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To the Financial Stability Board:

The Institute of International Finance (IIF) through its Cross-Border Resolution Working Group welcomes the opportunity to comment on the *Assessment Methodology for the Key Attributes of Effective Resolution Regimes for Financial Institutions* (the “Assessment Methodology”) prepared by the Financial Stability Board (FSB) and issued in August 2013. The IIF fully supports the efforts of the FSB to create a uniform set of standards for assessing compliance with the *Key Attributes* and welcomes this guidance. It is important to bear in mind, in reviewing the Assessment Methodology, the goals for effective resolution from an international perspective, articulated recently by former Deputy Governor of the Bank of England Paul Tucker: “By promoting consistent implementation of the *Key Attributes* globally and providing for formal and rigorous assessment of national resolution regimes, the development of the assessment methodology is another important step towards curing the ‘too big to fail’ problem.”

The IIF is in broad agreement with the scope and general direction of the Assessment Methodology, but it is worth noting that the Assessment Methodology should not broaden the substance of the *Key Attributes* and that it should not be cited as authority for interpretations that tend to expand or modify the scope of the *Key Attributes*. The language of the text does not on the whole appear to do this and seems to be consistent with the *Key Attributes* (although there are points at which some ambiguity on this point could arise), but as the process develops, this is an issue that should be carefully monitored. Moreover, the IIF recommends that the Introduction include a sentence expressly stating that the document does not broaden the *Key Attributes* and should not be cited as authority for interpretations of the *Key Attributes*.

As the IIF clearly agrees with the general aim and intent of the Assessment Methodology, the purpose of this letter is to give comments on a few points of the specific text of the document.

Question for Consultation 3. We are concerned that it is out of the limited scope of this document to ask what the appropriate length of the temporary stay should be and whether the authorities should have the power to extend the stay. These are very important, substantive points (in fact international recognition of stays in each jurisdiction will assist in their achieving universal effect) and out of place in a consultation about assessment methodology. In order to get proper consideration, such questions should be in a stand-alone, subject-matter focused consultation, or in a consultation on substantive revision of the *Key Attributes*. We are concerned that posing the question in this context will not elicit sufficient attention and debate to generate a proper response. The IIF does not propose to answer this question

here, but would be delighted to do a fuller answer in due course, or to discuss the matter with the FSB's secretariat.¹

Question for Consultation 4. Whether a firm is systemic in failure is a major issue that should be left to the jurisdiction in question. This is a question outside of the scope of the assessors' task, in our view. The assessors could, however, review the appropriateness and adequacy of the criteria and methods used for making such determinations.

Responses to the other stated questions are covered by the detailed observations below.

On *Overview (p. 2)*: Presumably compliance with the Annexes to the *Key Attributes* will also be subject to assessment, in due course, including those relating to the resolution of insurers and financial market infrastructures (FMIs), the treatment of client assets in resolution, and information sharing between domestic and foreign authorities for resolution-related purposes. A statement to that effect should be included.

On *Conduct of Compliance Assessment, Need of access to a range of information and stakeholders (p. 12)*: Footnote 8 should be revised to specify that access to the recovery or resolution plans of individual financial institutions is not necessary.

On *Conduct of Compliance Assessment, Cross-border aspects (p. 12)*: The importance of Key Attribute 3 (resolution powers) and 4 (set-off, netting, collateralization, segregation of client assets) should not be overlooked. These are fundamental parts of the resolution process and ought to be considered as critical aspects of cross-border compliance. However, in assessing compliance, the criteria should be practical and pragmatic as opposed to legalistic.

On *Sector-Specific Considerations, FMIs (p. 16)*: Effective recovery and resolution mechanisms for FMIs are critical to the efficient operation and sustainability of the financial markets. Consistently with the September 2009 G20 and FSB statements, the public sector should take all necessary steps to maximize the ability of authorities to cooperate and act in a coordinated fashion in case of an FMI recovery or resolution. For more information on the IIF's views on FMI recovery and resolution, please refer to its recent submissions to the FSB² and to the Committee on Payment and Settlement Systems (CPSS) and International Organization of Securities Commissions (IOSCO).³

On *Assessment Methodology, Explanatory Notes, Holding companies (EN 1.1 (c)) (p. 24) and Domestic branches of foreign financial institutions (EN 1.1 (d)) (p. 25)*: A clear statement should be made to the effect of authorities' having the capacity to recognize the ability of subsidiaries of a bank holding company in a 'single point of entry' resolution to continue operating while the holding company is in resolution.

On *Assessment Methodology, KA 1.2 (p. 26)*: While many in the industry support the notion that the continuity of critical FMI functions should guide the choice of resolution powers, some members of the investor community take the position that preventing losses and limiting haircuts to client funds should be primary concerns. The current text is appropriate in that it reflects the proposed annex to the Key Attributes on FMI resolution. But, these varying views reflect the fact that the difficult issues of FMI

¹ For previous IIF views on this important issue, see *Making Resolution Robust – Completing the Legal and Institutional Frameworks for Effective Cross-Border Resolution of Financial Institutions*, IIF, June 2012, pp. 28 – 33.

² Letter from IIF, the International Swaps and Derivatives Association (ISDA), The Clearing House, and the Global Financial Markets Association (GFMA) to the FSB (Oct. 15, 2013) (on file with the FSB), available at http://www.financialstabilityboard.org/publications/c_131024af.pdf.

³ Letter from ISDA, the IIF, and The Clearing House to CPSS and IOSCO (Oct. 11, 2013) (on file with CPSS and IOSCO).

resolution still need more discussion in order to make sure that the markets, broadly speaking, fully understand and support the process and likely outcomes of FMI resolution. This part of the document should of course be reviewed once the relevant annexes are finalized.

On *Assessment Methodology, KA 1.3, Essential Criteria 1.3.3 (p. 26)*: The importance of having and maintaining institution-specific cross-border cooperation agreements cannot be overstated and should be stressed as part of an overall compliance assessment for all jurisdictions home to a G-SIFI.

On *Assessment Methodology, KA 2.1, Explanatory Notes, Arrangements for cooperation and communication (EN 2.1 (b)) (p. 29)* and *Cooperation between multiple resolution authorities for FMIs (EN 2.1 (c)) (p. 29)*: Both points are also worth underscoring. With respect to any exchanges of information necessary for resolution-related purposes, as mentioned in EN 2.1 (b), there should be no impediments to effective information sharing, both domestically and internationally.⁴ While EN 2.1 (b) makes clear that there should not be any legal restrictions on sharing necessary information among domestic authorities, a similar statement should cover the exchange of information between foreign authorities.

EN 2.1 (c) partly undercuts the importance of Responsibility E of the PFMI by suggesting that the authorities take account of it only “to the extent possible.” It would be preferable to expect that authorities either comply with Responsibility E fully or explain instances in which they did not cooperate entirely with one another (i.e., “comply or explain”).

On *Assessment Methodology, KA 2.6, Explanatory Notes, Protection from liability (EN 2.6 (a)) (p. 26)*: It is assumed that, except in cases of fraud or other egregious conduct, any claims should be assessable against the estate of the firm in resolution, but perhaps this could be made clear.

On *Assessment Methodology, KA 2.5, Essential criteria, 2.5.2 (p. 33)*: Transparency should not require disclosure of the results of assessments of, or the text of, individual financial institution’s recovery or resolution plans. The criterion should provide that such reports should not be understood to require disclosures of the results of assessments of, or otherwise non-public portions of, individual financial institutions’ recovery or resolution plans or other information not required to be made public by the relevant substantive law or regulations.

On *Assessment Methodology, KA 3.1, Explanatory Notes, Quantitative or qualitative Criteria to assess non-viability (EN 3.1 (c)) (pg. 39)*: The conditions for entry into resolution or exercise of resolution powers should be clear and transparent and set out in law or appropriate regulation. While there will always be a degree of subjective judgment in the application of such conditions, the aim should be global consistency on the understanding of the objective grounds prescribed for resolution.

Triggers (ii) and (iv) in EN 3.1 (c) risk triggering resolution action too early, to the detriment of stakeholders. Given the importance of the subjective application of these tests, it would be helpful to be as specific as possible in establishing global understanding of how they should be understood.

On *Assessment Methodology, KA 3.4, Explanatory Notes, Transparency (EN 3.4 (d)) (p. 54)*: Transparency and market confidence are best preserved systemically if investors and financial markets are confident that information concerning resolution measures is promptly and robustly disclosed to the public. This note should make clear the role that transparency will have in restoring confidence once a firm enters resolution.

⁴ Letter from IIF to the FSB (Oct. 15, 2013) (on file with the FSB), available at http://www.financialstabilityboard.org/publications/c_131024bg.pdf.

On *Assessment Methodology, KA 3.4, Explanatory Notes, Use of bridge institutions for FMI resolution (EN 3.4 (g)) (p. 55)*: An entity operating multiple FMIs for different products should be able to define an individual product-focused service as a separate FMI for resolution purposes, where its supervisor agrees that it has sufficient risk-management capability, capitalization, governance and (where applicable) clearing-fund provisions to sustain designation as a separate FMI. These products could be “siloed,” so to speak. However, this structure would need to be laid out in the CCP’s or FMI’s ex-ante rules and member agreements.

One of the difficulties in planning for or carrying out a resolution of an FMI will be determining which services are critical functions. It is implicit in earlier FSB papers and in the *Key Attributes* that the FMI, in agreement with its regulators, must clearly determine its critical functions. More guidance would be helpful on how the critical functions of an FMI should be determined. Depending on business model and form of corporate organization, an FMI may have associated functions or other commercial functions that need not be considered critical, and which need not be supported through loss-allocation mechanisms in recovery or in resolution.⁵

On *Assessment Methodology, KA 3.5, Explanatory Notes, Contractual cross-border recognition clauses (EN 3.5 (c)) (p. 58)*: It should be understood that the decision to require or not require contractual recognition terms is a matter for the relevant supervisory authorities to decide and the assessment process should not be intended to make a judgment one way or another, but rather to report what decisions have been taken. The language of this note could be interpreted to indicate a substantive position that seems to be broader than what the Key Attribute covers.

On *Assessment Methodology, KA 3.9 (p. 62)*: This is a particularly important issue and ought to be emphasized as part of the assessment process. In order to minimize the overall systemic effects of a firm’s resolution, authorities must consider the consequences that their actions will have, not only within their own jurisdictions but across borders as well.

On *Assessment Methodology, KA 3.9, Explanatory Notes, Requirement to take account of the impact on the group and on financial stability in other jurisdictions (EN 3.9 (a)(vi)) (p. 63)*: What is considered “as far as reasonably possible” should be left to the relevant authority to determine. For the purposes of the assessment process, there should only be a determination of whether or not the relevant powers exist.

On *Assessment Methodology, KA 4, Explanatory Notes, Protection of client assets (EN 4.1 (b)) (p. 67)*: It should be clear that the “legal framework” referred to is the broadly applicable legal framework and not the resolution regime per se. Rights governing client assets arise from broadly applicable law or relevant agreements, not from the resolution regime, which should take clients’ rights and obligations as it finds them.

On *Assessment Methodology, KA 5.2 (p. 71)*: The applicable law of the resolution of FMIs should make it possible for the resolution authority to follow the recovery rules of the FMI where possible. Thus, it may need to be specified that the normal insolvency rules that would set aside contractual provisions, such as recovery rules, do not apply to FMIs when in resolution, but that the resolution authority would have the power to apply the normal recovery rules of the FMI. As a result, the application of the “no creditor worse off than in liquidity” (NCWOL) principle would be deemed modified in this particular instance. Instead, the NCWOL principle would apply to judge the fairness of

⁵ See footnote 2 above.

the disposition of any residual losses and assets of the FMI after application of the loss distribution rules.⁶

On *Assessment Methodology*, KA 7 (p. 84), KA 7.2 (p. 85), and 7.5 (p. 90): Similarly to the point raised above with respect to Key Attribute 3.9, these issues should be considered carefully and will be critical to the success of any cross-border resolution. Unfortunately, there may be a tendency for jurisdictions to overlook some cross-border issues and focus instead on more local concerns. This would be a mistake from the standpoint of trying to preserve a firm's total economic value, and significant attention should be given to the cross-border effects of a domestic authority's actions. It is important that home and host regulators have the legal power to be able to recognize actions taken by other resolution authorities. This could be added as a new EC 2.4.2 perhaps, though it may be better positioned within KA 7 (it is referred to in passing under EN 7.1 (b)). Further guidance on these considerations might be helpful.

On *Assessment Methodology*, KA 7.5, *Explanatory Notes*, *Cross-border recognition clauses (EN 7.5 (d))* (p. 92): Once more, as with EN 3.5 (c), the choice of whether or not to require contractual recognition terms should be left for the relevant authorities to determine and would appear to be beyond the scope of the assessment process.

On *Assessment Methodology*, KA 7.6, *Explanatory Notes*, *Limitations or refusals to exchange confidential information (EN 7.6 (b))* (p. 93): In addition to the criteria stated, it should be determined whether the jurisdiction has the intent to exchange confidential information, except where meaningful impediments arise.

On *Assessment Methodology*, KA 7.6, *Explanatory Notes*, *Information necessary for recovery and resolution and for carrying out resolution (EN 7.6 (c))* (p. 94): The note should specify that the legal gateways should be subject to the requisite provisions, pursuant to Key Attribute 7.7, to assure confidentiality and appropriate use of the information transferred.

On *Assessment Methodology*, KA 9 (p. 100): Cross-border issues, again, need special consideration and should be addressed on a firm by firm basis as well as more broadly. Such guidance, on the institution-specific cross-border cooperation agreements, is welcomed and should be integrated as much as possible into the overall assessment process.

On *Assessment Methodology*, KA 10.4 (p. 106): There should be a presumption that, in conducting resolvability assessments, maximal reliance will be placed on the home authorities.

On *Assessment Methodology*, *Actions to improve resolvability (EN 10.5 (a))* (p. 108): This discussion seems to go beyond the inquiry as to whether there are necessary powers and into suggestions as to how to exercise them, which seems especially inappropriate in the context of coercive actions taken against firms.

On *Assessment Methodology*, KA 12.1 (p. 118): Again, while each Key Attribute is essential and deserves careful consideration, cross-border information sharing is particularly critical to ensuring the effectiveness of a cross-border resolution. The IIF has already offered its views on this issue in a recent letter to the FSB,⁷ but it is worth highlighting once more the importance of having ongoing and regular information exchanges between authorities. Not only will this help develop a level of trust and confidence among the various authorities, but good normal-time cooperation and coordination is also essential to making sure that data is understood consistently.

⁶ *Id.*

⁷ See footnote 4 above.

On *Assessment Methodology, Explanatory Notes, Meaning of “on a timely basis” (EN 12.2 (a)) (p. 121)*: It is not clear whether the information-production standards depend on generally applicable supervisory requirements or on resolution requirements. Given the complexity of this point, it should be clear that it is to be determined by normal supervisory requirements (within the recommendations of, for example, the Basel Risk Data Aggregation principles).

The IIF welcomes the opportunity to comment on the challenging issues posed by the *Assessment Methodology*. On the whole, the document seems directionally consistent with the *Key Attributes*, though further work may be necessary with respect to the issues raised above. Should you have any questions on the issues raised in this letter, please contact the undersigned.

Very truly yours,

A handwritten signature in black ink, appearing to read "David Schraa", with a long horizontal flourish extending to the right.

David Schraa
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