Growing Asia's Markets

29 September 2017

Shri Bhupender Yadav, M.P
Director (CB-1&JCs)
Lok Sabha Secretariat
Room No. 339, Third Floor,
Parliament House Annexe,
New Delhi – 110001
jcfrdi-lss@sansad.nic.in

Dear Shri Bhupender Yadav, M.P,

Re: ASIFMA response to the Consultation on the Draft Financial Resolution and Deposit Insurance Bill, 2017

The Asia Securities Industry & Financial Markets Association (**ASIFMA**) appreciates the opportunity to respond to the Consultation on the draft Financial Resolution and Deposit Insurance Bill, 2017 (**Draft Bill**). Ensuring effective resolution regimes is a critical part of global regulatory reform in which India, as a G20 country, plays a significant role.

ASIFMA represents a significant number of international financial institutions, the vast majority of whom are direct stakeholders in the Indian financial markets and are dedicated to India's success. ASIFMA had the opportunity previously to share its comments and views on the Finance Ministry's draft of the Financial Resolution and Deposit Insurance Bill, 2016 (**FRDI Bill 2016**) and we are grateful that some of our comments from then are reflected in the revised Draft Bill.

We fully support this enhancement of India's recovery and resolution framework to safeguard the stability of the financial system while minimising public costs and economic impact during a crisis. ASIFMA is committed to helping the Joint Parliamentary Committee develop an appropriate and proportionate regulatory framework that enhances the stability and liquidity of the Indian financial market and helps India continue the development of its financial and capital markets.

The following are our headline comments on matters related to the provisions of the Draft Bill.

Risk to viability classification criteria for Indian branches of foreign entities

Section 36(6) of the Draft Bill stipulates the possibility of specification of additional criteria for the risk to viability assessment of Indian branches of foreign entities. The language used under Section 36(6) does not state that such criteria will be "objective," as opposed to Section 36(5), which clarifies that for risk to viability assessment the criteria stipulated will be objective when assessing for other specified service providers (**SSPs**). Criteria for the classification of risk to viability should always be objective and there should not be differential / punitive treatment in respect of Indian branches of foreign entities.

India and coordination with other international financial centres

We welcome the provisions included under the new proposed Section 96 for recognition and enforcement of foreign resolution actions by the Indian authorities. As we stated in our comments to the FRDI Bill 2016, this is a key element of effective resolution regimes. We believe the introduction of a clear statutory basis for potential recognition of foreign resolution actions is important for India to support cooperative and coordinated approaches to the resolution of cross-border groups, particularly given that India hosts a significant number of financial institutions (**FIs**) that are subsidiaries or branches of foreign firms/entities. We therefore appreciate the inclusion of the provisions included under Section 96(5), which set out the grounds for refusing to recognise a foreign resolution order, and welcome the clarity introduced by setting out these grounds explicitly in Section 96(5). However, we note that Section 96(5)(iii) in particular (which states that inconsistency with the laws of India as a possible ground for refusal) is not in line with the Financial Stability Board's (**FSB**) Principles for Cross-border Effectiveness of Resolution Actions, (**FSB Principles**), specifically Principle 3[1].

We are of the view that Section 96(5)(iii) will limit the flexibility necessary for the Corporation to react to particular circumstances and may work counter to the intent of the FSB's Cross-Border guidance[2] on effective cross-border resolution actions. In the Draft Bill, Corporation has the ability to refuse to recognise a foreign resolution action if there is an adverse impact on the financial stability of India or such foreign resolution action is inconsistent with the objectives of the Draft Bill or is opposed to the public policy of India[3]. Each of these safeguards is sufficiently broad and provides the needed flexibility for the Corporation to refuse recognition in order to protect the Indian market and broadly cover the essence of the provision set out in Section 96(5)(iii), thereby removing the need of inclusion of Section 96(5)(iii) as an additional safeguard. Including this provision will have the reverse effect: limiting the flexibility of the Corporation instead of

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[1] Which states: "Grounds for refusing recognition of any foreign resolution proceeding and/or enforcing the foreign resolution measure should be clearly defined and generally limited to cases where the foreign resolution proceeding or measure in question would:

(i) have adverse effects on local financial stability (for example, the measure would affect the continuity of economic functions that are critical to the local financial system or would be inconsistent with or undermine the implementation of local resolution action undertaken or planned by the host authority);

(ii) contravene local public policy, (for example, if the effects of the foreign resolution measure could result in inequitable treatment of domestic creditors as compared to third-country creditors with similar legal rights or the procedure does not adequately ensure due process; see Principle 4); or

(iii) have material fiscal implications (for example, where the foreign resolution measure would expose local public authorities or taxpayers to loss)."

[2] Financial Stability Board, Principles for Cross-border Effectiveness of Resolution Actions, 3 Nov 2015, http://www.fsb.org/wp-content/uploads/Principles-for-Cross-border-Effectiveness-of-Resolution-Actions.pdf

[3] Draft Bill, Section 96(5)(i), (ii) and (iv)

expanding that flexibility as it will not take into account the differences that exist between each jurisdiction's recovery and resolution regime and laws.

For an effective cross-border resolution action to work, mechanisms are needed to overcome differences in recovery and resolution regimes and laws as no jurisdiction's recovery and resolution framework and laws will be identical to another jurisdiction's. What the FSB requires of jurisdictions is for them to ensure that ***there is an equivalent effect or outcome for creditors of the same company, no matter where they are located***, rather than a granular assessment of laws. As such, the proposal of any foreign order to be exactly consistent with the laws of India will make it impossible for the Corporation to recognise such foreign resolution action unless they are absolutely aligned to Indian laws, which is arguably impossible.

For effective cross-border recovery and resolution actions, it is fundamentally important that such differences in recovery and resolution regimes and laws are permissible to allow for the recognition of foreign resolution actions of a foreign financial institution. We respectfully request the provision in Section 96(5)(iii) be removed to grant the Corporation greater flexibility when dealing with a foreign FIs.

We believe that cross-border cooperation is essential to effectively resolve global financial institutions. For example: the host jurisdiction may consider the potential impact of its resolution actions on the financial stability in host jurisdictions; and the host jurisdiction may work with the home jurisdiction to achieve an optimal and coordinated resolution outcome for the global financial institution through supporting actions, as necessary, for an orderly resolution of the global financial institution, where these actions are consistent with the objectives of preserving the financial stability of the host jurisdiction.

Further, we note that the Corporation and / or any other relevant authority will reserve the ability to take action in relation to a failing branch in India if the home jurisdiction resolution authority cannot or will not take requisite action. We respectfully request that the Corporation and / or any other relevant authority will be required to inform, coordinate or work with the relevant home authority prior to taking any action in relation to a failing branch in India. This is consistent with resolution regimes in major host jurisdictions, such as Hong Kong and Singapore.

We support the principles set out in chapter 7 *(Legal framework conditions for cross-border cooperation),* chapter 8 *(Crisis management groups)* and chapter 9 *(Institution-specific cross-border cooperation agreements)* of the FSB Key Attributes of Effective Resolution Regimes for Financial Institutions[4] (**Key Attributes**) in relation to the topic of cross-border cooperation between home and host jurisdictions. In particular, we wish to highlight the need for pre-planning between the resolution authorities of home and host jurisdictions, as well as the need for comprehensive information-sharing between regulators for an effective cross-border resolution of a financial institution.

[4] Financial Stability Board, Key Attributes of Effective Resolution regimes for Financial Institutions, 15 Oct 2014, http://www.fsb.org/wp-content/uploads/r_141015.pdf

Furthermore, we wish to draw attention to paragraph 4.1(v) of I-Annex 222 to the Key Attributes, which states that a home resolution authority *"where possible and feasible, coordinate a resolution of the firm as a whole, with the aim of maintaining financial stability, and protecting depositors, insurance policy holders, and retail investors in all relevant jurisdictions,"* and paragraph 5.1(iii), which states that a host resolution authority should not *"pre-empt resolution actions by home authorities while reserving the right to act on their own initiative if necessary to achieve domestic stability in the absence of effective action by the home authority."* We appreciate the changes adopted under section 97 in removing the automatic trigger of a local resolution of a branch and amending the provision for priority for creditors of the local branch of a foreign entity to be subject to the agreement or memorandum of understanding (MoU) as well as any netting or set off as applicable. We respectfully request that any action taken for a local branch of a foreign entity only occurs after notification and consultation with the home authority.

Scope of entities subject to restoration and resolution planning

The resolution regime applies to SSPs, which is broadly defined to include certain categories of FIs (e.g. banks) and financial markets infrastructures, and other financial service providers. This scope of the resolution powers is in line with the Key Attributes. However, the FSB also states that only systemically important firms – those that present a potential risk to financial stability should they fail – are required to prepare recovery and resolution plans (or as named in the Draft Bill, restoration plans and resolution plans, hereafter referred to collectively as "**RRPs**"). We urge the Joint Parliamentary Committee to consider the level of risk to the Indian financial system and degree to which home regulators are already considering systemic risk of financial institutions before they are required to provide RRPs in India. Section 36(5) of the Draft Bill sets out categories of viability but these are determined purely on the probability of failure (rather than on the expected consequences of any failure). The requirement to produce RRPs should be based upon expected impact of failure of the relevant FI.

We recommend that RRPs should only be required for entities that are Systemically Important Financial Institutions (**SIFIs**) specifically in the Indian financial system. Further, we respectfully request that branches of foreign banks with existing group RRPs, formulated in accordance with the home regulator's requirements, should not be required to produce standalone RRPs. For foreign FIs whose failure would only have a low or mid to low impact on the Indian financial system and are not SIFIs in India, irrespective of their impact in their home jurisdiction, we would propose that no India-specific RRP be required, as regulators can simply recognise the resolution actions of the third country regulator under the proposed Section 96 of the Bill and obtain any information they require from the home resolution authority. For Indian branches of foreign banks who are SIFIs on the basis of the risk they pose to the Indian financial system, we encourage a method by which foreign RRPs may be recognised in India vis-à-vis such Indian branches of foreign banks. This is similar to the approach taken in Hong Kong and Singapore, where foreign FIs can leverage their group RRPs, and need only provide supplementary information needed on a local basis, to demonstrate how local requirements and triggers are covered. Foreign FIs will have developed group RRPs to ensure the effective recovery and orderly resolution should their business activities cease. In some cases, these may not be permitted to be shared by the financial institution themselves. Under the EU regime, for example, the bank owns the recovery plan but the authorities own the resolution plan due to confidentiality restrictions. The Corporation should therefore always in the first instance seek information on a foreign FI's group RRPs to the extent such information can be made available.

It should be noted that the non-provision of RRPs by such FIs will not mean that such entities are outside the Corporation's scope of resolution powers – which may be needed to support home resolution action in the event of failure. The Corporation certainly needs the information to understand the potential impact of a FI failure, and where this is not addressed in the group RRPs or provided by the home resolution authority, the Corporation may require such FIs to submit additional information.

If the Joint Parliamentary Committee decides to implement additional RRP requirements at a local level to notified branches of foreign banks in India which are of systemic importance in India, we would be grateful if the FI's home authority is given access to the FI's India RRPs and other relevant information. This would be in line with the Key Attributes' requirement that information be shared between an FI's home and host authorities.

Separately, while we note that the Draft Bill provides for increased timelines for submission and frequency of submission of the RRPs, the timelines still do not seem to be realistic in their approach. It would not be feasible for large and complex SIFIs to produce RRPs within a period of 90 days, given their global presence and the extent of their operations. For such submissions, it is recommended that a timeline of six to twelve months be considered. We also ask whether the submission frequency for resolution plans might be extended from annually to every two years, in order to accommodate alignment where a foreign FI's group resolution plan submission frequency is every two years.

Non-regulated operational entity a SSPs
The Second Schedule to the Draft Bill sets out the nature of entities that would fall within the definition of an SSP, this also includes a *"non-regulated operational entity within a financial group or conglomerate of a specified service provider"*. Further, Section 33 read with Section 36 also provide that where such an operational entity is classified in the category of risk to viability, such entity shall be deemed to be registered from such date.

The Draft Bill currently does not contain the definition of a *"non-regulated operational entity"*. Some SSPs may have group entities that provide a more supportive role and may not have any impact to Indian financial markets, such as a service company which may be providing back office services. Whether such entities can fall within the definition of non-regulated operational entity is not clear at this stage. If such entities are deemed as SSPs, compliance with the requirements under the Draft Bill may be a challenge for them, given their size of operations and the nature of their existence.

It is therefore requested that a clarification be included under the Draft Bill to assist in the understanding of the term *"non-regulated operational entity"*.

Offences and penalties
While some minor amendments have been made to the Section on offences and penalties, we note that the Section may still need to be revisited, given that it establishes disproportionate penalties, lacks basic guarantees for the accused and risks undermining the policy objectives of the Draft Bill. Under Section 105(5), for example, failure to inform the Corporation of any material changes in the RRPs or failure to modify and resubmit the plans as requested under Section 41 can result in imprisonment of up to five years. Such severe penalties are not adopted in other jurisdictions and we humbly request dilution of such penal implications as stated above.

As regards some penalties, a threshold should be made applicable. For example, Section 105(1) establishes that where a transfer of any assets in violation of an order takes place, the minimum penalty is three years' imprisonment.

Broadly, it is unclear whether certain offences require intent, and the level of diligence that must be lacking to be constitutive of an offence (in Section 106(2) there is reference to "neglect," whereas in Section 107(2) there is reference to "gross negligence").

Thank you very much for your consideration of these important issues. We look forward to submitting further, more detailed comments about the Draft Bill. However, if it would be helpful, we would be happy to organise a call or meeting with your staff to provide additional information on these priority concerns related to the Draft Bill.

If you have further questions or would otherwise like to follow up, please contact Wayne Arnold, ASIFMA Executive Director and Head of Policy and Regulatory Affairs, at warnold@asifma.org or +852 2531 6560.

Sincerely,

Mark Austen
Chief Executive Officer
Asia Securities Industry & Financial Markets Association