ASSOCIATION DES BANQUIERS CANADIENS
CANADIAN BANKERS ASSOCIATION

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Secretariat of the Financial Stability Board
c/o Bank for International Settlements
CH-4002, Basel, Switzerland
fsb@bis.org

Dear Sir/Madam:

Re: Cross-Border Recognition of Resolution Action: Consultative Document

I am writing on behalf of the Canadian Bankers Association[1] to provide comments on the Cross-Border Recognition of Resolution Action Consultative Document published on September 29, 2014. This letter responds directly to the 5 specific questions posed in the consultative document. We fully support the work of the Financial Stability Board and the progress that has been made to date, and believe that a key component of an effective resolution regime is to improve structural relationships and transparency between foreign regulators around resolution planning. We are also pleased that the proposal can be implemented regardless of whether the parent entity in the group is a bank or a bank holding company.

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

Generally, we believe that the elements of cross-border recognition frameworks identified in the report are appropriate. However, in addition to the focus on temporary restrictions or stays on early termination rights in financial contracts, greater clarity and/or stay language should also be included in relation to contractual obligations with respect to financial market infrastructure (FMI), as FMI termination powers are commonly broad, and the termination of FMI relationships for a global systemically important financial institution (G-SIFI) in resolution could lead to extensive system contagion. Given the overall timeline noted in Section 3 of the consultative document, we believe that efforts to

[1] The Canadian Bankers Association (CBA) works on behalf of 60 domestic banks, foreign bank subsidiaries and foreign bank branches operating in Canada and their 280,000 employees. The CBA advocates for effective public policies that contribute to a sound, successful banking system that benefits Canadians and Canada's economy. The CBA also promotes financial literacy to help Canadians make informed financial decisions and works with banks and law enforcement to help protect customers against financial crime and promote fraud awareness.

help ensure that a G-SIFI's participation in an FMI cannot be terminated by the FMI if the G-SIFI is being resolved or is experiencing financial difficulty should be a priority.

We would also note that, beyond the bail-in of eligible liabilities, legal frameworks need to consider the transferability of liquidity and repatriation of capital across borders, particularly between branches (i.e., ring-fencing a branch that provides funding to the group could lead to a lower resolvability assessment than would be the case if a cooperative solution were pursued). In particular, while we support the position that foreign branches should be considered as part of the associated legal entity in its home jurisdiction, we are concerned that some foreign regulators may not share this view, and it is critical to have clarity around the treatment of branches in order for the cross border resolution framework to be effective.

The legal frameworks would also benefit from a structured understanding of how uncertainties would be addressed between regulators, given the 'need for speed' in resolution. For example, tactical elements of regulator coordination in a resolution event should be considered, such as the seniority of persons at the respective regulators partaking in such conversations and the degree of transparency expected. In addition, acceptance must be premised on jurisdictions agreeing to implement the Key Attributes and comprehensive statutory frameworks - without this assumption it would be difficult to implement cross border resolution.

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

Yes, we generally agree that foreign resolution actions can be given effect using the different approaches outlined in the consultative document. However, while these approaches should work conceptually, there is still uncertainty as to how regulators across jurisdictions will have aligned incentives to negotiate the terms as recommended in the consultative document (for example, if domestic interests are going to be a priority in the event of a resolution of an international G-SIFI, overcoming this barrier does not appear to be directly addressed in the document). As such, we believe that it is important that the framework address the alignment of incentives as a condition of foreign regulators adopting such provisions if they are not in their jurisdictions' best interests.

We also believe that greater clarity with respect to the practical meaning of 'equitable treatment of creditors' in home and host jurisdictions will be a pre-requisite to achieving agreement on appropriate foreign resolution actions concerning the cross-border movement of liquidity and capital.

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

We do not believe that achieving cross-border enforceability of (i) and (ii) is a critical prerequisite for the effective implementation of resolution strategies for G-SIFIs, although a failure to do so will greatly increase the cost, complexity, uncertainty and delays in completing a resolution. Also, as noted in Question 1, we believe that greater clarity and/or stay language with respect to cross-border FMI relationships for G-SIFIs in resolution should be pursued to ensure that FMIs cannot terminate the membership of a G-SIFI that is in resolution or is experiencing financial difficulty.

We also believe that timely repatriation/redeployment of capital to home (or other) jurisdictions (in order to recapitalize entities where losses have occurred) from legal entities in jurisdictions where it exceeds the amount required to protect local creditors, is critical to promote resolvability and minimize the potential for contagion. Accordingly, we would encourage the FSB to consider ways of expediting cross-border flow of capital for banking groups in resolution.

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

We generally agree that contractual approaches can both fill the gap where no statutory recognition framework is in place and reinforce the legal certainty and predictability of recognition under the statutory frameworks once adopted. However, we believe that this would only be an interim solution, and that a statutory framework should still be established. It is highly inefficient to solve the problem via changes in certain financial contracts across financial institutions, and there is a risk to the effectiveness of the overall approach, as each adjustment can be subject to interpretation. The framework should also consider the manner in which banks are required to implement contractual changes in financial instruments (e.g. at the time of a new contract or renewal as opposed to an en masse renegotiation of existing arrangements, which would be complex and resource intensive). We would also emphasize the need for a coordinated approach among regulatory authorities in the implementation of these measures, especially in relation to the imposition of contractual stays on non-prudentially regulated firms, so as not to cause a disruption in trading activities or prejudice institutions from any particular adopting jurisdiction.

Just as a statutory regime is preferable to a contractual one, embodying the work of the FSB in a treaty would provide predictable, equitable and consistent treatment as domestic regimes would be aligned and banks and their stakeholders (including governments) would be protected by the rule of law. While a treaty is a longer term solution, it would maximize financial stability by providing the greatest certainty on issues such as recognition of bankruptcy stays, bail-in, seizure of assets and co-ordination of resolution actions. An interim step towards a treaty that could provide similar benefits, but only between the contracting governments, would be using bi-lateral cross-border resolution agreements to provide certainty and to accommodate unique aspects of each banking regime (e.g. Canadian banks have not adopted the bank holding company structure and the operating bank is the top holding company for the other entities in the group).

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

We generally agree that the key principles for recognition clauses in debt instruments set out in the report are appropriate.

We would like to thank you for the opportunity to comment on the consultative document.

Sincerely,