September 2, 2011

By electronic submission to fsb@bis.org

Financial Stability Board
c/o Secretariat to the Financial Stability Board
Bank for International Settlements
CH-4002 Basel
Switzerland

Re: Comments on the Consultative Document on Effective Resolution of Systemically Important Financial Institutions

To the Financial Stability Board:

The Global Financial Markets Association, The Clearing House Association, the American Bankers Association, The Financial Services Roundtable, the Institute of International Bankers, and the Institute of International Finance (collectively, the "**Associations**"),[1] welcome the opportunity to comment on the Consultative Document on Effective Resolution of Systemically Important Financial Institutions published by the Financial Stability Board (the "**FSB**") on July 19, 2011 (the "**Consultative Document**").

I. Introduction

We strongly agree with the overall objective of the Consultative Document – that authorities in all relevant jurisdictions should have the capacity to resolve systemically important financial institutions ("**SIFIs**") without systemic disruption and without exposing the taxpayer to the risk of loss, within a reasonable timeframe. Taxpayer-funded bailouts have been chosen in the past, including during the recent global financial

[1] A description of the Associations is set forth in the Annex to this letter.

crisis, because they were considered the lesser of two evils, as compared to a severe destabilization or collapse of the financial system and the potential long-term harm to the wider economy in terms of higher unemployment, lower output and other factors.[2] Thus, various nations and international bodies have taken initiatives to reduce systemic risk and enhance resolvability.[3] If implemented and administered properly, these initiatives have the potential to create a credible alternative to taxpayer-funded bailouts, a goal that each of the Associations wholeheartedly supports.[4]

The Consultative Document is a significant step forward in achieving that goal. We strongly support the underlying conclusion of the Consultative Document that reforms of domestic resolution regimes and cross-border cooperation frameworks need to accelerate.[5] In addition, the Consultative Document makes a number of helpful specific recommendations, which we address in greater detail in Sections II and III below. In Section II, we address recommendations in the Consultative Document for effective resolution regimes, including specific tools within resolution, duties of the resolution authorities, and rules governing creditor rights. In Section III, we address recommendations for Recovery and Resolution Plans, with particular emphasis on issues relating to cross-border cooperation, confidentiality, resolvability assessments, and implementation timelines. In particular, we oppose discriminatory depositor preference laws that discriminate against foreign deposits or foreign depositors because such

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[2] Randall D. Guynn, *Are Bailouts Inevitable?*, YALE JOURNAL ON REGULATION (forthcoming Fall 2011).

[3] *See, e.g.*, BANK FOR INT'L SETTLEMENTS, BASEL COMM. ON BANKING SUPERVISION, BASEL III: A GLOBAL REGULATORY FRAMEWORK FOR MORE RESILIENT BANKS AND BANKING SYSTEMS (Dec. 2010, Rev. June 2011), *available at* http://www.bis.org/publ/bcbs189.pdf; Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203 §§ 115, 165, 111th Cong., 2d Sess. (July 21, 2010); Banking Act, 2009, United Kingdom, *available at* http://www.legislation.gov.uk/ukpga/2009/1/pdfs/ukpga_20090001_en.pdf; Bank Restructuring Act, 2010, Germany (Bundestag printed paper 17/3024); DIRECTOR-GENERAL INTERNAL MARKET AND SERVICES, TECHNICAL DETAILS OF A POSSIBLE EU FRAMEWORK FOR BANK RECOVERY AND RESOLUTION (2011), *available at* http://ec.europa.eu/internal_market/consultations/docs/2011/crisis_management/consultation_paper_en.pdf.

[4] *See, e.g.*, Joint Trade Association Comment Letter to the FDIC and the Federal Reserve on the Joint Notice of Proposed Rulemaking Implementing Resolution Plan and Credit Exposure Report Requirements of Section 165(d) of the Dodd-Frank Act (June 10, 2011), *available at* http://www.fdic.gov/regulations/laws/federal/2011/11c08AD77.PDF; INSTITUTE OF INT'L FIN., ADDRESSING PRIORITY ISSUES IN CROSS-BORDER RESOLUTION (May 2011) *available at* http://www.iif.com/regulatory/resolution/; INSTITUTE OF INT'L FIN., PRESERVING VALUE IN FAILING FIRMS (Sept. 2010) *available at* http://www.iif.com/regulatory/resolution/article+811.php; INSTITUTE OF INT'L FIN., A GLOBAL APPROACH TO FAILING FINANCIAL FIRMS: AN INDUSTRY PERSPECTIVE (May 2010), *available at* http://www.iif.com/regulatory/resolution/.

[5] Consultative Document at 7.

discrimination will be an impediment to cross-border resolutions of G-SIFIs.[6] Instead, foreign and domestic deposits, and foreign and domestic depositors, should be treated as a single class in any depositor preference law.

In particular, we commend the FSB's efforts to begin the systematic work of assembling a single comprehensive and cohesive package of policy measures to improve the capacity of authorities to resolve SIFIs within and across national borders.[7] An asymmetric global framework, in which some nations have established clear protocols that promote orderly resolution without taxpayer support while others lack such clarity could be destabilizing during a financial crisis and encourage regulatory arbitrage. We also commend the FSB for focusing on the resolution process and regulator actions in resolution so that the process and actions are clear, transparent and predictable to the market well in advance of stress on any individual firm or the financial market generally.

We believe that a global regulatory consensus on these issues is necessary, that the FSB's and the G-20's cooperation is necessary to achieve such consensus, and that their further support will be essential in order to translate the proposed policy measures into legislative action. We urge the member countries of the G-20 to make the legislative actions recommended by the Consultative Document a stated priority, and encourage such legislative actions to be explicitly added to the implementation timeline. We also urge the FSB to conduct and publish a meaningful peer review of the degree to which countries comply with its final recommendations, as well as publish annual peer reviews to assess progress toward full implementation.

Furthermore, we view the various recommendations made in the Consultative Document as interconnected, and urge regulators and national authorities to proceed with their implementation in light of this interconnectedness. For example, resolvability assessments depend in part on the progress of institution-specific cross-border cooperation agreements and recovery and resolution planning related to cross-border exposures, and the timeline should reflect such dependencies. In addition, we believe that a number of transition issues with regard to the implementation of the timeline in the Consultative Document will need to be addressed.

In particular, we believe that progress on orderly resolution regimes should reduce the amount of any G-SIFI surcharge currently being considered.[8] If a G-SIFI is

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[6] Discussion in this letter of deposit discrimination corresponds to the concept reflected in Annex 7 of the Consultative Document of "national depositor preference." Consultative Document at 68, Annex 7, paragraph 5.

[7] Consultative Document at 3.

[8] *See* BANK FOR INT'L SETTLEMENTS, BASEL COMM. ON BANKING SUPERVISION, GLOBAL SYSTEMICALLY IMPORTANT BANKS: ASSESSMENT METHODOLOGY AND THE ADDITIONAL LOSS ABSORBENCY REQUIREMENT (July 2011), *available at* http://www.bis.org/publ/bcbs201.pdf.

resolvable, then the need for a surcharge premised on the lack of resolvability is substantially decreased and therefore any surcharge should be commensurably reduced.[9]

II. Recommendations for Cross-Border Resolution Regimes

We agree with the need for special national resolution regimes for SIFIs to be used as a last resort after the failure of all other measures reasonably designed to prevent a SIFI from becoming nonviable. Such measures could include the conversion of contingent capital instruments, the execution of recovery plans and, in jurisdictions where such legal authority exists, the write-down or conversion to common equity of subordinated debt and other junior regulatory capital instruments prior to the initiation of a formal resolution proceeding.

We also agree that these special resolution regimes should be designed to preserve the continued performance of the systemically important and other functions of a SIFI whose going concern values are higher than their liquidation values. We endorse the FSB's recommendation that resolution authorities be given the option to have the use of bridge entities in systemic resolutions, as these are a tool not generally available under ordinary bankruptcy or insolvency regimes. Bridges can be used to facilitate the recapitalization of the systemically important and other viable business of a failed SIFI, as an alternative or additional option to a direct recapitalization of a failed SIFI. Either approach allows a failed SIFI to continue to fulfill its market and macroeconomic role and preserve the failed firm's going concern value for the benefit of creditors, and would do so without providing undue support for counterparties, creditors and shareholders in a manner that presents moral hazard.

Structuring cross-border SIFI resolution regimes correctly on both a national and international level is a critical, high-stakes undertaking both for supervisors and regulated institutions. To the extent possible, regulators should coordinate and standardize their approach to key resolution issues in order to facilitate planning and to avoid the creation of inefficiencies or overly burdensome regulation.

Bail-In Within Resolution. We strongly support including recapitalization of a SIFI or its operations – i.e., bail-in within resolution[10] – as a resolution tool, provided that

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[9] For further comments on the Basel Committee on Banking Supervision's Consultative Document on "Globally systemically important banks: Assessment methodology and the additional loss absorbency requirement," see Global Financial Markets Association Comment Letter (Aug. 26, 2011), *available at* http://www.bis.org/publ/bcbs201/gfma.pdf; The Clearing House Association L.L.C. and Institute of International Bankers Comment Letter (Aug. 26, 2011), *available at* http://www.bis.org/publ/bcbs201/chaaioib.pdf; American Bankers Association Comment Letter (Aug. 26, 2011), *available at* http://www.bis.org/publ/bcbs201/amba.pdf; Institute of International Finance Comment Letter (Aug. 26, 2011), *available at* http://www.iif.com/download.php?id=82XdpBP6pBY=.

[10] Consultative Document at 35, Annex 2.

resolution proceedings are only commenced as a last resort after the failure of all other measures reasonably designed to prevent a particular SIFI from becoming nonviable.

Indeed, we believe that resolving SIFIs either by recapitalizing them directly by an exchange of claims for equity in the SIFI, or transferring their systemically important and other viable operations to a bridge institution and exchanging claims against the SIFI for equity in the bridge,[11] should be available and used if that resolution technique would maximize the value of the SIFI for the benefit of its creditors and minimize the systemic consequences of the SIFI's failure. Assuming appropriate safeguards for creditors are in place, we believe that recapitalizations are likely to be a more effective resolution tool during a financial panic than a fire-sale liquidation of financial assets.

The recapitalizations should be effected by starting at the bottom and moving up the capital stack, i.e., in reverse order of priority. Thus, for example, senior common equity would be converted to ordinary common equity first, followed by preferred equity, followed by hybrid regulatory capital instruments, followed by subordinated debt, and followed by other debt obligations that rank below senior debt.[12] Only as a last resort, where the conversion of junior instruments to common equity is insufficient to recapitalize the SIFI or the portion of its business transferred to a bridge at a reasonable level, should any of the senior debt be converted to common equity. Moreover, only that portion of the senior debt that is necessary to recapitalize the SIFI or the bridge at a reasonable level should be converted.

Resolving SIFIs by recapitalizing them directly or using a bridge to recapitalize the systemically important and other viable parts of their businesses should both reduce the incentive of creditors to run at the first sign of trouble, and ensure that any and all losses are ultimately borne by shareholders and creditors rather than taxpayers. In the absence of taxpayer-funded bailouts, which the Associations oppose, the destabilization created by fire-sale liquidations poses profound financial market and macroeconomic risks. It is thus vital that resolution regimes not only allow for orderly resolutions, but also for recapitalizations in ways that the market can readily anticipate, clearly plan for, and count on to prevent panicked asset liquidations.

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[11] *See, e.g.*, Comment Letter from SIFMA and The Clearing House to the FDIC on the FDIC's Second Notice of Proposed Rulemaking under Title II of the Dodd-Frank Act: Recapitalizations as an Effective Way to Resolve Systemically Important Banks and Non-Bank Financial Companies on a Closed Basis Without Taxpayer-Funded Bailouts (May 23, 2011), *available at* http://www.fdic.gov/regulations/laws/federal/2011/11c16Ad73.PDF; INSTITUTE OF INT'L FIN., ADDRESSING PRIORITY ISSUES IN CROSS-BORDER RESOLUTION 19-25 (May 2011), *available at* http://www.iif.com/regulatory/resolution; AFME, RESPONSE TO THE EUROPEAN COMMISSION CONSULTATION ON TECHNICAL DETAILS OF A POSSIBLE EU FRAMEWORK FOR BANK RECOVERY AND RESOLUTION (Mar. 2011), *available at* http://afme.eu/Documents/Consultation-Responses.aspx; AFME, SYSTEMIC SAFETY NET: PULLING FAILING FIRMS BACK FROM THE EDGE (Aug. 2010), *available at* http://afme.eu/Divisions/Prudential-Regulation.aspx.

[12] *See* Consultative Document at 38, Annex 2, paragraphs 5.2 and 6.1.

Resolution Authority to be Invoked at the Point of Non-Viability. Because an effective resolution authority is likely to require greater discretionary power than traditional insolvency regimes,[13] an entity should be determined to have reached the point of non-viability before being put into resolution to prevent resolution proceedings from becoming a means to circumvent the legitimate rights of shareholders, creditors and other stakeholders that would otherwise apply.[14] Resolution upon the point of non-viability, as determined by the home country regulator, provides an important safeguard against abuse of the resolution authority.

Moreover, market stability is enhanced by assurances that the resolution authority will be exercised in a consistent, transparent and predictable manner. If creditors fear the resolution authority might be invoked too early, they may run for the exits at the first sign of trouble at a major financial institution in periods of financial weakness. Such an accelerated run could rapidly spread throughout the system, increase the likelihood of a financial panic and accelerate the destabilization or collapse of the firm, the financial system and the broader economy. This increased risk of a collapse could make a taxpayer bailout more likely to avoid the social costs of a total collapse of the financial system and the potential long-term harm to the wider economy in terms of higher unemployment and lower output, the very problems the resolution authorities were intended to avoid.

Duty to Maximize Value for the Benefit of Creditors. We agree that a SIFI's shareholders and creditors should bear any and all losses. However, it is essential for the market to be confident that a SIFI will be resolved in a manner that preserves its going concern value or otherwise maximizes its value for the benefit of its creditors in order to prevent a severe destabilization or collapse of the financial system. Such market confidence will reduce the incentive of creditors throughout the system to panic and run, as creditors will reasonably expect to receive an amount that exceeds the amount they would receive in a fire-sale liquidation.

Thus, we believe that a key attribute of any resolution regime is that the resolution authority have a duty to maximize the value of the SIFI for the benefit of its creditors, along with duties to preserve or restore financial stability, preserve equal treatment among similarly situated creditors wherever possible and maximize market discipline. We believe that creditors' interests in favor of value maximization, avoidance of value destruction and preservation of going concern value align with those of other stakeholders in the process. Efforts to educate the markets in advance of a financial crisis as to how regulators would exercise their discretionary authority in a manner that would maximize value should minimize panic in a future financial crisis. Further, if preserving the institution as a whole bank rather than breaking it up would maximize value for the

[13] *See* Consultative Document at 25, Annex 1, Section 4.

[14] Consultative Document at 26, Annex 1, paragraph 4.1.vi.

benefit of creditors, regulators should have the flexibility to implement a whole-bank resolution, and we believe the Consultative Document supports such flexibility.[15]

In addition, we believe it could be necessary in order to maximize the value of the institution for the benefit of creditors as a group, or to contain the potential systemic impact of a firm's failure, to depart from general equal treatment and absolute priority rules and to prefer some creditors over others. Just as bankruptcy courts typically approve immediate payments to critical vendors whose inputs are necessary for the continuing operations of a bankrupt firm in order to maximize its value for the benefit of its creditors in a corporate reorganization,[16] so depositors and other parties who provide critical funding for a SIFI's continued operations may need to be paid in full or transferred to a creditworthy bridge entity in order to maximize the value of the SIFI or the systemically important and other viable parts of its business for the benefit of its creditors as a group or to stem runs throughout the system that could result in a severe destabilization or collapse of the financial system. Funding is the crucial input for the continuing operations of a financial institution the way raw materials are the critical input for the continuing operations of a manufacturing business.[17] For these reasons, we support giving resolution authorities this flexibility, subject to the safeguards discussed below. In addition, we recommend that authorities develop clear plans to ensure liquidity capabilities which could be used to support resolution. This could potentially include the ability to create a preferred creditor status for a class of new post-resolution investors, a technique often used in private restructurings.

Minimum Recovery Right. The assurance that no creditors would be worse off in a cross-border resolution than they would be in liquidation is an important protection that will also contribute to the market stabilizing goal of such resolution regimes by enhancing the predictability of its resolution authority, and reducing creditor concerns.[18] The proposals should also provide guidance for how the hypothetical liquidation value of assets will be calculated for such purposes, including the specification that regulators not rely on fire sale prices in making such liquidation value calculations.

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[15] *See, e.g.*, Consultative Document at 9-10 (noting that resolution tools include the "sale of the entire firm" or the "recapitalization of the firm").

[16] *See, e.g.*, Douglas G. Baird, ELEMENTS OF BANKRUPTCY 225-226 (5th Ed. 2010).

[17] Thomas F. Huertas, the Alternate Chair, European Banking Authority, Member, Basel Committee on Banking Supervision and Director, Banking Sector, Financial Services Authority (UK), has made this point about funding in the banking context. "The very essence of banking is the ability to make commitments to pay – depositors at maturity, sellers of securities due to settle, borrowers who wish to draw on lending commitments, derivative counterparties who contracted with the bank for protection from interest rate, exchange rate or credit risks." *See* T. Huertas, Barriers to Resolution 1 (Discussion Draft, Version 5, Feb. 22, 2011), available at http://www2.lse.ac.uk/fmg/events/conferences/2011/DBWorkshop_14Mar2011/11-ThomasHuertas.pdf.

[18] Consultative Document at 28, Annex 1, paragraph 7.1. Such a right is, for example, provided in the United States, under Section 210(a)(7)(B) of the Dodd-Frank Act.

Ranking of Claims. We agree with the Consultative Document's position that differences in ranking of claims across jurisdictions will affect the willingness of national authorities to cooperate and achieve coordinated cross-border solutions.[19] For that reason, we are opposed to discriminatory depositor preference in resolution. We do not believe that the claims of depositors with accounts payable in domestic offices of the institution should be paid ahead of deposits payable in other countries. We believe such a rule represents a real obstacle to cross-border resolutions.[20]

We suggest that regulators be discouraged from exercising any powers to ring-fence local assets or discriminate against foreign creditors.[21] A non-discrimination rule would also enhance the goals of cross-border cooperation. We suggest that the issues raised in Annex 7 should be carefully studied and concrete recommendations in this area be considered as part of the cross-border resolution review. The review should also consider the interaction of the minimum recovery right discussed above with such claims rankings. In addition, we believe that the treatment of customer assets in a resolution should be carefully considered and may require cross-border cooperation. We expect to provide further comments on these important topics in the future.

Due Process and Judicial Review. The Consultative Document recommends that the resolution authority and its staff be protected against lawsuits for actions taken or omissions made in good faith.[22] We agree that the resolution authority and its staff needs protection from frivolous lawsuits that may arise out of the exercise of resolution powers during a financial emergency, and that staff should be protected from personal liability in such circumstances.

However, we believe that the protection afforded to the resolution authority should be limited so that time-tested due process protections of creditors, claimants and third parties are not eviscerated unnecessarily. At a minimum, there needs to be robust after-the-fact judicial review to enforce, among other things, the minimum recovery right, resolve valuation disputes and address any manifest abuses of authority. We also believe that judicial review of the claims process should not interfere unnecessarily with the power to transfer assets and liabilities to a bridge institution, and that judicial review of such sorting out of claims between and among parties is appropriate and important to the fair treatment of creditors.

Host Country Power to Cooperate with Home Country. We agree that host countries should give one or more local financial regulatory agencies the discretionary

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[19] Consultative Document at 69, Annex 7, paragraph 11.

[20] Consultative Document at 69, Annex 7, paragraph 9.

[21] INT'L MONETARY FUND, STAFF REPORT FOR THE 2011 ARTICLE IV CONSULTATION – UNITED KINGDOM 43 (July 2011), *available at* http://www.imf.org/external/pubs/ft/scr/2011/cr11220.pdf.

[22] Consultative Document at 25, Annex 1, paragraph 2.6.

power to consent to the transfer of assets, liabilities and contracts located in their jurisdictions, including all ownership and other securities issued by a subsidiary, or otherwise governed by the host country's law, to a bridge entity established by the home country to resolve a SIFI.[23] Once the agency consents, the transfers should be enforceable without any further consent from, or review by, any counterparties or a court.

The transfer of assets, liabilities and contracts to a bridge can be an effective tool in avoiding the value destruction inherent in the outright liquidation of a firm at fire-sale prices, while ensuring that shareholders and creditors, rather than taxpayers, bear the losses of the closed institutions (thereby minimizing moral hazard and maximizing market discipline).[24] We recognize that host country regulators could have concerns about the impact of such transfers on their local jurisdictions and creditors, yet, to work effectively, a bridge must function as a central repository for the systemically important and other viable assets and liabilities of the SIFI, wherever they are located; to have assets and liabilities scattered among home and host country resolution proceedings removes the ability of the home country regulator to minimize the systemic impact of the firm's failure and preserve maximum value for the benefit of creditors of the failed institution. Accordingly, we believe that host country regulators should be obligated to consider the systemic consequences on a global basis before deciding not to cooperate, and should be obligated to consult with home country regulators before deciding to implement separate proceedings.

Temporary Stay on Financial Contracts. The Consultative Document requests comment on whether a brief stay on the exercise of early termination and close-out rights should be imposed in order to facilitate the recapitalization of the failed firm or the transfer of financial contracts to a third party or a bridge.[25]

If a temporary stay on early termination of certain qualified financial contracts ("**QFCs**") is recommended, we believe that the following conditions should be imposed on it:

- the stay should be brief (e.g., one business day);
- the counterparty should be allowed to suspend its performance on the QFC during the pendency of the stay based on the contractual provisions in the contract, including an *ipso facto* clause tied to the resolution proceeding;

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[23] Consultative Document at 29, Annex 1, paragraph 8.4. Such consent powers would apply regardless of the organizational form of the failed institution's subsidiaries or branches located in the host country.

[24] See Comment Letters from SIFMA and The Clearing House to the FDIC on the FDIC's Notice of Proposed Rulemaking Implementing Certain Orderly Liquidation Authority Provisions of the Dodd-Frank Act (Nov. 18, 2010), *available at* http://www.sifma.org/Issues/item.aspx?id=22345 and http://www.theclearinghouse.org/index.html?f=071032, respectively.

[25] Consultative Document at 39, Annex 2, paragraph 8.1.

- the counterparty should be allowed to exercise its remedies upon a non-*ipso facto* default by the receiver or resolution authority during the pendency of the stay;
- the counterparty should be allowed to close out upon a performance or other default on the QFC by the transferee entity after the transfer has been effected, but not upon an *ipso facto* default under the terms of the contract tied to the transfer or the initiation of resolution proceedings;
- a transfer of any QFCs between the firm in resolution and a particular counterparty and its affiliates should require the transfer of (1) all QFCs between the firm in resolution and that counterparty and its affiliates, and (2) any related collateral arrangement; and
- a transfer should only be allowed to a creditworthy third party or, with appropriate assurances of performance from the resolution authority and its government, to a bridge institution established by the resolution authority and, in either case, the third party or bridge institution should be subject to the same or a substantially similar legal and fiscal regime so that the economic and tax position of the counterparty (apart from the issue of creditworthiness) is not materially affected by the transfer.[26]

In the event of a direct recapitalization of a failed firm in resolution, we believe similar conditions should apply, and that the assumption of the QFCs should only be allowed if the bail-in results in a creditworthy recapitalized entity.

III. Recommendations for Cross-Border Resolution Plans

The Associations and their members are strong supporters of Recovery and Resolution Planning as a key building block in the emerging system of enhanced prudential regulation for SIFIs being instituted on a global basis. Considering the importance, novelty and complexity of creating an integrated and effective recovery-and resolution-planning process for both firms and regulators, we respectfully suggest some modifications and refinements to the Consultative Document aimed at more effective resolution planning.[27]

Single Plan Approach. Just as the Consultative Document recommends a lead authority to coordinate the resolution process of a group with multiple entities in the jurisdiction, we recommend that the home country regulator lead the coordination of

[26] Indeed, a transfer of *any* liabilities should only be allowed to a creditworthy third party or, with appropriate assurances of performance from the resolution authority and its government, in a recapitalization or to a bridge institution established by the resolution authority.

[27] For additional discussion of the guiding principles under which Recovery and Resolution Plans should be designed, *see generally* Davis Polk & McKinsey & Company, *Credible Living Wills: The First Generation* (Apr. 2011), *available at* http://www.davispolk.com/files/Publication/37a3a804-6a6c-4e10-a628-7a1dbbaece7c/Presentation/PublicationAttachment/c621815c-9413-436b-91ea-3451b2b4cf32/042611_DavisPolkMcKinsey_LivingWills_Whitepaper.pdf.

recovery and resolution planning, and the actual resolution of a firm, in all applicable jurisdictions. Specifically, we agree with the recommendation that the home country regulator lead the development of the group resolution plan of a SIFI in coordination with the members of the SIFI's Crisis Management Group.[28] We also believe it is unreasonable for a firm to have to show resolvability under all possible resolution methods, and suggest that if a firm can demonstrate resolvability along one of the enumerated resolution methods, including, at its option, bail-in within resolution, that it should be sufficient to meet the resolvability requirement.

In light of the single plan approach, we believe any efforts to address deficiencies should be implemented through the home country regulator.[29] If the host country deems the resolution plan insufficient for the operations in its jurisdiction, we believe the host country should be required to work through the home country regulatory authority. Otherwise, if a host country resolution authority can maintain its own detailed resolution plan for the operations of the firm in its jurisdiction, then there will be no incentive for national regulatory authorities to work together and coordinate. Instead, firms will be subject to an array of separate, and potentially conflicting, requirements, the result that cooperation is intended to avoid.

Many firms will have to change their internal-reporting structures and invest heavily in information systems and personnel to produce the extensive information that regulations will require. Creating different types of plans for different jurisdictions would be a significant project, and resolution planning should be structured so the process is efficient, and as consistent and uniform as possible.

Home Country Deference. In accordance with the goal of creating a consistent and uniform planning process, and considering confidentiality concerns, we suggest that the home country resolution authority should limit access to the Recovery and Resolution Plan by foreign resolution authorities to those resolution sections relevant to the particular jurisdiction.[30] Broad-based sharing of plans provides little additional supervisory benefit, and the greater the amount of data shared among multiple supervisory agencies and regulatory authorities and their staff, the higher the risk of leaks or unauthorized access.

For similar reasons, recovery actions should be the purview of the home country regulator, with assurances to each host country regulator that the recovery plan adequately addresses relevant issues in its jurisdiction. Otherwise, a SIFI could be subject to conflicting concerns and priorities in various jurisdictions, with no overall coordinating regulator. From their work together in the Crisis Management Groups, and agreement to broad principles through the FSB, we expect that regulators will become increasingly comfortable with the judgments of their peers who are, for a particular

[28] Consultative Document at 32, Annex 1, paragraph 11.6.

[29] Consultative Document at 32, Annex 1, paragraph 11.10.

[30] Consultative Document at 29, Annex 1, paragraph 8.7.

institution based in their jurisdiction, in the best place to make a comprehensive assessment of the recovery plans.

Private Sector Industry Input in Cross-Border Cooperation and Coordination Arrangements. We agree that home and host country authorities should establish arrangements in advance of how they will cooperate and coordinate in the event of a cross-border resolution of a SIFI.[31] In addition, we note the need for resolution planning and crisis coordination between home and host country central bankers, particularly around the conditions for providing liquidity support.

We believe that private sector industry representatives should have input into the sort of cross-border cooperation and coordination arrangements discussed above and, in the case of institution-specific arrangements, the institution itself should have input into the arrangements.[32] Given their global and complex nature, it is clear that the SIFI itself is best placed to give regulators an initial overview of the complexities of its business and structure. Indeed, much of the work that is suggested to be conducted to assist with these agreements, including identification and evaluation of legal impediments to resolution, is likely to be underway by the institution.[33] Without information sharing and discussion, the firm's plan and the cooperation agreements may make differing assumptions or come to differing conclusions, which will be confusing in a crisis.

Moreover, we strongly support the statements in the Consultative Document that cooperation agreements should include bilateral agreements.[34] We do not believe that attempting to have formal multilateral agreements in place, in the first instance, is a feasible initial goal.

Confidentiality. We strongly believe that the balance of interests clearly favors the nondisclosure of the content of a firm's Recovery and Resolution Plans.[35] We support and encourage disclosure by the regulators of how they expect to approach the resolution process within their jurisdiction, and how they would exercise their discretionary authority with respect to firms generally. We believe such disclosure would enhance market stability by providing creditors and counterparties some insight into how their rights are likely to be affected in a special resolution proceeding. However, for reasons we have discussed in more detail elsewhere,[36] we believe each institution's

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[31] Consultative Document at 41, Annex 3.

[32] Consultative Document at 41, Annex 3, paragraph 1.2.

[33] Consultative Document at 45, Annex 3, Section 7.

[34] Consultative Document at 13.

[35] *See* Annette L. Nazareth & Margaret E. Tahyar, *Transparency and Confidentiality in the Post Financial Crisis World—Where to Strike the Balance?*, HARVARD BUS. L. REV. 145 (2011).

[36] Joint Trade Association Comment Letter to the FDIC and the Federal Reserve on the Joint Notice of Proposed Rulemaking Implementing Resolution Plan and Credit Exposure Report (…continued)

Recovery and Resolution Plan should be viewed as highly confidential supervisory information, and we would be concerned with any attempt to make even a portion of the Plan public.

We are willing to support the disclosure by regulators of the existence of institution-specific cross-border cooperation agreements; however, we do not support the disclosure of any details, or even the broad structures, of the actual agreements.[37] We are concerned that, as this is likely to be a process that will develop in discussions over time, any public statement about the content of the cooperation agreements could lead to significant misunderstandings in the market, potential disclosure of sensitive information or other results that exacerbate systemic risk and will be misleading as to the existence and extent of any gaps in resolvability. Selective disclosure of plans or portions of plans can also be more destabilizing in a financial crisis, rather than contributing to financial stability, by providing an incomplete picture of the recovery- and resolution-planning actions of the subject institution.

We particularly appreciate the sensitivity to the fact that information sharing among regulators may change depending on whether sharing is "pre-crisis" or "in crisis" and that information may need to be shared in limited, secure ways.[38] We understand that for securities law reasons, it may be necessary for a firm, in a financial crisis, to make a judgment about the need for public disclosure of material information; however, we do not believe that it is necessary to make such a determination pre-crisis.

Resolvability Assessments. We support the review of and assessment of resolvability of institutions, and we believe that progress on increasing the resolvability of G-SIFIs should reduce the amount of any G-SIFI surcharge concurrently being considered. If a G-SIFI is resolvable, then the need for a surcharge premised on the basis of lack of resolvability is substantially decreased and therefore any such surcharge should be commensurably reduced. In particular, we support the suggestion that a resolvability determination is supported where the national resolution regime has those key attributes identified in the Consultative Document which allow for an orderly resolution.[39]

In order to ensure transparency in making resolvability assessments, we suggest that (1) the standards for making resolvability determinations should be clear, (2) the procedures for reaching such determinations should be clear, and (3) home country regulators should make the ultimate determinations of resolvability.

(continued…)

Requirements of Section 165(d) of the Dodd-Frank Act (June 10, 2011), *available at* http://www.sifma.org/Issues/item.aspx?id=25934.

[37] Consultative Document at 30, Annex 1, paragraph 9.2.

[38] Consultative Document at 44, Annex 3, Section 6.

[39] Consultative Document at 50, Annex 4, paragraph 4.9.

Overall, the questions raised by resolvability assessments are challenging and, as we noted at the outset, highly interconnected with the other recommendations in the Consultative Document, such as progress on cross-border cooperation agreements. Therefore, we do not think that impediments to resolvability beyond those within an institution's power to control, as currently suggested by the Consultative Document, should be used as a justification for ordering institutions to change their business structure or practices, or be factored into the resolvability assessment for purposes of the G-SIFI surcharge.[40] Instead, such impediments should be addressed in a timely way by national supervisors and resolution authorities.

Managing for Success, Rather Than Failure. One of the challenges in the resolution-planning process is that a financial business should be managed to optimize capital formation, prudent maturity transformation and economic growth as a going concern, rather than for failure as a gone concern. As a result, we respectfully request that measures to improve resolvability should be reasonable, and should not result in a conflict between managing for failure at the expense of managing for success.[41]

We agree with the efforts to identify in advance and address those operational complexities that can create practical obstacles to resolution, but we urge that implementation take into account going concern priorities, such as maximizing value for shareholders. The mandates of the resolution authority, prudential regulator and recovery authority (if separate) should have due regard to each other.

Timelines. We believe that recovery and resolution planning should be viewed as a cooperative and iterative process between firms and supervisors that will evolve over time.[42] The iterative approach is necessary in part due to the complexity of crafting balanced resolution regimes that reflect the needs of both bank and non-bank SIFIs. This is especially true in light of the additional legislative action suggested by the Consultative Document, which we support. We urge the member countries of the G-20 to make the legislative actions recommended by the Consultative Document a stated priority, and indeed, we believe the legislative actions should be explicitly included in the implementation timeline. Absent implementing legislation, especially for non-banks, the resolution regimes will be aspirational, not real, because action based on them cannot be certain. This will exacerbate, not lessen, market disruptions and the "rush to the exits" discussed above. It could also lead to regulatory arbitrage that, especially under stressful

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[40] Consultative Document at 48, Annex 4, Section 3 (Stage 1 of the resolvability process states that "feasibility" is to be assessed by taking into account the "current resolution tools available, including RRPs, and the authorities' capacity to apply them at short notice to the specific SIFI in question").

[41] Consultative Document at 32, Annex 1, paragraph 11.11.

[42] *See generally* Joint Trade Association Comment Letter to the FDIC and the Federal Reserve on the Joint Notice of Proposed Rulemaking Implementing Resolution Plan and Credit Exposure Report Requirements of Section 165(d) of the Dodd-Frank Act (June 10, 2011), *available at* http://www.sifma.org/Issues/item.aspx?id=25934.

market conditions, could disrupt markets and make it far more difficult for regulators in one sector, such as banking, to contain and control.

We firmly support reasonable timelines for Recovery and Resolution Plans which recognize that the submission of the first drafts are likely to be followed by intense discussions between firms and regulators, as well as among regulators. The current proposal that G-SIFIs have recovery plans in place by the end of 2011,[43] therefore, seems unrealistic, especially given that the G-SIFI designation process has yet to be crafted.[44] In addition, there would need to be an implementation timeline for newly-added G-SIFIs to allow adequate time to meet the Recovery and Resolution Plan requirements. Any deadline for the initial submission of completed Recovery and Resolution Plans should recognize that the discussions are likely to identify issues regarding both internal and external impediments, that the issues will need to be discussed and addressed by both firms and regulators over time and in various forums, and as a result any assessments of "feasible and credible" should not be linked to the completion of a first generation plan.[45]

* * *

[43] Consultative Document at 19.

[44] BANK FOR INT'L SETTLEMENTS, BASEL COMM. ON BANKING SUPERVISION, GLOBAL SYSTEMICALLY IMPORTANT BANKS: ASSESSMENT METHODOLOGY AND THE ADDITIONAL LOSS ABSORBENCY REQUIREMENT (July 2011), *available at* http://www.bis.org/publ/bcbs201.pdf.

[45] *See generally* Davis Polk & McKinsey & Company, *Credible Living Wills: The First Generation* (Apr. 2011), *available at* http://www.davispolk.com/files/Publication/37a3a804-6a6c-4e10-a628-7a1dbbaece7c/Presentation/PublicationAttachment/c621815c-9413-436b-91ea-3451b2b4cf32/042611_DavisPolkMcKinsey_LivingWills_Whitepaper.pdf.

The Associations thank the FSB for the opportunity to comment on the Consultative Document. If you have any questions, please do not hesitate to e-mail or call the undersigned.

Sincerely,

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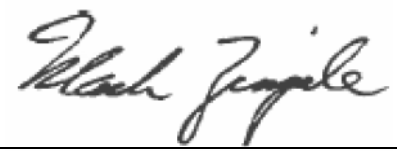

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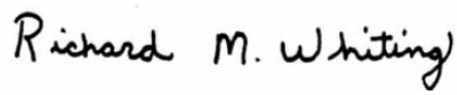

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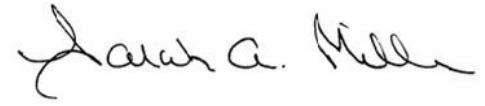

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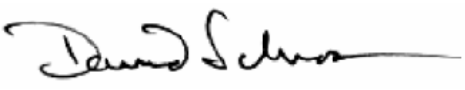

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ANNEX

Global Financial Markets Association

The Global Financial Markets Association (GFMA) joins together some of the world's largest financial trade associations to develop strategies for global policy issues in the financial markets, and promote coordinated advocacy efforts. The member trade associations count the world's largest financial markets participants as their members. GFMA currently has three members: the Association for Financial Markets in Europe (AFME), the Asia Securities Industry & Financial Markets Association (ASIFMA), and, in North America, the Securities Industry and Financial Markets Association (SIFMA).

The Clearing House Association

Established in 1853, The Clearing House is the oldest banking association and payments company in the United States. It is owned by the world's largest commercial banks, which collectively employ over 2 million people and hold more than half of all U.S. deposits. The Clearing House Association L.L.C. is a nonpartisan advocacy organization representing—through regulatory comment letters, amicus briefs and white papers—the interests of its owner banks on a variety of systemically important banking issues. Its affiliate, The Clearing House Payments Company L.L.C., provides payment, clearing, and settlement services to its member banks and other financial institutions, clearing almost $2 trillion daily and representing nearly half of the automated-clearing-house, funds-transfer, and check-image payments made in the U.S. *See* The Clearing House's web page at www.theclearinghouse.org.

American Bankers Association

The American Bankers Association represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its two million employees. The majority of ABA's members are banks with less than $165 million in assets. Learn more at www.aba.com.

The Financial Services Roundtable

The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $92.7 trillion in managed assets, $1.2 trillion in revenue, and 2.3 million jobs.

Institute of International Bankers

The Institute of International Bankers (IIB) is the only national association devoted exclusively to representing and advancing the interests of the international banking community in the United States. Its membership is comprised of internationally headquartered banking and financial institutions from 38 countries around the world.

The IIB's mission is to help resolve the many special legislative, regulatory, tax and compliance issues confronting internationally headquartered institutions that engage in banking, securities and other financial activities in the United States. Through its advocacy efforts the IIB seeks results that are consistent with the U.S. policy of national treatment and appropriately limit the extraterritorial application of U.S. laws to the global operations of its member institutions.

Institute of International Finance, Inc.

The Institute of International Finance, Inc. (IIF), is a global association created in 1983 in response to the international debt crisis. The IIF has evolved to meet the changing needs of the international financial community. The IIF's purpose is to support the financial industry in prudently managing risks, including sovereign risk; in disseminating sound practices and standards; and in advocating regulatory, financial, and economic policies in the broad interest of members and foster global financial stability. Members include most of the world's largest commercial banks and investment banks, as well as a growing number of insurance companies and investment management firms. Among the IIF's Associate members are multinational corporations, consultancies and law firms, trading companies, export credit agencies, and multilateral agencies. All of the major markets are represented and participation from the leading financial institutions in emerging market countries is also increasing steadily. Today the IIF has more than 400 members headquartered in more than 70 countries.