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Secretariat to the Financial Stability Board
Bank for International Settlements
Centralbahnplatz 2
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Sent by e-mail to: fsb@bis.org

Re: IIF Response to the FSB's Consultative Document, "Recovery and Resolution Planning: Making the Key Attributes Requirements Operational"

To the Financial Stability Board:

On behalf of the Cross-Border Resolution Working Group (CBRWG) of the Institute of International Finance (IIF), the global association of financial institutions, the IIF welcomes the opportunity to comment on the consultative document, "Recovery and Resolution Planning: Making the Key Attributes Requirements Operations" – henceforth the "Consultative Document" – prepared by the Financial Stability Board (FSB) and issued in November 2012. The IIF commends the FSB for its consideration of some of the issues raised by recovery and resolution planning and by the implementation of the *Key Attributes*, and it welcomes the open and consultative approach taken by the FSB in this report.

Introduction

The ultimate purpose of the Consultative Document is to encourage alignment of recovery and resolution practice and national institutional frameworks more closely with the *Key Attributes*. The IIF agrees on the need for a greater degree of consistency in implementation of the *Key Attributes* and for a common framework of standards for cross-border resolution. In this broad sense, the objectives of the report are well-aligned with the IIF's recommendations. In offering these general comments on the Consultative Document, the IIF's CBRWG reiterates the basic point of the IIF's report on *Making Resolution Robust*, that the FSB should take a more affirmative stance on creating clear and certain conditions for the international cooperation that will be essential to the success of any resolution of an internationally active institution.[1] There is much in the Consultative Document that is in line with industry thinking; however, certain important points do require comment.

Scope. The FSB report was drafted in response to the experiences that authorities have had in the initial drafting of recovery and resolution plans (RRPs) for G-SIFIs. The

[1] See IIF, *Making Resolution Robust – Completing the Legal and Institutional Frameworks for Effective Cross-Border Resolution of Financial Institutions* (May 2012).

initial list of G-SIFIs published by the FSB in November 2011 consisted only of banking groups. The FSB should be mindful that, as noted, these observations were drawn from experiences of working with banking groups and that there are other and different issues concerning non-bank entities. There is also the possibility that this process of identifying the key elements for RRPs for entities other than banks might be better served if the FSB waits until other non-bank G-SIFIs were identified, so common characteristics for RRPs across bank and non-bank entities could then be identified. Also, as has been brought up in previous IIF letters and reports, there is a risk that the authorities will look at the recovery and resolution of non-banking entities through the prism of the bank resolution regime and draw inappropriate conclusions.

Cross-border Cooperation Generally. While the report does address the need for cross-border processes and identifies specific needs for cooperation and coordination, it could have been stronger on recommending to the authorities the need for specific, committed processes before and during the recovery and resolution process. Among other things, the report appropriately addresses firm-specific cross-border resolution agreements (COAGs) as one of the critical elements of a comprehensive resolution strategy, but it would be helpful if more could be done to show the need for clear, well-understood and accepted mandates to cooperation by home and host authorities in order to maximize confidence that the arrangements will in fact work.

- The CBRWG therefore continues to advocate stronger, more binding cross-border cooperation requirements, and urges the FSB again to consider broader international commitments as a medium-term strategy, along the lines of the proposed Convention published in *Making Resolution Robust*.[2] The report goes part of the way by talking about "commitments" of home and host authorities at **p. 14**, but the nature and scope of such commitments should be amplified and solidified.
- In addition to the general discussion in our prior report, there are a number of topic areas where further work on cross-border cooperation, including legislation in some cases, is needed. Among them are the following (omitting those, such as the "No Creditor Worse Off Than in Liquidation" principle, that are established in the *Key Attributes*):
    - Hosts should publicly state that home restructuring (including bail-in at the holding-company level) would be recognized as valid by hosts, and not give rise either to administrative or legal obstacles to recognition, or to recognition to events of default, etc. There is some language about this issue (cf. **p. 15** of the report) but it tends to be ambiguous as to how binding it would be on host regulators.
    - There should be an obligation of authorities to acknowledge an overriding duty to consider the overall systemic risk impacts of their decisions for all affected jurisdictions.
    - One of the goals for resolution should be the fair treatment of creditors, which would include non-discrimination; no ring-fencing of assets for undue benefit of local creditors; respect for legal entity structure of group; etc. These points of course raise a number of difficult issues, particularly where there is domestic

[2] See IIF, *Making Resolution Robust* (June 2012), Annex I, pp. 47-51.

depositor preference, but need to be confronted, at least by developing a focused, intense dialogue of the public and private sectors (see the further discussion below).

- Authorities should have full authority for cooperation in planning and carrying out resolutions, including from a group perspective (as argued at length in *Making Resolution Robust*), as an essential part of the statutory powers necessary to implement the *Key Attributes*. Cooperation powers should be an important part of the FSB's ongoing peer review process, along with whether jurisdictions have the basic powers to execute the *Key Attributes*. As a related matter, it is still unclear in some countries what agency will be the resolution authority and how it will relate to the prudential supervisor -- the FSB should urge jurisdictions to make clear decisions on such matters as soon as feasible.
- Operational requirements: authorities should use statutory powers to ensure that local banks would continue to provide services to the group (on appropriate conditions).
- Cross-border recognition of bail-in or debt restructuring should, as discussed at length in *Making Resolution Robust*,[3] include full powers to align suspension of acceleration of rights, and recognition of stays recognized by home or other authorities.[4]

Drawing lines between liabilities. A further point of general concern is to find means of providing more clarity to the market about what liabilities would or would not be subject to bail-in. The recent dialogue drawing a distinction between "capital structure liabilities" and "operating liabilities" is a path to be explored in order to clarify market expectations, although it will require addressing legal and operational issues. Further work is clearly required and a full consensus has not yet been reached in the industry; however, it is becoming increasingly clear that it would be very helpful to have concepts along these lines clear in order to achieve the right balance between the market demand to know what would be subject to bail-in and the desire on the part of the authorities to have some necessary discretion in making such determinations. Conceptual clarity could help balance these opposing goals and could provide sufficient constraints around judgment calls to meet current needs and to avoid unnecessary obstructions arising in the way of raising finance in the coming years.

Annex I: Guidance on Recovery Triggers and Stress Scenarios

1. Quantitative and Qualitative Triggers (pp. 8 - 9)

As a general matter, the industry is concerned about discussion of "triggers" in the recovery context. Rather, members who have contributed to the CBRWG's discussions would prefer to see the discussion couched in terms of *Early Warning Indicators* (EWIs) (or whatever similar term might be adopted) that would be integrated with the overall risk

[3] See IIF, *Making Resolution Robust* (June 2012), Annex I, pp. 17, 22.

[4] See IIF, *Making Resolution Robust* (June 2012), Annex I, pp. 28-34. For these purposes, one constructive path would be to amend the UN Model Law on Cross-Border Insolvency and its legislative equivalents, like Chapter 15 of the U.S. Bankruptcy Code, to ensure that resolution proceedings implemented in one state are recognized in others.

management process as well as with planning for recovery as suggested at **p. 9**. Such EWIs would include a range of quantitative metrics and qualitative benchmarks relevant for the business models, markets, and specific needs of each group, and would include the elements identified at **p. 8**, as well as other micro indicators, including early indicators of profitability, business-level profit and loss questions, counterparty risk issues, and the like, and, importantly, macro elements such as unemployment rates, relevant sovereign debt ratings, GDP trends, interest rates and the like.

Each firm should define such EWIs for itself, in discussion with its relevant supervisors. Changes in the EWIs should be monitored and tracked, and deterioration would be noted both for risk-management purposes, so that mitigating actions in the normal course would be taken, and for determination of whether the firm should be taking crisis-prevention measures or indeed would be approaching the recovery phase.

Given the analytical nature of the process, the issue is not to "trigger" specific actions, or indeed to identify specific events as formal "triggers," but to be sure that the risk-governance process requires rigorous attention to the trends or issues, and escalation to senior management and the board of the firm when deterioration becomes marked, with notice to the firm's relevant supervisors. The issue is not what decisions would be made, but to make sure that the escalation occurs, to provide some general guidance as to how decision-making should take place (without dictating specific decisions), and who is responsible for taking such decisions. The latter point is recognized by the Consultative Document at **p. 10,** but the centrality of that point needs more emphasis, and the use of the term triggers and certain other aspects of the discussion tend to distract the reader or suggest other interpretations.

While the distinction between "soft" triggers and EWIs may be somewhat semantic, the distinction is important because the term "trigger" may imply a misleading degree of automaticity or certainty to a process that will necessarily be somewhat judgmental. The critical issue is that the process involves escalation, with a heightened level of internal communications and communications with supervisors, well in advance of when drastic recovery actions might have to be taken. It is thus essentially a matter of clear and robust governance.

For these reasons, requiring "hard" triggers would be even more inappropriate. In banks' experience, a good EWI process would raise issues well before hard triggers would, and, even more importantly, hard triggers would lack the flexibility needed to allow organizations to cope with specific situations, either idiosyncratic or systemic.

The Consultative Document recognizes at several points that the response to events that might be considered to risk triggering the need for recovery actions ought to be left largely to the discretion of the firm in consultation with the relevant authorities. This approach is clearly correct. Rather than putting the discussion in terms of "triggers," it would be more appropriate to consider guidance as to how firms and supervisors should develop appropriate procedures within each firm to make sure the appropriate governance response

will occur, rather than focusing on the kind of mechanical responses that the term "trigger" implies.[5]

The actions that a bank may take aimed at "recovery" cover a spectrum of issues and responses that are difficult to anticipate with any kind of precision. Indeed, actions taken to help a firm recover from a difficult situation should not be thought of in terms of the kind of cliff-edge situations that the term "trigger" implies: rather there should be clarity and analytical rigor as the firm moves across the spectrum. The notion of a "trigger" is more appropriate for resolution situation, where there is indeed a cliff-like point of criticality to be confronted.

The foregoing discussion should serve to answer the FSB's formal **questions 1 through 3**. It also helps answer **question 4**, "How can financial institutions achieve the goal of early and effective internal triggers while avoiding negative market reaction to recovery actions taken?" This question is very important and illustrates the importance of looking at recovery as requiring a spectrum of responses, rather than anything like mechanical triggers. The issues are all the more important given the disclosure issues that the question implies. Firms entering difficulties will be required for reasons of securities law or for good market relations to make disclosures of deteriorating situations;[6] in some instances, "recovery" issues will in any case be evident to the market. These disclosure requirements are complex and demanding enough and should not be added to by requirements driven by recovery and resolution planning. This issue is recognized by the report in passing at **p. 10,** but the point needs to be stressed because it provides another reason why definition of "triggers" in advance, which may or may not be relevant in a given situation, should be avoided. The firm should make its disclosure decisions on the usual bases, and should not be pushed into making disclosures that might not be material, strictly speaking, but could take on a reality of their own, as might be the case if a mechanistic "trigger" is breached.[7]

Similarly, in response to **question 5**, "[a]re there triggers that are more suitable as early warning indicators for preemptive recovery actions versus trigger events that are more suitable for particular recovery actions?," it is important to stress yet again that the governance process is the critical thing in the recovery context, and the industry believes it is much more likely to be counterproductive than helpful under most circumstances to define triggers for "particular recovery actions."

2. Stress Scenarios

There is of course some tension between the absolute need to define recovery procedures and planning around the needs of each particular firm and the desire for some consistency. While the essence of stress testing for recovery purposes should be left to each firm, it would be useful to have some guidance as to how the official stress tests provided by

[5] See IIF, *Governance for Strengthened Risk Management* (October 2012). Although the issues of risk governance are broader than the governance issues related to recovery, they do overlap hand have many of the same elements, which are discussed in the *Governance* report.
[6] See FSB, *Report of the Enhanced Disclosure Task Force* (October 29, 2012).
[7] See IIF, *Making Resolution Robust* (June 2012), Annex III, p. 55, for a discussion on investors' perspectives on recovery and resolution.

the FRB, EBA or other authorities ought to be folded into each firm's process, as there is an argument for consistent treatment of such supervisory stress tests across the jurisdictions to which they apply. To be clear, this would apply only where such official stress tests constitute part of the overall going-concern regulatory environment. The question should not be taken to imply that there should be imposed stress testing for resolution purposes. Stress testing is better seen as a business-as-usual process, helpful for identifying likely scenarios when recovery plans are being developed, but otherwise it is important that RRPs be flexible and modular, not linked to specific scenarios.

3. General Guidance (pp. 10-11)

Subject to the comments above, the general guidance seems appropriate and helpful. It is particularly noteworthy and appropriate that the importance of use of discretion and judgment by management are well recognized. Use of good management judgment, in consultation with the authorities, will be essential to crafting a response to any firm's deteriorating situation, and is much more likely to result in turning it around than would any automatic reaction that could be required. This is underscored by the statement at **p. 10** that "firms should continue to separate their recovery triggers from automatic, compulsory reactions in order to provide decision makers with flexibility to develop a discretionary response in accordance with the specifics of the situation."

Annex II: Guidance on Developing Resolution Strategies and Operational Resolution Plans

Clarity and Presumptive Path. The report strives to underscore the independence of authorities in taking resolution actions. It mentions, "While this Guidance should provide firms with an indication of how authorities may use the material that they may be required to supply, it is not binding on authorities" (**p. 13**).

The reasons for this are understandable: it is not likely that the authorities would bind themselves to a particular solution in future circumstances that cannot be predicted specifically. Thus, "Resolution strategies and plans set out the approach to resolution that is likely to be adopted should the need arise, but they do not prescribe the precise course of action that the authorities will pursue" (**p. 14**).

While these concerns are obvious to the industry as well, they must be balanced by the sense that all parties – firms, regulators, and above all investors – would be best served insofar as there is a high degree of relative predictability of the authorities' response. This is a major theme of *Making Resolution Robust.*[8]

[8] See IIF, *Making Resolution Robust* (June 2012), pp. 37-38. "While…authorities cannot and should not tie their hands on triggering a resolution (provided their authority to do so corresponds to FSB norms), the dilemmas created by constructive ambiguity are real and are likely to have real costs for firms raising funding. Therefore, there should be a debate among firms and FSB member organizations to define appropriate pre-resolution disclosures by the relevant authorities that would necessarily be quite general but would at least give investors in the market a sense of how the home authority would approach a resolution (over-simplify, single-entry, or multiple-entry), and how the principal host authorities concerned with the group would coordinate any resolution actions."

It is becoming an important theme of the international and cross-sectoral discussion of resolution issues that there needs to be a good sense for a given institution of the exposure of its debt at various levels to bail-in that can be understood by the market. While it is understood that the precise details of intervention cannot necessarily be fully prescribed in advance, ground rules for the application of bail-in would help significantly in providing guidance and clarity on what the market could expect in a resolution. For some institutions, it could be of interest to extend such ground rules to include understanding its "presumptive path" to resolution in case of need. Such ground rules are, of course, highly important to the firm as it pursues its capital and business strategies in the going-concern environment.

In addition, while the general outlines of any "presumptive path" should be determined ex ante where possible, and many firms believe doing so would be helpful to both their resolution planning and their understanding by the market, this may not be possible in some situations. Depending on the nature of the group and its businesses, it may not be possible reasonably to predict in advance which part or parts would require resolution and the better solution may be to leave open different options to respond to different circumstances. This point is perhaps implicitly recognized at **p. 15**, which contemplates a mix of MPE and SPE at some point, but that discussion seems to imply that prescriptive solutions would necessarily be decided, whereas for other groups keeping possibilities open may make more sense.

As a general matter, the authorities should provide as much clarity as possible on the parameters that would guide their actions, while making it clear they cannot be bound in the end by such statements. Any changes in such parameters or in the authorities' thinking on resolution should be made as transparent to the market as possible.

Business Models and Structures. Another major issue is the extent to which firms may have to modify their business models or structures, or at least business plans, in order to accommodate one resolution method or another. The report specifies certain requirements and preconditions for using SPE and MPE. Either approach may give rise to any number of specific issues, given differences in how the relevant conceptual approaches would affect particular groups.

While the SPE/MPE distinction makes sense as a means to structure thinking about resolution planning and execution, the distinction itself should not be allowed to mask the diversity of business models within each category, or the need for attention to the economic and business structure as well as legal structure of each group. Thus, even when the framework of the broad SPE or MPE categorization is applied, analysis of resolution planning should be done on an institution by institution basis and should be considered in light of an institution's particular characteristics.

A further point of concern in discussions of their RRPs is that, given the resources required, banks should generally (subject to possible exceptions) not have to do recovery and resolution planning in detail for multiple approaches. For many groups, once a single, primary approach is agreed upon with the regulators, it should be the focus of subsequent planning. This is not just a matter of planning. Different approaches may be mutually exclusive: even at the very highest level of generality, the implications of an SPE plan or an MPE plan are very different. Furthermore, once an appropriate plan is decided upon,

multiple planning is at best a diversion and at worst a source of serious confusion as an organization tries to work through all the implications of carrying out a good RRP process.

Finally, it must be recognized that the entire industry, most especially in the US and EU, are undergoing very serious structural discussions, the outcomes of which are as yet quite unclear. The final outcomes of the Vickers, Liikanen, and Volker discussions will have profound effects, and firms will need time to adjust to the final decisions under those discussions. The RRP process should not front-run that process, or preclude useful solutions to the issues they raise.

Resolvability Assessments: The report says that "implementation of all G-SIFI resolution requirements…will be reviewed through regular resolvability assessments conducted by the resolution authorities and CMGs and through a resolvability assessment process for G-SIFIs that the FSB expects to launch in 2013" (**pp. 13, 16**). A broad concern of the industry, but one that still requires thinking through, is how to achieve some degree of consistency of the resolvability process across firms, while still respecting its firm-specific character. This is something that the IIF will need to continue considering with the official sector, and which would appropriately be discussed when the assessment process is being prepared. Suffice it to say at this point that, given the potentially very serious impacts of resolvability assessments on firms and given the interference that any directives based on such assessments would represent in the traditional business and strategic prerogatives of Boards of Directors, this issue needs further thought, but, for the purposes of this document, the directional goal of broad consistency of process (but not of specifics or details) needs to be kept in mind.

The IIF would appreciate more dialogue on this point in order the better to understand the FSB's and the authorities' thinking.

The SPE model. The report *Making Resolution Robust* contains important points about the SPE model. Please refer thereto in continuing the analysis after this consultation.[9]

The SPE model in particular requires "sufficient certainty," as the Consultative Document rightly says, on the part of host authorities that the home authorities would allow resources generated by a recapitalization at the holding company (or top-level operating company) level or from other sources to be down-streamed to subsidiaries, and clarity as to the legal, regulatory and tax implications for the holding company to assume losses of subsidiaries in a resolution (and that such arrangements would be accepted and acted upon by the relevant host authorities). Lack of confidence in cooperation among the authorities is likely to be a significant barrier to cross-border resolution in the context of continuing support of global markets, which, after all, is the G20 goal. This is an issue that the private sector cannot address on its own. The Institute, again, urges the FSB and G20 to confront this issue and take decisive action while the post-crisis focus on these issues remains strong.[10]

[9] See IIF, *Making Resolution Robust* (June 2012), p. 36.
[10] See IIF, *Making Resolution Robust* (June 2012), p. 20.

It is expected that thinking on the SPE model will continue to progress in light of the FSB's consultations and the industry in general and the Institute in particular look forward to continuing the dialogue.

We note in particular the importance of developing strong, consistent treatment of contractual issues such as cross-defaults, change of control covenants, acceleration and stays. Reliable and consistent treatment of such very important legal issues is as much a necessity for SPE strategies as for MPE strategies. We refer to the extensive discussion thereof in *Making Resolution Robust.*[11] Full control of such contractual issues, including possibly additional legislation in some countries, will be necessary to provide the assurances that the authorities will have the control they need when a "weekend" resolution occurs. This is of course part of the wider problem of making sure that there is an adequate statutory base in each jurisdiction for the full resolution program envisioned in the *Key Attributes.*

Finally, it is important to comment on one important factual assumption: it is stated at **p. 17** that "the failure of a significant subsidiary anywhere within the group would generally need to trigger resolution at the top parent level …." While this certainly could be true, it is might also not be the case in a particular event and no automatic triggering relationship should be assumed. Rather, the group's structure should be analyzed to have assurances that the appropriate actions could be taken, given that structure, in the event of a problem at a major subsidiary, given the nature of the problem and overall degree of integration of the group.

The MPE Model. The MPE strategy is being developed in parallel to the SPE. As with the SPE, the broad lines of development of the MPE model seem to be developing appropriately; however, there needs to be continuing conceptual development work and, perhaps even more than with the SPE model, the MPE model requires attention to the needs and specifics of each group.

In particular, the report seems to veer into more prescriptiveness with respect to MPE than with respect to SPE, and on certain points it might be interpreted to make requirements that would in fact be unnecessary in specific situations. For example, **paragraph 1.2 of Annex II, bullet 3,** suggests that separate ratings of each subsidiary may be necessary. This is certainly an over-generalization about an issue that can only be decided on a case-by-case basis.

Similarly, **paragraph 1.2, bullet 4,** asserts that MPE "may require subsidiaries to have local functionality and staffing." This, again, is a point of fact that is not at all susceptible of generalization and, if taken too literally, could create tremendous and unnecessary inefficiencies for MPE groups. Many effective and resilient arrangements are possible within MPE groups and such groups should not be precluded from realizing operational, financial, risk-management and control efficiencies through central or regional provision of such services although, of course, they would need to prove to their supervisors that whatever operational arrangements do apply would be robust and reliable in a resolution situation.

[11] See IIF, *Making Resolution Robust* (June 2012), pp. 28-34.

Finally, the structural arrangements of many MPE banks may already be fully adequate and the suggestion that more structural changes might be needed should certainly be subject to full analysis and verification, and no a priori assumptions should be made across the MPE group. An entity with a decentralized structure may not necessarily require many structural changes, and ultimately the degree to which an entity may or may not have to make changes will depend on the business structure of that entity.

Two of the FSB's questions are of particular importance here;

FSB Question 8 asks: "What are the potential obstacles to the effective implementation of either the MPE or the SPE approaches that could arise from national legal frameworks (e.g., insolvency law)? How could they be addressed?" While COAGs can provide very useful structure and substantial comfort to the authorities working on the RRP process for a given group, as indicated above, full comfort on the full range of issues, including recognition of foreign resolution actions, assurances about delivery of resources or of non-ring-fencing of resources, about acceleration clauses and stays, about cross-defaults and other contractual provisions, is in the medium term likely to require legislative action in the major jurisdiction in order to embed the FSB's mandated approach to resolution. A suggestion as to how to approach this problem is made in the IIF's prior report.[12]

The only solution is for the FSB to make the necessary legislative changes a priority now, so that they can be carried out expeditiously, while also making COAGs, MOUs, and other such measures as robust as possible in the interim. It is important to understand the conditions imposed by national law, as the report clearly indicates at **p. 23,** but the FSB should set itself a program of pressing to overcome legal obstacles where they arise, such as a degree of national discretion that would cut against the kind of commitments from home and host authorities that are required for clarity. Firms should not be forced into less-efficient going-concern arrangements because of potential obstacles to effective resolution that are outside their control and could be corrected by concerted international action.

FSB Question 9 asks, "What are the implications of the MPE and SPE approaches for the way financial institutions are structured, and what are the likely benefits and costs of any consequential changes in structure?" This question has substantially been answered above. The final cost-benefit analysis must be done by each firm in consultation with its supervisors. The only possible generalization is that, while resolution-driven changes may in fact have business and risk-management benefits, the costs thereof must be weighed against each firm's ability to continue to deliver credit and financial services to the markets it serves. There should be no a priori assumptions and any changes that override a firm's business and strategic decisions should be necessary and well-grounded economically. The point of resolution is to give assurances that firms can fail without imposing costs on taxpayers. It is equally true that resolution planning must be done proportionately, to avoid unduly burdening the sector's ability to fulfill its social function in the global economy.[13]

[12] See IIF, *Making Resolution Robust* (June 2012), Annex I, pp. 47-51.
[13] See IIF, *Specific Impacts of Regulatory Change on End-Users* (October 2012).

4. Operational Resolution Plan

The report appropriately identifies the elements of an operational resolution plan. However, in so doing, the report could give further attention to a number of important, practical issues. The following is a sampling, but essentially the entire process needs further study and very specific actions to make sure all the moving parts will work together. Much of this must be done by or in conjunction with the official sector and cannot be dealt with by firms alone.

- ***Section 4.1*** discusses home and host relations and the need for clear decision-making. As discussed above and in *Making Resolution Robust,* explicit and eventually binding buy-in by homes and hosts to the specific resolution solutions adopted for any given group (whether SPE or MPE) will be required. In this regard there is brief reference to the need to prevent termination of third-party contracts and of temporary stays. As noted above, this issue is essential and is discussed in *Making Resolution Robust.*

  Reference is made to systemic or "public interest" objectives (see, e.g., **footnote 11**): this is entirely appropriate, but it is an area where the "presumptive path," if available for the institution, and likely objectives should be made as explicit as possible so that the market can understand the bases on which authorities would take action against a firm or its creditors.

- ***Section 4.4***, on conditions for activation of the resolution plan, provides a good overview. However, it is important to stress the IIF's view that there should never be hard-wired, mandatory activation of a plan, given that the facts and circumstances, including the systemic circumstances, may require different reactions from those foreseen (although there should be mandatory cooperation among authorities once a plan is triggered).

- ***Section 4.6***, on potential sources of resolution funding, simply requires the operational plan to be clear about how the DGSs may be required to contribute to a bail-in or other resolution: This may be enough for purposes of this report, but the role of DGSs in cross-border resolution is clearly one of the most important and also most difficult issues that has yet to be confronted. The IIF is undertaking further work on this point and cannot comment in detail at this point, except to say that the final guidance that the FSB issues should make allowance for the outcome of the broad discussion on the role of DGSs.

- ***Section 4.8***, on valuation requirements: here again, there is considerable work going on to develop concepts of provisional valuations that may be subject to possible rectification later on (as adumbrated by the penultimate paragraph of Section 4.8). Relative priority and the ability to correct or modify valuation judgments that will necessarily need to be made under very difficult, hurried conditions are among the other primary issues on which international consensus is still to be reached. Allowance for the outcome of those discussions should, again, be made and the FSB should avoid locking in any view on these issues at this stage.

- ***Section 4.11***, on payments, clearing and settlement: Subject to the ongoing discussions on FMI resolution, which will intersect with this issue, consideration should be given to legal provisions that would (subject to appropriate risk-management measures to protect infrastructure entities) require the recognition of post-resolution entities that are continuing to provide essential services by payment, clearing, and settlement systems.

- ***Section 4.13***, on maintenance of third-party contracts and intra-group service legal agreements: Maintenance of both third-party and intra-group service level or similar agreements after a resolution will be critical to continuing essential services, but it also raises myriad, largely technical legal issues. For third-party contracts, resolution authorities may need to be given powers to require services to be continued, on conditions similar to those that may be imposed by a bankruptcy court.

  More broadly, the industry will soon face a major task of renegotiation of such agreements with the new resolution regime in mind. At the very least, the FSB's guidance should recognize that a substantial amount of time is likely to be required to renegotiate such agreements. Furthermore, firms will face first-mover disadvantages and other problems in attempting to renegotiate such agreements. It would be very helpful to have clear statements of regulatory expectations for such agreements. This would enable firms and contractors alike to negotiate on a firmer footing, and would help reduce the risk that firms would invest the time, energy, and cost required in renegotiations of major supplier contracts only to find that expectations had not been met.

- ***Section 4.14***, on communication with host authorities and other parties: The industry remains concerned that there are substantial ambiguities about allowing data and business information to be shared among all the authorities involved in resolution planning and execution (a broader group than is involved in normal supervision of course), and seeks assurances from the FSB that such issues, including protection of the confidentiality of information shared, are being addressed on a basis that will be fully robust in all concerned jurisdictions. In addition, there is also considerable lack of clarity and consistency about different authorities' policies and procedures for sharing of information through CMGs: convergence of such policies and procedures would be very helpful to banks involved in the process, would create clearer expectations (and thus trust) among authorities involved, and would provide a means to mitigate potential undetected or ill-defined legal issues.

Annex III: Guidance on Identification of Critical Functions and Critical Shared Services

As the report notes, "The objective is to provide a common ground for CMGs to carry out these assessments in both a national and a global context " (**p. 29**). This is entirely appropriate, and the FSB ought to put some emphasis on consistency of *process* of such assessments, in order to avoid disrupting the level playing field for international firms, while accepting the fact (as it appears to do) that such assessments are necessarily going to be firm-specific.

The report indicates that "the management of a G-SIFI may have a different view of what services or functions they consider "critical," e.g., by considering a firm's franchise value or profitable business lines. As the report notes, "While such considerations can play a role in the recovery phase and may be relevant in more long-term restructuring proceedings, they are not the immediate focus of resolution planning" (**p. 30**). The industry is concerned about this statement, which seems to gloss too easily over the very real issues faced by going concerns, and indeed the goals of providing a productive global financial system. Management's views on these matters are critical for avoiding unnecessary disruption of going-concern functions, for maximizing the residual value that can be salvaged if the firm goes under, and therefore for minimizing losses to creditors and unnecessary destruction of value if a resolution does occur. While preserving critical functions is an essential fact of resolution, one that the industry fully accepts, it should not be the only goal of resolution; minimizing destruction of value for creditors will be important to reducing the knock-on systemic effects of a resolution, reassuring creditors, and helping facilitate the financing of the banking system during recovery from the crisis.[14]

At this stage, the Group does not consider it necessary to give detailed questions on Annex III on the identification of critical functions and critical shared services. On the whole, they seem sensible. As a general point, though, the list of critical services and critical shared services should not be viewed as mandatory or fixed; what is determined to be critical must be decided in context and in relation to each bank's situation.

The Group nevertheless would like to comment on one point of detail from the Appendix. At **p. 47, 1.4(b),** reference is made to "excessive maturity transformation." While the issues of wholesale funding are widely recognized, they are also dealt with through Basel liquidity requirements and it is difficult to see why further, special attention is required in this context. If it is so required, the concept of "excessive maturity transformation" is nonetheless perplexing, maturity transformation being the basic social function of the banking system. The preceding paragraphs about wholesale functions as drivers of criticality would seem to be sufficient. If this paragraph is retained, it should be perhaps recast to test compliance with the Basel liquidity requirements.

Conclusion. The IIF's CBRWG appreciates the opportunity to continue the dialogue with the official sector by responding to the present consolation. As already indicated, many issues require ongoing development and thought, and the Institute hopes to continue to work with the official sector to develop opportunities for constructive exchanges on these vital, difficult issues.

The IIF recommends that the FSB also give further guidance on other aspects of the *Key Attributes*. The CBRWG sees two areas, in particular, where additional consideration would be welcome. First, there should be greater clarity on the many issues involving CMGs, including the composition and governance of CMGs (e.g., the delegation of tasks within CMGs). Second, further examination of home-host protocols for recovery planning, namely the scope for incremental requirements by host regulators, is needed. These are just two issues that the CBRWG has identified as needing further study, and the IIF welcomes the FSB's efforts in developing guidance on these and other issues relating to the *Key Attributes*.

[14] See IFF, *Making Resolution Robust* (June 2012), p. 46.

The IIF welcomes the opportunity to comment on the Consultative Document and looks forward to further engagement with the FSB on these issues. Should you have any questions on the issues raised in this letter, please contact Alec Oveis (aoveis@iif.com; +1 202-857-3615).

Very truly yours,