAS to impose a temporary stay on termination rights triggered by the MAS' exercise of resolution powers. It therefore appears on a reading of the draft regulations that there is therefore an overlap between section 30AAZAH and section 30AAZAI, and we would submit that MAS should consider the ambit of the scopes of both sections. We would like to seek clarification on the following points: (i) whether section 30AAZAH is intended to function as a permanent stay. We note that section 30AAZAH appears to follow Key Attribute 4.2 and would query if this is the intention; (ii) if section 30AAZAH does contemplate a permanent stay, whether both section 30AAZAH and section 30AAZAI are intended to cover the same types of termination rights – i.e. termination rights triggered upon the MAS' exercise of resolution powers. We would welcome clarification from the MAS if this is the intended interpretation of section 30AAZAH and section 30AAZAI.

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	If the intention is for section 30AAZAI to cover only termination rights that arise solely as a result of the MAS' exercise of resolution powers, we would welcome further guidance from the MAS as to what section 30AAZAI is intended to capture that is not already captured by section 30AAZAH, and how these two sections are intended to operate together in practice. As background, we would note that the UK Banking Act has also introduced a permanent stay and a separate temporary stay, but the scope of the type of termination rights covered is narrower under the permanent stay: (1) the permanent stay is only on termination rights that arise solely because of an exercise of resolution powers; and (2) the temporary stay affects all termination rights generally that arise during the duration of the stay (even where such termination rights do not arise in connection with the exercise of resolution powers); and (iii) given that section 30AAZAH appears to be limited to termination rights that arise because of the MAS' exercise of resolution powers, we would query why section 30AAZAJ only applies specifically to section 30AAZAI and not section 30AAZAH, and would submit that section 30AAZAJ should be expanded to cover section 30AAZAH as well. (b) *Definition of "termination right"* We note that "termination right" is defined to include rights to set-off or net, which can include forms of set-off and netting other than close-out netting (for instance, payment netting). We would submit that this should be limited only to close-out netting and set-off, as these take place on termination. In contrast, payment netting is the netting of intra day cash flows. It is different from close-out netting as it is not linked to termination and is instead intended to streamline processing of intra-day payments and reduce settlement risk. (c) *Length of stay* (i) We note that the MAS has removed the proposal set out in the Policy Consultation allowing for an extension of the stay in respect of financial

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	contracts, and are supportive of the approach to strictly limit the length of the stay. For clarity, we would submit that it should also be expressly provided that there cannot be an extension of time, and that subsequent consecutive stays cannot be imposed. (ii) In terms of the length of stay, we note that the stay is set to expire after 23:59 on the second business day after the date of the publication of the notification in the *Gazette*. This appears to allow the length of the stay to exceed two business days – for instance, if the stay were to be published at 09:00 on a Monday, it would only expire at 23:59 on Wednesday, which is a period longer than 48 hours or two business days. We have received feedback that members are concerned that the proposed drafting allows for a period that is longer than 2 business days and submit that this should be limited to 2 business days as contemplated by the Key Attributes. Members have also requested that the MAS consider harmonising the length of stay with that of other resolution regimes and the Key Attributes. In this connection, we would highlight the approaches taken in other jurisdictions: (1) as mentioned in our 2015 Submission, the US resolution authority, the FDIC, has powers to suspend contractual early termination rights for 24 hours; (2) the BRRD provides that member states shall have the right to stay termination rights from the publication of the relevant notice until midnight in the member state at the end of the business day following that publication. Both these time periods appear to be shorter than the length of stay under the proposed regulations. (d) *Commencement of stay* We are of the view that a stay should be clear and certain in its operation, and the FSB Key Attributes provide that there should be clarity as to the beginning and end of the stay. As the stay is discretionary, ideally, the MAS should only be able to impose the stay at the outset of resolution – from the time that the MAS actually exercises its resolution power. Alternatively, there should be a limit on the period in which

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	the stay can be imposed, and it should be clear that once resolution has ceased, the MAS will no longer have the power to impose a stay. Members have also requested for further clarification on whether and how the power to impose a temporary stay will arise in connection with the recognition of a cross border resolution action – in particular, whether the MAS' power to introduce a temporary stay would arise from (i) the time that the MAS' powers arise under section 30AAZHA(3) (power to exercise its powers for the purpose of recognising the resolution) or (ii) the time that the Minister issues a certificate of recognition under section 30AAZHB. (e) *Contracts subject to the temporary stay* We note that the MAS in the Policy Consultation stated that the temporary stay would apply to financial contracts and non-financial contracts that pertain to critical functions and critical shared services. In the proposed legislative amendments, however, the temporary stay is expressed to be applicable to "contracts" - which is not defined and which we would read as meaning any contract. We would be grateful if the MAS could clarify if the intention is still to restrict the stay to financial contracts and non-financial contracts pertaining to critical functions and critical shared services, and would submit that if so, this should be made clear in legislation. In addition, we have received feedback that the temporary stay provisions under this part of the MAS Act should be applied to financial contracts only. Non-financial contracts for essential services and functions of an FI are subject to different concerns and should be covered by provisions relating holistically to ensuring operational continuity. Members have requested for further legislation or guidance on this point, similar to recent international development on the subject, and would welcome the opportunity for further consultation on this. We have also received feedback that members are concerned about the effects of the temporary stay on contracts with FMIs. In particular, FMI rules usually take effect as binding contracts on FMI members which are non-negotiable, and it is unclear how such contracts may be affected by the temporary stay. Members have commented that the proposed stays of termination rights are not sufficient to ensure operational continuity in areas such as FMI memberships. Similar to our general comments that the exercise of the MAS' resolution powers should not, of itself, cause FIs or their counterparties to breach regulatory obligations, an exercise of the MAS' resolution powers (including the power to order transfers of business) should not cause FMI members to breach obligations under FMI rules. Members would

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	therefore urge the MAS to include legislative powers to suspend requirements under FMI rules temporarily in order to allow continuity of FMI memberships during and following resolution. It is submitted that having such statutory powers would provide industry participants with the certainty that FMI memberships would not be disrupted by resolution actions. (f) *Drafting comments* We note that section 30AAZAI(5) provides that a party may exercise the termination right on expiry of the stay. However, this sub-section creates ambiguity as: (i) sub-section (a) refers to termination rights that have been triggered independently of the MAS' exercise of any specified power, but section 30AAZAJ provides that section 30AAZAI does not apply where a termination right becomes exercisable independent of the MAS' exercise of any specified power; and (ii) by making specific reference to the types of contracts in section 30AAZAI(5) and stating that the party subject to the stay may exercise the termination right on the expiry of the stay, this suggests that for other types of contracts, the party is unable to exercise its termination rights even upon expiry of the stay. We would submit that the other sub-sections of section 30AAZAI are sufficiently clear that the stay ceases to affect termination rights on expiry, and that section 30AAZAI(5) is therefore unnecessary and should be deleted to avoid the ambiguities described above. (g) *Contractual provisions* We note the proposal to require pertinent FIs and insurers to include contractual provisions in specified contracts, such that MAS' powers to temporarily stay the termination rights on the contracts will be enforceable. For your information, we had mentioned in our submission on the Policy Consultation that ISDA released a resolution stay protocol in 2014. This has since been replaced by the 2015 ISDA Universal Resolution Stay Protocol[6]. ISDA also released the Resolution Stay Jurisdictional Modular Protocol in 2016[7].

[6] See https://www2.isda.org/functional-areas/protocol-management/protocol/22

[7] See http://www2.isda.org/news/isda-launches-resolution-stay-jurisdictional-modular-protocol

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	We would also note that ISDA, together with the International Capital Market Association, International Securities Lending Association and Securities Industry and Financial Markets Association, have also drawn up an Securities Financing Transaction Annex to the 2015 ISDA Universal Resolution Stay Protocol extending the stay protocol to securities financing transactions[8]. G-SIFIs have generally adhered to the 2015 Universal Resolution Stay Protocol. We urge the MAS to consider the structure and contents of these protocols in determining the requirements for the contractual provisions, and would submit that the use and recognition of standard industry documentation would be beneficial for industry participants, and would also help to ensure that there is harmonisation with other jurisdictions. We have also received feedback that the scope of any requirement to impose such contractual recognition should be appropriate and proportionate in terms of the contracts and the entities to which such requirement should apply. In particular, such requirement should not apply or extend to contracts entered into by a within-scope FI or any of its group companies if the relevant entity is already subject to substantially similar or equivalent requirements relating to contractual recognition on stay of termination rights in the jurisdiction of its incorporation in another G20 jurisdiction in line with the FSB Key Attributes. Members have also requested that the industry be given the opportunity to consult before any such additional regulations are promulgated and to have the opportunity to provide comments on the draft regulations and consider the impact of such proposed rules. Members have also requested that the implementation of any such regulation be in phases, as appropriate, on contracts entered into from a specified date in the future.
Question 4: MAS seeks comments on the draft amendments to Part IVB of the MAS Act in relation to the statutory bail-in regime.	(a) *"Eligible instrument" – coverage of derivatives* We note that "eligible instrument" will be defined in regulations and look forward to the proposed regulations. As set out in our 2015 Submission, we would highlight that derivatives transactions give rise to specific concerns. To recap briefly, it is likely that there would be severe practical

[8]See http://www.icmagroup.org/News/news-in-brief/icma-announces-publication-of-2015-universal-resolution-stay-protocol-with-securities-financing-transaction-annex/

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	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 hedged 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. There are also considerations that arise out of applying bail-in to the net amount due under an ISDA Master Agreement, in terms of timing, valuation, and striking a balance between the benefit of realising the asset as against the disadvantage of losing the ong-oing risk protection offered by the transactions under the ISDA Master Agreement. Finally, 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. In light of the specific issues that arise in connection with derivatives transactions, we would submit that derivatives should be specifically carved out from the scope of eligible instruments. (b) *Timing* We have received comments from certain members in respect of timing for the implementation of statutory bail-in: (i) under section 30AAZAB(9) with respect to the publication of the Minister's notice of intention to approve a determination, a reasonable time frame should be provided to allow affected holders of eligible instruments to make written representations; and (ii) under section 30AAZAC(11), the period of time for which prohibition on the ability of shareholders to exercise their voting powers runs (which is determined by the length of time required for the Minister to publish either the notification in the *Gazette* confirming the status of the significant bail-in shareholders as significant shareholders, or the

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	notification in the *Gazette* allowing all shareholders to exercise their voting powers in an FI under resolution) should not extend for an unduly long period. (c) *Scope of liabilities* Our members have generally commented that the scope of liabilities should be determined against considerations such as (i) ensuring that the liabilities are sufficient for its purpose; (ii) the need to avoid contagion and (iii) the need to fulfil the FSB's definition of a bail-in power. Some members note that the MAS has specifically acknowledged and addressed the concerns in (i) and (ii) in respect of the current scope of eligible instruments, and therefore generally feel that the scope of liabilities is sufficient. However, we have also received feedback from certain members that limiting the class of liabilities subject to bail-in will have to be balanced against the risk that there may be insufficient eligible liabilities to bail-in. The concern is that there may be insufficient eligible liabilities (as senior unsecured debt is excluded), which could either expose the MAS to increased cost of resolution (e.g. through bail-out) or impose additional resolution costs on surviving banks that could be required to contribute through ex post levies to complement an insufficient bail-in. The wider economy and tax payers may also be impacted to the extent that the losses are not contained. (d) *Impact on foreign banks* We note that the statutory bail-in requirement will be applied to "Division 4A financial institutions", which will be prescribed by regulations. We note that the intention is to apply the requirements only to Singapore-incorporated banks and bank holding companies. We are supportive of this proposal, and look forward to this being reflected in the regulations.
Question 5: MAS seeks comments on the draft amendments to Part IVB of the MAS Act in relation to cross-border recognition of resolution actions.	As a general comment, we would highlight that we are supportive of a statutory framework for the cross-border recognition of resolution actions. As set out in the FSB's *Principles for Cross-Border Effectiveness of Resolution* (the **Principles**), the foundation for resolution should be in statute, and contractual provisions are an interim solution with statutory bases as the ultimate goal. We would note that in determining issues of cross-border resolution, as the Key Attributes and other FSB publications recognise, it is important to remove insofar as possible incentives for jurisdictions to resolve local branches or subsidiaries on a local, individual basis.

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	Ultimately, as the 2012 IIF report[9] emphasised, every jurisdiction will be better off if a cooperative regime is firmly established, but in the conditions of an actual resolution, the temptations to eschew cooperation and go it alone may be substantial. While these risks cannot be removed altogether, a good pattern of international recognition statutes could make a big difference in assuring more effective, fairer results, focusing on groups as a whole (for the good of the entire global economic system) rather than attempting to maximise local benefits. This does not imply necessarily the same process in every country, but it does imply a serious effort to enact the same principles on a consistent basis that would lead to consistent interpretations. As statutory changes proceed, it will be important to be sure that effective statutory bases for cross-border recognition are included, and that no friction arises between the contractual solutions that the industry has already put in place and the statutory powers. We would submit that it is important to create incentives for cooperation and structures through which international cooperation can be achieved more readily, and good statutory underpinnings can greatly enhance the chances of fair and appropriate outcomes in resolution. Consideration should be given not only to the question of how foreign resolution measures can be recognised under national law but also the question of how to prevent other local-law provisions (e.g. supervisory rules, foreign banking act requirements, or securities law requirements) from impairing the effect of recognition (e. g. by asset transfer restrictions, liquidity maintenance requirements, or the like), once recognition is granted. The European Banking Authority has published *Regulatory Technical Standards on Resolution Colleges*[10] that, while specific to implementation of the BRRD, provide a useful point of reference for guidance that could be developed at the international level on processes and steps to enable good cross-border cooperation on resolution planning and execution via CMGs. Provisions that could be adapted for use include the following key principles[11]: • organisational requirements of CMGs; • suggested processes to follow during planning and to remove disagreements about strategy; and

[9] See: IIF, Making Resolution Robust — Completing the Legal and Institutional Frameworks for Effective Cross- Border Resolution of Financial Institutions, June 2012 (https://www.iif.com/publication/iif-proposes-key-steps-strengthen-cross-border-resolution-major-multinational-banks).

[10] See: EBA, FINAL draft Regulatory Technical Standards on resolution colleges under Article 88(7) of Directive 2014/59/EU, EBA/RTS/2015/03, 03 July 2015 (https://www.eba.europa.eu/documents/10180/1132831/EBA-RTS-2015-03+Final+draft+RTS+on+Resolution+Colleges.pdf).

[11] This list suggests helpful process points that could make CMGs and colleges more effective; however it is not intended to suggest prescription to the point that cooperation becomes cumbersome or impeded by red tape; as always, balancing is required, but directional guidance may be helpful.

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	• transparency. With respect to the specific proposals, we would make the following comments. (a) *Safeguards for set-off and netting arrangements* As further elaborated on in question 8, section 30AAZHB may provide that the resolution has substantially the same legal effect as if the resolution was undertaken by the MAS. This should be also be subject to the proposed safeguards for set-off and netting arrangements (b) *Notification where a resolution is not recognised* We would submit that, for certainty, if the MAS or the Minister has refused to recognise a resolution, the industry should also be informed. (c) *Impact on financial stability in other jurisdictions* We note that the MAS has listed (under section 30AAZHA(2)) various criteria for the recognition of a foreign resolution action. Generally, we are supportive of the criteria in sub-sections (a) to (d). In addition to these criteria, which are predominantly focused on Singapore, as previously submitted in respect of the Policy Consultation, we would submit that, in line with FSB Key Attribute 2.3(iv), 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 and a specific criteria for recognition. This would support a coordinated and cooperative approach to the resolution of a cross border firm, to protect financial stability across home and host jurisdictions. It may also be helpful in light of any other potential hurdles to the recognition of cross-border resolution – for instance, if there is inconsistency or tension between such recognition and local statutory provisions for ring-fencing of assets or limitations on transfers of assets, such as section 61 of the Banking Act and section 377(3)(c) of the Companies Act. (d) *Section 30AAZHA(2)(e)* Members have asked that the MAS consider removing section 30AAZHA(2)(e) which provides for the MAS' power to prescribe any other conditions required for cross-border recognition. FSB's recommendations in the Principles stated that grounds for refusing recognition of foreign measures should

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	be clearly defined and limited. Such a catch-all provision may create uncertainty as to whether a foreign resolution order would be given effect. As emphasised in our 2015 Submission, transperancy and certainty are key concerns in cross-border recognition.
Question 6: MAS seeks comments on the draft amendments to Part IVB of the MAS Act in relation to the creditor compensation framework.	(a) *Scope of framework* We note that the eligibility criteria for compensation under section 30AAZHE is tied specifically to the exercise of a trigger power and it is not clear whether this would necessarily capture a breach of a safeguard. We would submit that it should be made clear that a breach of a safeguard should also be expressly included as a ground for compensation. More fundamentally, however, it should be ensured that the safeguards are sufficient to protect set-off and netting rights, and reliance should not be placed on remedies for breaches.
Question 7: MAS seeks comments on the draft amendments to Part IVB of the MAS Act in relation to resolution funding arrangements.	We note that the MAS has stated in its Response to the Policy Consultation that: (a) the MAS will only use the resolution fund to recapitalise an FI under resolution after losses have been imposed on unsecured subordinated creditors and equity holders to the fullest extent possible or appropriate; (b) in the event that an FI manages to return to viability after significant expenses have been incurred in planning for the resolution of the FI, the MAS will not recover these from the industry and will consider alternative means of cost recovery, including recouping the costs from the affected FI; (c) the MAS will recover costs incurred in resolving an FI via an ex post recovery mechanism and will only tap on privately-financed ex ante funds that already exist (such as the Deposit Insurance (DI) Fund); and (d) the residual value of the FI will be used to offset the cost of resolution ahead of unsecured creditors and equity holders, and the MAS will accord the DI Fund priority to recoveries from assets of the bank under resolution where the DI Fund is used for resolution funding. We and our members welcome and support these positive commitments from the MAS. We are grateful for the additional clarity that the MAS has provided in the Response, particularly in elaborating on the types of costs that would be covered under the resolution funding arrangements. We have received feedback from some members that they are supportive of an ex post recovery system rather than an upfront levy.

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	We note that the MAS will consult on the details of the framework for ex post levies at a later stage, taking into consideration the sector-specific recovery mechanisms. We are supportive of having a consultation process for this and would welcome the opportunity to consider and provide feedback on the specific issues. For instance, some members have asked that that consultation considers (i) the methodology behind the computation of the levies and (ii) issues relating to the recapitalisation of an FI under resolution and how that may be measured with references to the size of the FI's operations in Singapore.
Question 8: MAS seeks comments on the draft amendments to the Monetary Authority of Singapore (Control and Resolution of Financial Institutions) Regulations 2013.	<u>General comments</u> (a) *Scope of safeguards* We are supportive of the proposal to introduce regulations setting out safeguards for set-off and netting arrangements where the MAS has exercised its resolution powers. In particular, regulation 15 is helpful in addressing the concerns arising out of MAS' power to order a compulsory partial transfer of business of a financial institution. The importance of a no cherry-picking safeguard for a partial transfer of business was also set forth in our 2015 Submission, and we welcome the introduction of this safeguard. We note that the MAS has adopted the drafting approach of prescribing individual safeguards for certain of its powers. However, the enactment of individual safeguards for specific MAS resolution powers as set out in the draft regulations gives rise to potential uncertainty with regards to powers that are not covered by these safeguards. For instance, such powers may include: (i) the power to issue directions to relevant FIs under section 30AAB(2); (ii) the recognition of cross-border resolution actions – under section 30AAZHB, the certificate of recognition may provide that the resolution has substantially the same legal effect as if the resolution was taken by the MAS. The safeguards under these regulations do not cover the recognition of a foreign resolution under section 30AAZHB, or directions under section 30AAZHB(6) that the MAS may issue to a FI; (iii) powers under Part IVA, Division 2. The MAS will have general powers under the new Division 2 of Part IVA to direct pertinent FIs to e.g. implement arrangements or measures (section 30AAJB(4))

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	and take measures to address or remove impediments to resolution (section 30AAJC(3)). Section 30AAJD(1) also allows the MAS, by notice in writing to an FI, to give directions or impose requirements as may be necessary or expedient for the purposes of recovery planning or resolution planning. Given that the safeguards under the proposed regulations make specific references to certain sections of the MAS Act and not others, there are no safeguards for the other powers that do not fall within the scope of the regulations, and may suggest that the policy intention is not to restrict such powers. Rather than listing out safeguards for each specific MAS resolution power, we would respectfully submit that the better approach would be to provide a high level statement of principle that no exercise of the MAS' powers will affect set-off and netting arrangements, and to cite the proposed regulation 15 as a specific example. This would be consistent with the policy intention reflected in the Parliamentary statements made during the second reading of the Monetary Authority of Singapore (Amendment) Bill, where it was stated that carve-outs for bilateral netting arrangements will apply across all FIs and will not be defeated by resolution. A general over-arching statement of this nature would avoid a situation where safeguards exist in respect of certain powers but not in respect of others, and would also help to avoid situations where a safeguard fails due to a technical point of drafting. (b) *Collateral arrangements* At present, the safeguards are silent on collateral arrangements entered into in connection with set-off and netting arrangements. While it is arguable that title transfer arrangements (for instance, under an ISDA English Law Credit Support Annex) should be caught within the ambit of a set-off or netting arrangement as these typically rely on set-off or netting, collateral arrangements that involve the creation of a security interest (such as under the English Law Credit Support Deed or the New York Law Credit Support Annex) may fall outside the protection of the safeguards as these do not rely on set-off. Collateral arrangements are key tools used by FIs to manage their exposure, and we would submit that they should be viewed as an integral part of a set-off or netting arrangement in the context of derivatives transactions, and appropriately safeguarded. This is also further supported by the Key Attributes which are concerned with the

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	preservation of collateral rights, and is the approach taken in the BRRD[12]. As stated in our general comments, collateral arrangements are expected to take on increased importance once the EU and US non-cleared margin requirements take effect, and there are concerns that the MAS' resolution powers may affect the ability of collateral takers to enforce their collateral rights in a timely manner as required under the non-cleared margin rules, given that the safeguards do not expressly cover collateral arrangements. As the US non-cleared margin requirements are expected to take effect from September 2016, with the EU requirements to follow thereafter, there is particular urgency surrounding this issue and we would therefore like to request that the MAS prioritise its review of the proposals surrounding the safeguards, ideally with a view to amending the safeguards prior to September 2016. ISDA will also contact the MAS separately on this point. (c) *Remedies for safeguards* As previously submitted, the remedy for a breach of safeguard must also be clear, and should be subject to compensation. At the moment, the power to provide compensation under section 30AAZHE is tied to the exercise of a trigger power or a combination thereof, and we would submit that it should be made clear that a breach of a safeguard should also be expressly included as a ground for compensation. (d) *Definition of "financial contract"* The proposed definition for financial contract is presently exhaustively defined, and is generally limited to instruments that are subject to MAS oversight. We would submit that this definition should not be exhaustively defined and should be broadened to capture all contracts that are generally regarded as derivatives contracts by market participants and which may be potentially included under a netting agreement such as the ISDA Master Agreement. Under the proposed definition, certain derivatives contracts (for instance, weather and emissions derivatives) may not be caught. This would create uncertainty, where certain classes of financial contracts are protected and certain

[12] See for instance, article 95 of the BRRD, which provides that in order to preserve legitimate capital market arrangements in the event of a transfer of some, but not all, of the assets, rights and liabilities of a failing institution, it is appropriate to include safeguards to prevent the splitting of linked liabilities, rights and contracts, as appropriate. Such a restriction on selected practices in relation to linked contracts should extend to contracts with the same counterparty **covered by security arrangements, title transfer financial collateral arrangements,** set-off arrangements, close out netting agreements, and structured finance arrangements (*emphasis added).*

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	classes are not, which could render the safeguard ineffective. Further, the limited scope of the present definition may curb financial innovation, as parties may be disincentivised from developing or adopting new forms of derivatives contracts if the position with regards to set-off and netting of such derivatives is uncertain. **Regulation 15** Our members welcome the proposal to introduce this safeguard and are supportive of it, subject to our comments on the extension of the safeguards generally to include collateral arrangements. In addition, as previously described in the 2015 Submission, we would also ask that the MAS consider including an express provision that the MAS cannot modify transferred contracts. **Regulation 16** We would submit that the inclusion of a specific safeguard for moratoriums in the context of set-off and netting arrangements would suggest that a moratorium would affect set-off and netting arrangements during the duration of the moratorium. These raises several concerns: (a) first, at present, it is generally understood that moratoriums are not intended to affect set-off and netting arrangements and that these are more relevant to collateral arrangements (for instance, being moratoriums on the ability of parties to enforce their security interests). However, the inclusion of a specific safeguard for moratoriums suggests that moratoriums *can* affect set-off and netting arrangements; and (b) second, this creates ambiguity as to the effect of the moratorium on the set-off and netting arrangement – it is unclear whether this is intended to function as a temporary stay, or whether it has more wide ranging effects. Furthermore, the moratorium provisions do not have the benefit of the specific safeguards available for the temporary stay. We would therefore submit that the drafting of regulation 16 is likely to have the unintended side effect of introducing uncertainty as to the effect of a moratorium on set-off and netting arrangements. We would submit that the preferred approach would be to have a high level statement that the MAS' resolution powers would not affect set-off and netting arrangements as well as associated collateral arrangements, as described under the general comments for this section. If it is necessary for the MAS to impose a temporary stay, this should be done under the stay provisions, rather than by way of a moratorium.