

BY EMAIL

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European Banking Authority
Level 46, One Canada Square
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Ladies and Gentlemen

ISDA and AFME comment on the European Banking Authority's consultation paper on draft Regulatory Technical Standards on the valuation of derivatives pursuant to Article 49(4) of the Bank Recovery and Resolution Directive (BRRD) (EBA/CP/2015/10)

The International Swaps and Derivatives Association, Inc. (**ISDA**)¹ and the Association for Financial Markets in Europe (**AFME**)² are grateful for the opportunity to provide input to the European Banking Authority's (the **EBA**) consultation paper on draft Regulatory Technical Standards (**draft RTS**) on the valuation of derivatives pursuant to Article 49(4) of the Bank Recovery and Resolution Directive (**BRRD**) (EBA/CP/2015/10) published on 13 May 2015 (the **Consultation**).

ISDA and AFME are primarily concerned in this letter with the impact of the proposed implementation on the safety and efficiency of the financial markets.

We appreciate the limits of the EBA's mandate and understand that, whilst certain derivatives liabilities may be excluded from the scope of the write down and conversion powers (or "bail-in powers") pursuant to Article 44(2) of the BRRD (for example, pursuant to the "secured liabilities" exclusion) or may be excluded from bail-in at the discretion of the relevant resolution authority pursuant to Article 44(3) of the BRRD, it is not open to the EBA to propose new grounds for exclusions from the scope of the bail-in powers under the BRRD. Consequently, it is possible that certain derivatives liabilities may be bailed-in and it is, therefore, important that statutory procedures are in place to enable the relevant resolution authority to accurately value such liabilities in a timely manner.

However, and as highlighted by the EBA in the Consultation, there are a number of practical difficulties and concerns that arise in respect of the valuation of derivatives liabilities for bail-in purposes. In particular, due to the nature of derivative contracts, the process for valuation is complex, may be difficult to achieve in a short timeframe and can lead to disputes between counterparties.

Consequently, although ISDA and AFME broadly support the EBA's proposals for the provisions of the draft RTS, we have concerns with the terms of the draft RTS as presently drafted. In particular, ISDA and AFME consider that, whilst it is appreciated that it is not desirable for resolution authorities to be required to consider the particular valuation methodology in every derivatives contract on a case-by-case basis, it is important, as stated in the Consultation, to avoid "discrepancies with the insolvency counterfactual that could lead to breach the non-creditor-worse-off principle". As such, we believe it is imperative that the

¹ Information regarding ISDA is set out in Annex 1 to this response.

² Information regarding AFME is set out in Annex 2 to this response.

valuation mechanism is aligned as closely as possible with the standard contractual close-out valuation mechanisms set out in market standard derivatives trading agreements such as the ISDA Master Agreements. A key concern relates to the assumption within the draft RTS that a counterparty would replace closed-out transactions. As discussed further below, this does not accord with market practice or align with the valuation provisions set out in the ISDA Master Agreements. In addition, fallbacks to mid-market prices are problematic and not market standard.

In addition, we note that (absent a general exclusion pursuant to Article 44(3) of the BRRD) the derivatives liabilities most likely to be bailed-in are those liabilities which are not collateralised and are not required to be cleared via a central counterparty (**CCP**). Thus, non-financial counterparties who are not subject to collateral and clearing requirements (and not financial counterparties, who will be subject to collateral and clearing requirements) are those most likely to be affected by the potential bail-in of derivative liabilities. Counterparties of this type are likely to be ill-equipped to respond quickly to a forced close-out of derivatives transactions by executing replacement transactions (for example, a buy-side end user may have entered into a derivatives contract to hedge a specific financing but may not otherwise be in the general business of entering into derivative contracts). Additionally, non-standard transactions which are highly structured and/or illiquid are more likely to be complex to value and it may be difficult to execute replacement trades in respect of such transactions (even if that were the appropriate step to take) within a restricted timeframe. Each of these comments is discussed further below.

Finally, we feel strongly that, in respect of derivatives transactions cleared via a CCP, the resolution authority or valuer should defer to CCP default procedures to calculate the relevant valuations without fallback to other valuation mechanisms. We expand on this further in our response to Question 7 below.

We hope that you find our comments useful in your continuing deliberations on the implementation of the draft RTS. Please do not hesitate to contact either of the undersigned if we can provide further information about the derivatives market or other information that would assist the EBA in its work in relation to the effective implementation of the BRRD requirements.

Yours faithfully

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QUESTIONS

Question 1: Do you agree with the definitions above? Do you consider it necessary to specify some of them further, and in particular the definitions of “commercially reasonable replacement trades” and “unpaid amounts”? [Article 1 (Definitions) of Draft RTS]

We will give further comments on some of the terms defined in Article 1 when we comment on the operative provisions of the draft RTS.

We note that the definition of “Unpaid Amounts” does not include amounts in respect of interest or compensation accrued during the period from the date on which relevant payment or delivery obligations fell due through to the relevant close-out date. We think this should be corrected.

As the RTS is currently drafted, the definition of “Commercially reasonable replacement trade” is particularly important for counterparties of an institution under resolution. As we will explain later in this response (see our response to Question 4), we believe the assumption within the draft RTS that a counterparty would replace closed-out transactions is incorrect and is not aligned with the standard contractual valuation mechanisms set out in the ISDA Master Agreements which permit quotations to be taken into account for valuation purposes.

However, to the extent that the draft RTS does anticipate that a counterparty would enter into actual replacement transactions and that the price at which it enters into such replacement transactions should be used to determine value for purposes of Article 49, we think that elements of the current definition of “commercially reasonable replacement trade” require amendment. Specifically:

a) we think that requiring the counterparty to have made best efforts to obtain best value for money in order for the replacement trade to be considered commercially reasonable sets an unreasonably high standard. In the context of standard market agreements such as the ISDA Master Agreements, parties are used to having their determinations and discretionary actions tested by reference to standards of commercial reasonableness as interpreted by English courts, for example, applying English law. While there have been, and will continue to be, different interpretations of what is commercially reasonable in any particular context, we submit that the interpretation which is closest to the position reflected in the draft RTS (based on some objective determination of what is commercially reasonable) still imposes a much lower standard than would be understood by a “best efforts/best value” standard. We appreciate the difficulty faced by the EBA in describing a standard which can be applied under other systems of law. We would be happy to discuss this issue in more detail.

b) if, as we would hope is the case, the intention is to allow counterparties to submit details of individual replacement trades each executed to replace a group of closed-out transactions, then this should be clarified. At present, the drafting seems to suggest one-for-one matching of replacement trade with closed-out transaction. This would drive inefficient and non-standard behaviour. We note that the definition requires replacement trades to be entered into on a netted risk exposure basis and agree that it is appropriate (and in the interests of the entity in resolution) for replacement trades to be considered commercially reasonable where they replace a netted risk position rather than a one-for-one replacement of a terminated transaction.

c) we suggest that it would be more appropriate to align the definition with Article 4(1)(b) of the draft RTS to permit counterparties to replace trades or to obtain the economic equivalent of the

material terms of the contracts and the option rights of the parties in respect of the terminated contracts.

d) we suggest that, in order to reduce the likelihood of litigation and subsequent adjustments being made pursuant to the “no creditor worse off” principle, a time period be introduced whereby the counterparty may challenge the determination of the early termination amount calculated by the valuer.

The definition of “write-down and conversion powers” does not need to refer to Article 59(2) of the BRRD as this article is not relevant to derivatives contracts and its reference may cause confusion.

Question 2: Should the deadline given by the resolution authority to the counterparty be further framed? If yes, explain why and how? Does this drafting allow the resolution authority to conclude resolution actions in a sufficiently swift manner? [Article 2 (Determination of value – Notification of the decision to close-out)]

It is important to bear in mind the context of a possible bail-in of derivative liabilities.

Most significant derivative trading relationships involving relevant financial institutions are already fully collateralised and, following the entry into force of EMIR margin requirements, will be required to be fully collateralised on an ongoing basis. It is therefore unlikely that, for these relationships, there will be any unsecured/uncollateralised liabilities which are susceptible to bail-in. The most likely trading relationships to create unsecured/uncollateralised exposures which are susceptible to bail-in (now and in the future) will be trading relationships between financial institutions and their non-financial institution clients; those entities least likely to be able quickly to respond to any forced close-out of derivative transactions in the context of a bail-in.

Most high volume, standardised OTC derivative transactions will be required to be cleared. Article 2 of the draft RTS would not apply to those cleared transactions. Uncleared transactions involving a financial institution under resolution would therefore likely be illiquid, structured transactions (so not quickly or easily valued) and/or transactions with non-financial counterparties (who are least likely to be able quickly to respond to a forced close-out).

The combination of these factors suggests that the relevant resolution authority should have the flexibility to provide a deadline of more than a few business days depending on the types of counterparty which have contracted with the entity in resolution and in respect of which a bail-in is contemplated.

In addition, we suggest that the draft RTS clarify that the close-out date and the date by which counterparties shall provide evidence of commercially reasonable replacement trades as specified by the resolution authority should, in each case, be a business day.

Question 3: This valuation principle is intended to be aligned with common market practice that recognises replacement costs in an early termination event, whilst giving certainty to the resolution authority on the methodology to be followed. Do you agree that this valuation principle would result in a fair valuation for the closed-out netting set and as such avoid a breach, from the counterparty’s perspective, of the no-creditor-worse-off principle? [Article 4 (Determination of value – Valuation principle for early termination amount)]

As you are aware, there are a variety of standard form agreements used in the global OTC derivatives markets. Whilst the valuation principle reflected in Article 4 attempts to synthesise the contractual basis

for determinations of close-out payments in those agreements, as discussed in our responses to Questions 1 and 4, the application of this principle within the draft RTS is not aligned with the standard contractual valuation mechanisms set out in the ISDA Master Agreements in a number of respects (for example, the draft RTS do not expressly permit quotations obtained by the closed-out counterparty to be taken into account for valuation purposes).

We note the reference in Article 4(1)(a) to “collateral” due from the institution under resolution or from the counterparty. We assume this is intended to refer to amounts (such as the amount calculated under Paragraph 6 of the ISDA Credit Support Annex (Bilateral Form – Transfer) (the English law ISDA title transfer CSA)) which reflect the value of collateral previously transferred and which are to be accounted for in the close-out calculation. If this is the intention, we think it would be helpful to clarify that intention. We would be happy to discuss how this could be achieved.

The word “on” in the third line of Article 4(1)(b) should be replaced by “of”.

Question 4: Do you agree with the preferential status given to commercially reasonable replacement trades? Should there be also a prioritisation among other sources of data? [Article 5 (Determination of value – Determination of the close-out amount)]

We agree that preferential status should be given to commercially reasonable replacement trades for purposes of determining value under Article 49 BRRD. However, as per Question 1 above, we believe the assumption within the draft RTS that a counterparty would replace closed-out transactions is incorrect and is not aligned with the standard contractual valuation mechanisms set out in the ISDA Master Agreements which permit quotations to be taken into account for valuation purposes. Whilst it is appreciated that it is not desirable for resolution authorities to be required to consider the particular valuation methodology in every derivatives contract on a case-by-case basis, it is important, as stated in the Consultation, to avoid “discrepancies with the insolvency counterfactual that could lead to breach the non-creditor-worse-off principle”. As such, we believe it is imperative that the valuation mechanism is aligned as closely as possible with the standard contractual valuation mechanisms set out in the ISDA Master Agreements (see the definition of “Market Quotation” in the 1992 ISDA Master Agreement and the definition of “Close-out Amount” in the 2002 ISDA Master Agreement). A key concern relates to the assumption within the draft RTS that a counterparty would replace closed-out transactions. As specified further below, this does not accord with market practice or align with the valuation provisions set out in the ISDA Master Agreements. In addition, fallbacks to mid-market prices are problematic and not market standard.

As to prioritisation among other sources of data, we have the following comments:

- 1) Article 49(3) BRRD requires the resolution authority or independent valuer to determine the liability arising from derivative transactions subject to a netting agreement in accordance with the terms of the agreement.
- 2) In drafting the RTS, Article 49(5) BRRD requires the EBA to take into account the methodology for close-out set out in the netting agreement.
- 3) An ISDA Master Agreement is a netting agreement for this purpose
- 4) The terms of the ISDA Master Agreement and the methodology for close-out set out in the ISDA Master Agreement provide that the non-defaulting party has, except in the case of Market Quotation under the 1992 ISDA Master Agreement, discretion as to the data sources it can use when determining the value of transactions in a close-out.

5) In particular, a non-defaulting party does not need to replace terminated transactions (either on a portfolio or trade-by-trade basis) in order to validly determine the relevant close-out amount.

6) If the non-defaulting party does in fact replace terminated transactions, then the cost or gain arising from the replacement will be a valid component of the close-out calculation, but, even in relation to the value attributable to the terminated transactions, there might be other factors which could legitimately be taken into account. Additional factors include differences between collateral terms applicable to the terminated and new transactions, differences in terms of trading documentation more generally, as well as funding costs for the counterparty. Consequently, we recommend that Article 4 be amended to allow counterparties to submit “adjusted” replacement values and for those adjusted values to be accepted/rejected by the resolution authority on the basis of commercial reasonableness.

7) If the non-defaulting party does not actually replace the terminated transactions (even in the circumstances where a quote is obtained to replace such transactions), there is no prohibition within the ISDA Master Agreement on the use of other data sources to arrive at a value.

8) To reflect the principles set out in Article 49(3) and Article 49(5) BRRD as summarised above, and in recognition of the terms and methodology of standard market agreements such as the ISDA Master Agreements, we suggest that resolution authorities and independent valuers should be required to take account of valuations provided by counterparties even when determined on the basis of data other than the price of actual replacement trades.

9) We note that the 2002 ISDA Master Agreement sets out (within the definition of the term “Close-out Amount”) a hierarchy of types of information which a determining party may consider when determining close-out values.

10) We also recognise that the difficult task of the resolution authorities in arriving at valuations under Article 49 BRRD will be made easier if they are provided with actual valuations by the counterparties.

11) We therefore suggest that the valuer should be required to determine the early termination amount at the prices of actual commercially reasonable replacement trades or, if no evidence of such actual commercially reasonable replacement trades has been provided by the applicable deadline, by using the value determined by the counterparty, in good faith using commercially reasonable procedures in order to produce a commercially reasonable result, as the relevant close-out amount (ie referring to Article 4(1)(b) of the draft RTS).

12) Article 5(4) of the draft RTS is clarified so as to expressly provide for the valuer to use data sources in the following order of priority:

- (i) data provided by third parties, such as market data and quotes from market makers, or values obtained from central counterparties where a contract is centrally cleared (currently Article 5(4)(d) of the draft RTS) – we believe that this data will provide for a more objective valuation than the subsequent data sources and should therefore rank above them;
- (ii) data provided by counterparties other than evidence of trades communicated pursuant to Article 2(2) of the draft RTS, including data on current or previous valuation disputes on similar or related transactions (currently Article 5(4)(c) of the draft RTS) – we also recommend that this limb is clarified so as to expressly recognise that a counterparty can provide actual valuations based on data other than executed replacement trades;

- (iii) for standardised products, valuations generated by the own systems of the valuer (currently Article 5(4)(a) of the draft RTS);
- (iv) data available within the institution under resolution, such as internal models and valuations including independent price verifications performed pursuant to Article 105(8) of Regulation (EU) No 575/2013 (currently Article 5(4)(b) of the draft RTS); and
- (v) any other relevant data (currently Article 5(4)(e) of the draft RTS).

13) In respect of Article 5(3) of the draft RTS, we agree that intra-group liabilities should be valued at mid-market prices.

Question 5: Do you agree with the method described under paragraph 2 for the resolution authority to calculate the close-out amount? Is there a reason to believe that mid-market prices might not always be available or possible to derive from other data sources? And under which circumstances? In that case, what do you consider as an appropriate reference for calculating the close-out amount? [Article 5 (Determination of value – Determination of the close-out amount)]

We expect that volatile markets – to be expected if a significant participant in the OTC derivatives market is resolved – would hamper a valuer’s ability to obtain or determine reliable mid-market prices. It is, therefore, all the more important that counterparties are permitted to value derivatives transactions based on other data sources as discussed above (in our response to Question 4).

In respect of Article 5(2)(b), we suggest the words “or re-establishing any hedge or related trading position” are amended to correspond with Article 4(1)(b) to provide for “economic equivalent of material terms of the contract and its option rights of the terminated contracts.”

Question 6: Should adjustments to the bid-offer spread, other than those specified under Article 6(4)(c), be considered? [Article 5 (Determination of value – Determination of the close-out amount)]

We suggest that, in line with market practice, the resolution authority should be required to consider additional factors when adjusting the bid-offer spread. Such factors should include position size, market depth, liquidity, contractual terms, hedging costs and cost of funding.

There should be an express recognition that value will be impacted by (i) the cost of funding and (ii) existing collateral arrangements between counterparty and institution under resolution and/or an express assumption as to the terms of any related collateral arrangements.

Question 7: Do you agree with the treatment of CCPs as laid down in this Article? Are the conditions laid down in this article compatible with a swift and efficient valuation of cleared derivatives within the context of a resolution process? Do you see any material risk that the treatment of CCPs as laid down in this Article could conflict with the requirements for a sound risk-management framework to deal with the default of a clearing member? [Article 6 (Determination of value – Valuation of cleared derivatives contracts entered into between an institution under resolution and a CCP)]

We feel strongly that the resolution authority or valuer should defer to CCP default procedures to calculate the relevant valuations without fallback to other valuation mechanisms. Equally, valuations of cleared derivatives should be carried out in accordance with the timeframes set out in the CCP default procedures (and not any deadlines imposed by the relevant resolution authority). In addition, the resolution authority or valuer should not conduct any preliminary valuation which is binding on the counterparties in any way as

part of the resolution process (although we have no issue in principle with the resolution or valuer conducting a preliminary valuation for its own purposes as a baseline for comparison). We are happy to discuss this in further detail with the EBA upon request.

We note there are possible adverse consequences for clients of clearing members if their clearing member goes into resolution. This is because transactions between client and clearing member appear not to be excluded from the general valuation provisions set out in Articles 2, 3, 4 and 5. It seems therefore that a client's positions are at risk of forced close-out and, notwithstanding the terms of the client clearing agreement, a close-out value being determined other than by reference to the CCP's own determinations. We would be happy to discuss this with the EBA in further detail.

Question 8: Article 7(1) is intended to be aligned with market practice in early termination events. Do you see a risk of increased market volatility on the first market day following the close-out notification, which could adversely affect the termination value? Do you consider the notion of "commercially reasonable" date sufficiently self-evident or should it be further specified? [Article 7 (Point in time for establishing the value of derivative liabilities and early determination)]

We do see a risk of increased market volatility on the first trading day following the close-out notification. In Article 7(1)(c) of the draft RTS, the test of commercial reasonableness seems to be linked to the question of whether a price is available in the relevant underlying market. We suggest that the test should not be whether a price is available, but whether it is reasonable for a closed-out counterparty to be replacing trades in the market on that day, i.e., would it be reasonable for the resolution authority to impose on the counterparty values derived from prices available on a day when a reasonable counterparty would have been deterred from trading due to the volatile conditions?

Question 9: As provided for under Article 7(2), the resolution authority will have the possibility to produce a valuation at a date or time earlier than the earliest commercially reasonable date as part of a provisional valuation carried out pursuant to Article 36(9) of the BRRD. This possibility is intended to allow for a swifter resolution process as resolution authorities will be able to apply the write down and conversion powers on the basis of the early determination. As in all cases where taking resolution action based on a provisional valuation, resolution authorities will update their determination either as part of a subsequent provisional valuation or the final valuation. At that point they will either adjust the write down and conversion of creditors, provided they have previously made the necessary arrangements such as holding sufficient equity, or provide alternative compensation, if necessary, on the basis of the final valuation of difference in treatment pursuant to Article 74 of Directive 2014/59/EU. Do you consider this optional early determination appropriate, or do you consider that this option would unreasonably increase the risk of litigation or ex post compensation according to Article 74 of the BRRD? [Article 7 (Point in time for establishing the value of derivative liabilities and early determination)]

If a resolution authority decides to bail in specific counterparties' net positions based on its estimated values and then corrects the valuations based on input from the counterparty and/or market data, we do consider that this approach significantly increases the risk of litigation. However, it is difficult to see how else a bail-in could be achieved within a reasonable time frame. A solution could be to allow counterparties to query valuations within a specific time frame.

Question 10: Alternatively, should resolution authorities always wait until there is pricing available in the market before producing their valuation, and therefore wait until that date before applying the bail-in tool? [Article 7 (Point in time for establishing the value of derivative liabilities and early determination)]

We consider that this alternative approach seems unrealistic.

Question 11: The possibility to produce an early determination is available also in relation to claims of a CCP. In this case the final valuation will reflect the CCP claim as determined pursuant to Article 6, on the basis of the CCP default procedures if provided under the conditions of that Article. Do you consider it appropriate to also allow an early determination in relation to CCP claims? [Article 7 (Point in time for establishing the value of derivative liabilities and early determination)]

Please see our response to Question 7.

Question 12: If so, do you consider that, with regard to CCP claims, resolution authorities should always be obliged to adjust the bail-in treatment of the CCP if and once the CCP provides its determination pursuant to Article 6? In that case, how do you assess the risk that the CCP determination process could hold back the finalisation of the bail-in process also for other claims? Alternatively, does the assessment of difference in treatment pursuant to Article 74 of the BRRD provide a sufficient safety net for CCPs? [Article 7 (Point in time for establishing the value of derivative liabilities and early determination)]

Please see our response to Question 7.

Question 13: Do you find the guidance provided in paragraph 2 of this Article sufficiently clear as to the terms of comparison? [Article 8 (Terms of the comparison)]

Yes.

Question 14: Do you agree with the main drivers of the destruction in value as described in this Article? [Article 8 (Terms of the comparison)]

Yes.

Question 15: Do you agree with the provision for a precautionary buffer? Do you consider the indicative elements supporting this precautionary buffer as sufficient? Do you see other considerations that should be taken into account when calculating a precautionary buffer? [Article 8 (Terms of the comparison)]

The EBA should clarify the reference to collateral exchange to make it clear whether it relates to errors or disputes in the valuation of collateral which is required to be accounted for as part of the close-out calculation. Again, we would be happy to discuss this point in more detail.

Question 16: In determining destruction in value, should resolution authorities incorporate into their analysis the impairment to the firm's franchise value that would result from the termination and closing-out of a firm's derivatives contracts and the cessation of its related business operations? [Article 8 (Terms of the comparison)]

We think resolution authorities should take into account impairment of the firm's franchise value.

Annex 1

ABOUT ISDA

Since its founding in 1985, the International Swaps and Derivatives Association has worked to make over-the-counter (OTC) derivatives markets safe and efficient.

ISDA's pioneering work in developing the ISDA Master Agreement and a wide range of related documentation materials, and in ensuring the enforceability of their netting and collateral provisions, has helped to significantly reduce credit and legal risk. The Association has been a leader in promoting sound risk management practices and processes, and engages constructively with policymakers and legislators around the world to advance the understanding and treatment of derivatives as a risk management tool.

Today, the Association has over 800 members from 67 countries. These members include a broad range of OTC derivatives market participants including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure including exchanges, clearinghouses and repositories, as well as law firms, accounting firms and other service providers.

ISDA's work in three key areas – reducing counterparty credit risk, increasing transparency, and improving the industry's operational infrastructure – show the strong commitment of the Association toward its primary goals; to build robust, stable financial markets and a strong financial regulatory framework.

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Our registration number in the relevant EU register is 46643241096-93.

More information about ISDA is available from our website at <http://www.isda.org>, including a list of our members, the address of our head office in New York and other offices throughout the world and details of our various Committees and activities, in particular, our work in relation to financial law and regulatory reform.

Annex 2

ABOUT AFME

AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

AFME is the European member of the Global Financial Markets Association (**GFMA**) a global alliance with the Securities Industry and Financial Markets Association (**SIFMA**) in the US, and the Asia Securities Industry and Financial Markets Association (**ASIFMA**) in Asia. AFME is listed on the EU Register of Interest Representatives, registration number 65110063986-76.