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To the Legal Affairs Department of the People's Bank of China¹ ("PBOC")
致：中国人民银行条法司(“央行”)

Consultation Draft of the Financial Stability Law of the People's Republic of China
关于《中华人民共和国金融稳定法(草案征求意见稿)》

On behalf of its members, the Asia Securities Industry & Financial Markets Association ("ASIFMA")² is pleased to submit to the PBOC Legal Affairs Department our comments and suggestions on the *Consultation Draft of the Financial Stability Law of the People's Republic of China* ("**Draft Law**", and after the formal promulgation, "**Law**") published on PBOC's website³.

¹ The "PRC" or "China", for the sole purpose of this letter, excluding Hong Kong, Macau and Taiwan.

仅为本函件之目的，“中国”一词不包括香港特别行政区、澳门特别行政区和台湾地区。

² ASIFMA is an independent, regional trade association with over 165 member firms comprising a diverse range of leading financial institutions from both the buy and sell side, including banks, asset managers, law firms and market infrastructure service providers. Together, we harness the shared interests of the financial industry to promote the development of liquid, deep and broad capital markets in Asia. ASIFMA advocates stable, innovative, competitive and efficient Asian capital markets that are necessary to support the region's economic growth. We drive consensus, advocate solutions and effect change around key issues through the collective strength and clarity of one industry voice. Our many initiatives include consultations with regulators and exchanges, development of uniform industry standards, advocacy for enhanced markets through policy papers, and lowering the cost of doing business in the region. Through the GFMA alliance with SIFMA in the United States and AFME in Europe, ASIFMA also provides insights on global best practices and standards to benefit the region.

ASIFMA 是一个独立的区域性行业协会，会员基础广泛，由银行、资产管理公司、律师事务所和市场基建服务供应商等 165 家来自买方和卖方市场的领先机构组成。我们与各家会员携手发掘金融行业的共同利益，提升亚洲各大资本市场的深度、广度和流动性。我们致力于促进亚洲资本市场的稳定、创新和竞争力，为区域经济增长提供必要支持。我们针对关键问题群策群力、统一立场，以努力形成共识、寻求解决方案并促成变革。我们的工作包括与监管部门和交易所开展磋商、制定统一的行业标准、发表政策性文件呼吁深化市场发展，并降低在亚太地区经营的成本。ASIFMA 通过全球金融市场协会(GFMA)与美国的证券业与金融市场协会(SIFMA)及欧洲的金融市场协会(AFME)形成联盟，共同提供全球最佳行业实践及标准，为区域发展作贡献。

³ Available at: <http://www.pbc.gov.cn/tiaofasi/144941/144979/3941920/4525751/index.html>.

可于以下网址查阅: <http://www.pbc.gov.cn/tiaofasi/144941/144979/3941920/4525751/index.html>。

DEVELOPING ASIAN CAPITAL MARKETS

亚洲证券业与金融市场协会("ASIFMA")谨代表其全体会员,就贵行网站上发布的《中华人民共和国金融稳定法(草案征求意见稿)》(以下简称“《草案》”,一经公布则称为“《金融稳定法》”)向贵行条法司提出意见和建议。

We welcome PBOC's steps to implement an effective recovery and resolution regime in the PRC. We recognize the importance of strengthening current arrangements to protect the PRC's financial stability in the unlikely event that a systemically important financial institution was to fail. As a major financial center, it is key for PRC to implement a resolution regime that aligns with the standards set out in the *Key Attributes of Effective Resolution Regimes for Financial Institutions* published by the Financial Stability Board⁴ ("FSB Key Attributes") to support the resolution of systemically important financial institutions on a cross-border basis.

我们非常欢迎并期待贵行就在中国实施有效的恢复和处置制度所取得的进展。我们也认同强化现有安排以确保极端情形下系统重要性金融机构遭遇危机时中国金融体系的稳定的重要性。作为主要金融中心之一,中国得以实施与金融稳定理事会("FSB")发布的《金融机构有效处置机制的关键要素》(以下简称“FSB 关键要素”)中规定标准相一致的处置机制以支持系统重要性金融机构的跨境风险处置,是十分重要的。

In light of the various essential features which the FSB Key Attributes require of a resolution regime, we also look forward to further implementation rules that will be formulated soon. We would also respectfully request that there be consultations covering those particular issues. An indicative list of some of the issues the authorities might wish to address is (a) further detail about how the bail-in resolution option would work and (b) how contractual stay provisions might be implemented.

针对 FSB 关键要素所规定的处置机制必备关键特征,我们期待不久之后将出台进一步的细则,同时我们谨请求贵行就某些具体问题征求意见。以下谨列出贵行可能希望解决的问题,包括:(a)关于自救纾困的处置模式将如何运作的具体规定,以及(b)如何实施合同暂停条款。

Based on feedback from our members, this letter sets out (a) our views on the Draft Law, (b) an explanation of the practical difficulties that certain financial institutions may face in complying with the Law, (c) our request for clarifications on certain provisions of the Draft Law and (d) our recommendations on the Draft Law.

根据来自协会会员的反馈,本函载列了(1)我们对《草案》的意见,(2)针对某些金融机构在遵守《金融稳定法》时可能面临的实际困难的解释,(3)我们对于《草案》某些条款的澄清请求,以及(4)我们对于《草案》的一些建议。

1. Article 47: Scope of Application 第四十七条:适用范围

Article 47 of the Draft Law provides that "[t]his Law, by taking as a reference, shall apply to the branches of overseas financial institutions and overseas financial infrastructure established within the territory of China.". According to this provision, we understand that onshore branches of foreign financial institutions would be caught by this Law and thus being required to implement relevant requirements taking this Law as a reference. It is important for foreign financial institutions who have established a local presence in China to understand to which extent this Law will apply to their onshore entities (e.g. the local branch or local

⁴ This was adopted in October 2011 and endorsed as a new international standard for resolution regimes by the G20 Leaders at the Cannes Summit. 《金融机构有效处置机制的关键要素》于 2011 年 10 月通过,并在戛纳峰会上被二十国集团领导人认可其为处置机制的新国际标准。

subsidiary of a foreign bank) and how this will be implemented in practice. Our general understanding is that foreign financial institutions with a limited presence in China should not be subject to some of the recovery and resolution measures provided in the Draft Law given their relatively limited impact on the PRC markets. Described below are recommendations we request PBOC consider specifying in the Law or implementation rules.

《草案》第四十七条第一款规定：“境外金融机构、境外金融基础设施在中华人民共和国境内设立的分支机构参照适用本法。”根据该条款，我们理解境外金融机构的在华分支机构将受《金融稳定法》约束，因此需要参照适用该法实施相关要求。由此引申出一个市场关切的重要问题，即对于在华设立实体的境外金融机构而言，该法将在多大程度上适用于其在华实体(如外国银行的境内分行或境内子公司)，以及该法在实践中将如何实施。我们的理解是，鉴于境外金融机构在中国业务规模有限且对中国市场的影响也相对有限，因此不应对其适用《草案》所规定的某些恢复与处置措施。以下是我们衷心期盼贵行在制定《金融稳定法》或相关细则中予以考虑的建议。

Financial Stability Security Fund 金融稳定保障基金

We note from Article 29 of this Draft Law (“[t]he State establishes a Financial Stability Security Fund, which is under the overall management of the National Financial Stability and Development Overall Coordination Mechanism as a reserve fund for dealing with major financial risks. The Financial Stability Security Fund consists of funds raised from financial institutions, financial infrastructure, and other entities, as well as other funds specified by the State Council.”) that the Financial Stability Security Fund will be financed by financial institutions, financial infrastructure, and other entities, as well as other funds specified by the State Council. We would highlight onshore branches or subsidiaries of foreign financial institutions are usually relatively small in size. Therefore, instead of requiring a foreign financial institution with such a limited presence in China to make contribution to the Financial Stability Security Fund which is not appropriate to its potential impact on the PRC markets, we consider it makes more sense to seek contributions only from the domestic systemically important financial institutions given the broad range of their business scope, multi-level of local presence, as well as the risk component of their services, as is a typical process followed globally⁵.

从《草案》第二十九条(“国家建立金融稳定保障基金，由国家金融稳定发展统筹协调机制统筹管理，作为应对重大金融风险的后备资金。金融稳定保障基金由向金融机构、金融基础设施等主体筹集的资金以及国务院规定的其他资金组成。……”)的表述来看，我们理解金融稳定保障基金的资金来源包括金融机构、金融基础设施等主体提供的资金以及国务院规定的其他资金。需注意的是，境外金融机构在华分支机构或子公司通常业务规模较小。因此，我们认为，如要求中国业务规模有限的境外金融机构向金融稳定保障基金缴付资金，将与其对中国市场的潜在影响不相称，而考虑到国内系统重要性金融机构广泛的业务范围、全方位的中国各地业务布局及其服务的潜在风险成分，仅要求国内系统重要性金融机构缴付资金更为合理，这也是全球遵循的典型做法⁶。

⁵ Taking the Single Resolution Fund (“SRF”) that has been set up in Europe as an example. SRF pools contributions raised at national level from institutions within the Single Resolution Board’s (“SRB”) remit in each of the 19 Member States within the Banking Union. These entities (115 banks and a handful of other groups) under the SRB’s remit can be found at: <https://www.srb.europa.eu/en/content/banks-under-srbs-remit>.

⁶ 以欧洲设立的单一处置基金 (“SRF”) 为例。SRF 汇集了银行联盟 19 个成员国在国家层面从各国单一处置委员会 (“SRB”) 监管的机构处筹集的资金。这些受 SRB 监管的实体(包括 115 家银行和少数其他集团)，可于以下网址查阅：<https://www.srb.europa.eu/en/content/banks-under-srbs-remit>。

Recovery and Resolution Plan 恢复与处置计划

In addition to the above, we also note that Article 15 requires a financial institution that meets the conditions specified by the financial regulatory authority of the State Council to formulate a recovery and resolution plan as required and specify the plan for restoration of normal operation and for orderly resolution when major risks occur. The *Interim Measures for the Implementation of Recovery and Resolution Plans for Banking and Insurance Institutions (Consultation Draft)* (“**February Consultation Draft**”) issued by the CBIRC on February 26, 2021, requires a banking and insurance institution that exceeds a certain amount of relevant assets on a consolidated basis to formulate recovery and resolution plans. We have submitted our feedback and recommendations to the February Consultation Draft that the “consolidated basis” should be limited to the relevant PRC entity and other PRC entities controlled by it (if any) but not extending to all entities owned or controlled at the parent company level, and the calculation should be restricted to assets of the PRC branch. This is to avoid the disproportionate burden on relatively small onshore entities of foreign financial institutions to formulate separate recovery and resolution plans since most foreign financial institutions with a presence in China will already have prepared resolution and recovery plans in compliance with their home jurisdiction's requirements. Our members would like to confirm with PBOC whether the “conditions” in this Article 15 would refer to the same conditions as specified in the current effective *Interim Measures for the Implementation of Recovery and Resolution Plans for Banking and Insurance Institutions*⁷. Similarly, we also suggest that PBOC could further specify the “conditions” in its implementation rules taking into consideration the size and business model of financial institutions to de-scope smaller onshore entities of foreign financial institutions from this requirement of preparing recovery and resolution plans.

除上述内容外，我们还注意到，《草案》第十五条要求符合国务院金融管理部门规定条件的金融机构应当按照要求制定恢复与处置计划，明确重大风险发生时恢复持续经营能力和有序处置的方案。银保监会于 2021 年 2 月 26 日发布的《银行保险机构恢复和处置计划实施暂行办法(征求意见稿)》(以下简称“**2 月征求意见稿**”)要求相关资产按照并表口径超过一定数额的银行保险机构制定恢复和处置计划。在对该 2 月征求意见稿提交的反馈和建议中，我们建议“并表口径”范围应仅限于相关的中国实体以及由其控制的其他中国实体(如有)，不应向上追溯至境外母公司层面持有或控制的全部实体，且“并表口径”的计算应限于在华分支机构的资产。这是为了避免使境外金融机构的小规模在华实体因制定恢复与处置计划而承受不成比例的负担，因为大多数在中国开展业务的境外金融机构已经按照其所在司法管辖区的要求制定了恢复与处置计划。我们协会会员希望向贵行确认，该第十五条规定的“条件”是否与现行正式有效的《银行保险机构恢复和处置计划实施暂行办法》中所规定的“条件”相同⁸。同样地，我们也建议贵行在考虑不同金融机构的不同规模和业务模式的情况下，在相关细则中进一步明确该等“条件”，从而使境外金融机构的小规模在华实体免于制定恢复与处置计划。

Resolution Measures under Chapter III and Chapter IV 《草案》第三章及第四章规定的处置措施

Consistent with our members' wishes that the authorities pursue a proportionate approach to recovery and resolution planning, we would like to submit that a similar proportionate approach be taken when resolution takes place.

⁷ According to current effective *Interim Measures for the Implementation of Recovery and Resolution Plans for Banking and Insurance Institutions*, the threshold for a commercial bank to form RRP is - with adjusted on- and off-balance sheet assets (the denominator of leverage ratio) up to CNY300 billion (including equivalent foreign currency) or above at the end of the previous year (both at home and abroad) under consolidated statement standards.

⁸ 根据现行正式有效的《银行保险机构恢复和处置计划实施暂行办法》第 4 条，商业银行制定恢复和处置计划的条件是：按照并表口径上一年末(境内外)调整后表内外资产(杠杆率分母)达到 3000 亿元人民币(含等值外币)。

正如我们协会会员希望监管部门就制定恢复和处置计划采用同比例相称的做法，我们建议在实施处置措施时也应采取类似的同比例相称的做法。

Under the global standard adopted in key jurisdictions such as Hong Kong, the resolution authority would only initiate a resolution action of an in-scope financial institution if certain resolution conditions are met. The last condition is that the non-viability of the financial institution poses risks to the stability and effective working of the financial system of Hong Kong, including the continued performance of critical financial functions. This approach strikes an appropriate balance between ensuring that relevant institutions are within the regime's scope but that resolution only occurs where appropriate to secure continuity of critical financial services and to contain the risks posed to financial stability by the failure of an institution.

根据全球主要司法管辖区采用的标准，例如在香港，只有在满足某些处置条件的情况下，香港处置部门才会对规定范围内的金融机构启动处置措施。其中，最后一项条件是若该金融机构丧失持续经营能力，将对香港金融体系的稳定和有效运作构成风险，包括对关键金融功能的持续有效造成风险。这种做法在确保相关金融机构虽受制度约束、但仅在为保障关键金融服务的连续性等适当情况下实施处置措施，以及控制金融机构倒闭对金融稳定性造成的风险之间取得了适当的平衡。

In striking such a balance, the resolution authority may also consider the potential effect of a resolution decision on any other group company and the stability and effective working of the financial system in any other jurisdiction. Furthermore, in recognition of the inter-connectedness of financial markets, relevant legislation in Hong Kong has express measures to recognize foreign resolution measures without needing to initiate its own resolution action on the local entity. Therefore, we recommend that PBOC could permit exceptions in this Law or implementation rules that the resolution actions under Chapter III and Chapter IV of this Draft Law should not be applicable to the smaller onshore entities of foreign financial institutions.

在取得上述平衡时，香港处置部门也可能考虑处置决定对任何其他集团公司的潜在影响，以及任何其他司法管辖区的金融系统的稳定和有效运作。此外，鉴于全球金融市场之间紧密联系，香港有关立法明文规定承认境外作出的处置措施而无需就香港本地实体启动香港的处置措施。因此，我们建议贵行可以在《金融稳定法》或相关细则中规定例外情形，即《草案》第三章和第四章规定的处置措施不应适用于境外金融机构的小规模在华实体。

In addition, we note from the definition of “financial institution” in Article 46 of this Draft Law includes “*financial institutions in the banking industry, securities and futures industry, trust industry, and insurance industry that engage in financial business in accordance with the law; financial holding companies...*”. We generally understand that this Draft Law is intended to apply to systemically important banks, brokers, dealers and securities companies (and affiliates or holding companies thereof). Moreover, financial institution resolution laws and regulations in major financial jurisdictions have only included certain types of entities (e.g. the EU’s Bank Recovery and Resolution Directive (“BRRD”) only applies to EU banks, investment firms, and their holding companies and affiliates, where “investment firms” are defined relatively narrowly in the BRRD and would, effectively, exclude firms which (i) do not deal in any financial instruments for their own accounts or underwrite issues of financial instruments on a firm commitment basis; and (ii) provide a limited set of services (including execution of investors’ orders or management of investment portfolios). Similarly, under the Financial Institutions (Resolutions) Ordinance in Hong Kong, “within scope financial institutions” are limited to banking sector entities, insurance sector entities and securities and futures sector entities, where the definition of “securities and futures sector entities” is generally limited to branches or subsidiaries of global systemically important financial institutions or non-bank/non-insurer global systemically important financial institutions. In Singapore, under the Monetary

Authority of Singapore (Resolution of Financial Institutions) Regulations 2018, the definition of “pertinent financial institutions” broadly includes banks, insurers, finance companies, trustees of collective investment schemes but excludes financial advisors. In the United States (“U.S.”), Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act broadly applies to financial companies, which is broadly drafted, however, when a resolution authority actually seeks to utilize its powers, a qualitative assessment is required prior to making a recommendation to the U.S. Treasury Secretary to take action – which (among other things) requires that failure of the financial company would have significant impact on the stability of the U.S. financial system. We suggest that definition of “financial institution” is drafted in a more specific manner to only include the intended entity-types which could pose a risk to the stability of the PRC or global financial system.

此外，我们注意到《草案》第四十六条对“金融机构”的定义为“依法从事金融业务的银行业、证券期货业、信托业、保险业金融机构，金融控股公司……”。我们认为，《草案》旨在适用于系统重要性银行、经纪人、交易商和证券公司(及其关联公司或控股公司)。另外，主要金融司法管辖区的金融机构处置法律法规规定的金融机构仅包括特定类型的实体(如欧盟的《银行恢复与处置指令》(“BRRD”)仅适用于欧盟银行、投资公司及其控股公司和关联公司，其中BRRD对“投资公司”的定义范围相对狭窄，实际上不包括以下公司：(i)不为自营目的交易任何金融工具或承销任何以包销方式发行的金融工具的公司，以及(ii)提供有限的服务(包括执行投资者指令或管理投资组合)的公司)。同样地，根据香港的《金融机构(处置机制)条例》，“范围内的金融机构”限于银行部门实体、保险部门实体以及证券期货部门实体，其中“证券期货部门实体”的定义一般限于全球系统重要性金融机构或非银行/非保险全球系统重要性金融机构的分支机构或子公司。在新加坡，根据《2018年新加坡金融管理局(金融机构处置)条例》，“相关金融机构”的定义较为广泛，包括银行、保险公司、金融公司、集合投资计划的受托人，但不包括金融顾问。在美国，《多德-弗兰克华尔街改革和消费者保护法案》第二章的条文规定宽泛，适用于广义的金融公司，然而，如处置部门实际寻求行使该权力，则在向美国财政部长提出采取措施建议之前，需要进行定性评估——即(除其他要求以外)该金融公司的破产是否会对美国金融系统的稳定性造成重大影响。我们建议贵行以更具体的方式对“金融机构”的范围做出限定以使得“金融机构”仅包括可能对中国或全球金融系统稳定性构成风险的特定实体类型。

2. Article 30 (4): Stay of Close-Out Netting of Qualified Financial Transactions 第三十条第四项：暂停合格金融交易的终止净额结算

Article 30 of this Draft Law provides that “[w]here the financial regulatory authority of the State Council implements the financial risk treatment, with the approval of the principal, the following treatment measures could be taken based on different circumstances:...(4) temporarily stay the close-out netting of qualified financial transactions.”.

《草案》第三十条规定：“国务院金融管理部门实施金融风险处置的，经主要负责人批准，可以区别情形依法采取下列处置措施：……(四)暂停合格金融交易的终止净额结算；……”。

As a general comment, our members respectfully request that the scope of, conditions and safeguards to temporary stay in FSB Key Attribute be expressly set out in the Law. Specifically, our members suggest that PBOC could (1) further clarify the wording "qualified financial transactions" in the Law, (2) specify that subject matter of the temporary stay should be the right of a counterparty to the financial institution under treatment to early terminate the transactions; and (3) specify that the stay period would not exceed 48 hours and close-out netting should not be subject to any further restriction after the expiry of the stay period. Our reasons for this recommendation are below.

总体而言，我们协会成员谨请求贵行在《金融稳定法》中明确规定 FSB 关键要素中有关暂停的范围、条件及保障措施。具体而言，我们协会会员建议，贵行可以在《金融稳定法》中(1)进一步澄清“合格金融交易”的含义，(2)明确暂停标的应是被处置金融机构的对手方提前终止交易的权利；以及(3)明确暂停期不得超过 48 小时，且暂停期届满后终止净额结算不得受到任何进一步限制。我们提出上述建议的理由如下。

a. Definition of “Qualified financial transactions”

“合格金融交易”的定义

“Qualified financial transactions” is a term that firstly appears in the PRC laws and is not defined. Close-out netting may apply to various types of financial contracts such as futures and derivatives transactions under the *PRC Futures and Derivatives Law* and some securities financing transactions in PRC market. It would be helpful if PBOC could further clarify what are the in-scope “qualified financial transactions” in the law or its implementation rules. Our members recommend that the Law include the definition of “qualified financial transaction” proposed as follows:

“合格金融交易”的概念在中国法下首次出现且未做定义。终止净额结算可能适用于各种类型的金融合约，如《中华人民共和国期货和衍生品法》中规定的期货交易和衍生品交易，以及中国市场上的某些证券金融交易。我们希望贵行可以在相关细则中进一步澄清哪些是规定范围内的“合格金融交易”。我们协会会员建议在《金融稳定法》中纳入“合格金融交易”的定义，相关提议如下：

“Qualified financial transaction” means any financial agreement, contract or transaction, including without limitation:

“合格金融交易”是指任何金融协议、合约或交易，包括但不限于：

(i) a derivative product defined under the *Futures and Derivatives Law*;

(一) 《期货和衍生品法》中规定的衍生品；

(ii) a securities contract, including a securities lending transaction and an agreement to buy, sell, borrow or lend securities, such as a securities repurchase or reverse repurchase agreement, a securities lending agreement or a securities buy/sell-back agreement;

(二) 证券合约，包括证券借贷交易和购买、出售、借入或出借证券的协议，如证券回购或逆回购协议、证券借贷协议或证券购买/回售协议；

(iii) an agreement to clear or settle securities transactions or to act as a depository for securities;

(三) 证券交易清算、结算、或者证券托管业务的相关协议；

(iv) a collateral arrangement; and

(四) 担保安排；以及

(v) any agreement, contract or transaction designated or recognized as a qualified financial contract by the financial regulatory authority.

(五) 金融监管机构指定或认定为合格金融交易的其他协议、合约或交易。

“Collateral arrangement” means any margin, collateral or security arrangement or other credit enhancement related to or forming part of a netting agreement or qualified financial transaction, including, without limitation: (i) a pledge or any other form of security interest in collateral; (ii) a title transfer collateral arrangement; and (iii) any guarantee, letter of credit or reimbursement arrangement.

“担保安排”是指与净额结算协议或合格金融交易有关的或构成其一部分的任何保证金、担保或履约保障安排或其他增信方式，包括但不限于：(i) 质押或其他权益担保形式；(ii) 转让式履约保障安排；以及(iii) 任何保证、信用证或偿付安排。

“Title transfer collateral arrangement” means a margin, collateral or other collateral arrangement related to a netting agreement based on the transfer of title to collateral, including, without limitation,

a repurchase agreement, securities lending agreement, and a securities buy/sell-back agreement.

“*转让式履约保障安排*”是指与担保品所有权转让的净额结算协议有关的保证金、担保或其他担保安排，包括但不限于回购协议、证券借贷协议和证券购买/回售协议。

b. Temporary stay on the contractual early termination rights
暂停合同提前终止权

Our members would like to point out that, as a technical matter, the temporary stay should only relate to the right of a counterparty to the financial institution under treatment to terminate transactions early by reason only of the financial institution's entry into resolution or in connection with the exercise of any resolution powers. Significantly, the exercise of early termination rights is only the essential first step in the entire process called “close-out netting”, the other steps being valuation of the terminated transactions and then determination of the net balance owing by or to the defaulting party under the close-out provisions. In other words, it is neither necessary nor desirable to suspend “close-out netting” or a counterparty's “rights to close-out netting” per se. Rather, the Law could simply suspend temporarily the initiation of the close-out netting process, namely, the exercise of contractual early termination rights.

我们协会会员指出，在立法技术上，暂停应仅指以下情形，即被处置金融机构的对手方仅因该等金融机构开始受到处置或其与任何处置权力的行使有关而提前终止交易的权利。值得注意的是，行使该等提前终止权只是“终止净额结算”全套流程中必要的的第一步，其他步骤还包括对被终止的交易进行评估，再根据终止条款的约定确定违约方欠付或向违约方应付的净额余额。换言之，暂停“终止净额结算”或对手方的“终止净额结算权利”本身既无必要也不可取。相反，《金融稳定法》可以规定暂时停止启动终止净额结算程序，也即暂停行使合同提前终止权。

c. 48-hour stay period and no restriction after the expiry of the stay period
48 小时暂停期及暂停期届满后不受限

It is well-recognized international practice that a temporary stay of the exercise of early termination rights and other close-out rights should be strictly limited in time, and the stay should be subject to adequate safeguards that protect the integrity of financial contracts and provide certainty to counterparties. For example, the time limit suggested by the FSB is two business days or 48 hours. Also, Article 95 of the *PRC Commercial Bank Law (Draft for Comment)* provides that the organization who takes over the commercial bank can decide to temporarily stay the close-out netting within a certain period, and the stay period is up to 2 business days. In terms of the precise formulation of the time limit, our members would recommend using 48 hours instead of two business days. Our members believe 48 hours is more appropriate considering the number of long statutory holidays in China (such as the National Day, Chinese New Year or Labor Day statutory holidays), which will significantly lengthen the actual period of the stay and increase the uncertainty and potential risk exposure of counterparties if a “two-business day” formulation is adopted.

公认的国际惯例是，暂停行使合同提前终止权及其他终止权应在持续时间上有严格限制，且该等暂停应受限于充分的保障措施，用以保护金融合约的完整性并向对手方提供确定性。例如，金融稳定理事会建议的暂停期限为两个工作日或 48 小时。另外，《中华人民共和国商业银行法(修改建议稿)》第九十五条规定，接管组织可以决定在一定期限内暂停净额结算，暂停期限最长为两个工作日。就暂停期限的具体表述，我们协会会员建议采用“48 小时”而非“两个工作日”的表述。我们协会会员认为，考虑到中国有部分持续时间较长的法定

节假日(如国庆节、春节或劳动节等法定节假日), 如果采用“两个工作日”的表述将大大延长实际暂停期限, 给对手方增加不确定性和潜在风险, 因此“48 小时”的表述更为恰当。

Furthermore, the FSB Key Attributes suggests that temporary stay should be subject to the condition, amongst others, that the counterparty can exercise the right to close out immediately against the firm in resolution on expiry of the stay or earlier if the authorities inform the firm that the relevant contracts will not be transferred. Therefore, our members recommend that the Law make it clear that close-out netting should not be subject to any further restriction after the expiry of the stay period.

此外, FSB 关键要素建议, 暂停应受限于一些条件, 其中包括在暂停期届满之时或主管部门通知被处置机构相关合约不可转让之时二者孰早的时点, 对手方有权立即对被处置机构行使终止结算权。因此, 我们协会会员建议《金融稳定法》明确, 暂停期届满后不得对终止净额结算作出任何进一步的限制。

Therefore, our members propose the following wording of Article 30(4): “...*(4) temporarily stay the counterparties’ early termination rights under qualified financial transactions, provided that the stay period is up to 48 hours, and provided further that, the financial institution under treatment continues to perform the substantive obligations under the contract including payment and delivery obligations and obligations to provide or return collateral. After the expiry of the abovementioned stay period determined by the financial regulatory department, the counterparty of financial institutions under treatment can exercise the close-out netting according to the laws and the agreements, and close-out netting should not be subject to any further restriction imposed by the financial regulatory department.*”.

因此, 我们协会会员提议《草案》第三十条第四项采用以下表述: “(四) 暂停合格金融交易对手方的提前终止权, 但该等暂停期最长不得超过 48 小时, 且被处置的金融机构应继续履行合同约定的实质性义务, 包括支付和交割义务以及提供或归还担保品的义务。上述金融监管部门决定的暂停期届满后, 被处置机构的对手方可以依据法律规定及合同约定行使终止净额结算, 金融监管部门不得对该等终止净额结算作出任何进一步的限制。”。

In addition, as what we recommend in the above Section 1, our members also suggest that onshore branches of foreign financial institutions should also not be subject to the temporary stay requirements under Article 30(4), otherwise it would create an undue burden as they would be subject to the stay requirements of their home jurisdictions. We would highlight that both Hong Kong and Singapore have excluded foreign branches from their temporary stay regimes.

此外, 正如我们在上述第一部分所提出的建议, 我们协会会员还希望境外金融机构的在华分支机构不应适用第三十条第四项规定的暂停措施, 否则若该等在华实体同时受到其母国司法管辖区暂停要求, 这将会对其造成不适当的负担。需注意的是, 香港和新加坡均已将境外分支机构排除在暂停制度之外。

3. Article 30(6) & Article 32: Write-Down of Equities and Liabilities

第三十条第六项及第三十二条: 权益减记及其责任

Article 30 of this Draft Law states that “[w]here the financial regulatory authority of the State Council implements the financial risk treatment, with the approval of the principal, the following treatment measures could be taken based on different circumstances:...(6) if the financial institution meets the conditions prescribed by the financial management department of the State Council, write-down of equity and creditor’s rights and debt-to-equity swap.”. Article 32 further provides for requirements for write-downs.

《草案》第三十条规定：“国务院金融管理部门实施金融风险处置的，经主要负责人批准，可以区别情形依法采取下列处置措施：……(六)被处置金融机构符合国务院金融管理部门规定条件的，实施股权、债权减记和债转股；……”。《草案》第三十二条进一步规定了减记要求。

We would be grateful if PBOC could further clarify that these write-downs are not applicable to onshore entities of foreign financial institutions that are small in size and are not systematically important, as suggested above. We also suggest that PBOC could consult with domestic systematically important financial institutions to formulate more details, to the extent possible, in its interpretation or the implementation rules on how this would be implemented in practice.

如以上所提出的建议，我们希望贵行能够进一步澄清，这些减记措施不应适用于规模较小且非系统重要性境外金融机构的在华实体。就如何在实践中实施上述减记措施，我们也希望贵行能够向国内系统重要性金融机构征求意见，并在相关解释或细则中做出尽可能具体的规定予以明确。

4. Article 30(7): Suspension of Cross-Border Payment

第三十条第七项：中止跨境支付

Article 30(7) of this Draft Law (“...[s]uspending the financial institution from transferring funds abroad and requiring the financial institution to transfer back overseas assets.”) appears to empower the regulator to suspend cross-border payment activities of financial institutions in the process of financial risk resolution.

《草案》第三十条第七项(“……中止被处置金融机构向境外汇出资金，要求被处置金融机构调回境外资产”)似乎授权监管部门在金融风险处置过程中暂停金融机构的跨境支付活动。

Our members concern that this could cut off fund flows at the very time of financial difficulties and therefore exacerbate the deteriorating financial conditions of an international financial group. This may also result in ring-fencing in resolution of international financial institutions and therefore be inconsistent with the spirit of cross-border coordination and cooperation under the FSB Key Attributes. For these reasons, we recommend PBOC to consider international cooperation and coordination with the home authorities of international financial groups and make references to such international cooperation in the Law.

我们协会会员担心，这可能会导致在相关金融机构已发生财务困难之时切断其资金流，从而加剧国际金融集团财务状况的恶化。这也可能导致在处置国际金融机构的过程中出现以邻为壑，因而不符合 FSB 关键要素所体现的跨境协调与合作精神。基于上述理由，我们建议贵行考虑与国际金融集团的母国主管机构进行国际合作和协调，并在《金融稳定法》中提及该等国际合作。

5. Article 30 (8): Systemically Important Financial Institution

第三十条第八项：系统重要性金融机构

Article 30 of this Draft Law provides that “[w]here the financial regulatory authority of the State Council implements the financial risk treatment, with the approval of the principal, the following treatment measures could be taken based on different circumstances:...(8) when dealing with a systemically important financial institution, the domestic and overseas institutions of the financial institutions’ group are required to provide the necessary support to maintain uninterrupted key financial services and functions.”

《草案》第三十条规定：“国务院金融管理部门实施金融风险处置的，经主要负责人批准，可

以区别情形依法采取下列处置措施：……(八)处置系统重要性金融机构的，要求所属集团的境内外机构提供必要支持，维持关键金融服务和功能不中断。……”

We suggest that PBOC could clarify the scope of “systematically important financial institution”. We also would like to confirm that the systemically important financial institutions under this Law should only apply to those headquartered in mainland China and who have been granted financial licenses by the competent PRC authorities.

我们建议贵行可以澄清“系统重要性金融机构”的范围。同时，我们希望向贵行确认，《金融稳定法》中规定的系统重要性金融机构应仅限于总部设于中国大陆并且已获得中国主管部门颁发的金融牌照的机构。

6. Article 18: Information Submission Obligation **第十八条：信息报送义务**

Further to the above, we note that Article 18 of this Draft Law provides that “... *Financial institutions shall, in accordance with regulations, submit relevant materials such as business management, financial status, risk status, and statistical data to the financial regulatory authority of the State Council in a true, accurate and complete manner. Financial institutions shall submit information to the public finance department in accordance with laws and regulations, as well as relevant provisions on state-owned financial capital management and financial accounting systems.*”.

此外，我们注意到《草案》第十八条规定：“*金融机构应当按照规定真实、准确、完整地向国务院金融管理部门报送经营管理、财务状况、风险状况、统计数据等相关资料。金融机构应当按照法律法规以及国有金融资本管理、财务会计制度等相关规定向财政部门报送信息。*”

Our members suggest that PBOC could further clarify that onshore entities of foreign financial institutions will be required to submit relevant information in connection with their group company (if applicable) only to the extent permitted by their home jurisdiction's law or regulatory requirements.

我们协会会员建议贵行能够进一步澄清，境外金融机构的在华实体仅在其母国司法管辖区法律或监管要求允许的范围内报送与其集团公司(如适用)相关的信息。

7. Article 14: Requirements for Dividends Distribution **第十四条：股息红利分配要求**

Article 14 of this Draft Law provides that “[f]inancial institutions and non-financial enterprises participating in financial market financing shall not damage, directly or indirectly, the legitimate rights and interests of creditors and other stakeholders by distributing dividends.”.

《草案》第十四条规定：“*金融机构、参与金融市场融资的非金融企业不得通过分配股息红利损害或者变相损害债权人、其他利益主体的合法权益。*”

We would be grateful if PBOC could provide guidance on in which circumstances the financial institution would be deemed as damaging the legitimate rights and interests of creditors and other stakeholders by distributing dividends.

我们希望贵行能够提供具体指引，明确在哪些情形下金融机构将被认定为通过分配股息红利损

害债权人及其他利益主体的合法权益。

8. Article 21: Early Correction and Supervision by Regulatory Authorities
第二十一条：监管部门早期纠正和监管

We note from Article 21 (“*[i]n the event of a financial institution experiencing risks such as abnormal fluctuations in regulatory indicators, the financial management department of the State Council shall issue a risk warning, may interview directors, supervisors, senior managers, major shareholders, actual controllers, and order correction from their side within a time limit*”) that PRC regulators can take a number of measures when a financial institution experiencing risks such as abnormal fluctuations in regulatory indicators, such as having regulatory interviews with directors, supervisors, senior managers, major shareholders, actual controllers, and then may take further steps if the correction is not made within the time limit, or the regulatory indicators deteriorate, endangering itself or the stable operation of the financial market.

根据《草案》第二十一条(“*金融机构发生监管指标异常波动等风险情形的，国务院金融管理部门应当提出风险警示，可以约谈董事、监事、高级管理人员、主要股东、实际控制人，责令限期整改……*”)，我们注意到当发生监管指标异常波动等风险情形时，中国监管部门可以采取一系列措施，如约谈董事、监事、高级管理人员、主要股东、实际控制人，如逾期未改正，或者监管指标恶化、危及自身或者金融市场稳健运行的，监管部门可以继续采取进一步措施。

We would also be very grateful if PBOC could provide more details in the Law or implementation rules on what “abnormal fluctuations” means and clarify to the extent possible under what circumstances will the PRC regulators impose these regulatory measures.

我们衷心希望贵行能够在《金融稳定法》或相关细则中对“异常波动”的含义作出具体规定，并适当澄清中国监管部门将在哪些情形下采取这些监管措施。

We would be pleased to engage in further discussions with PBOC in relation to our comments and provide further industry input where necessary. If you have any questions, please do not hesitate to contact Lyndon Chao, Managing Director - Head of Equities and Post Trade at ASIFMA, at lchao@asifma.org or +852 9826 8020. Our PRC based member law firm JunHe helped us hold the pen. Their key point of contact is Natasha Xie (email: xieq@junhe.com, phone: +86 1300 214 8227).

我们很乐意与贵行进一步探讨我们的意见，并在有需要时进一步提供业界意见。如果贵行有任何疑问，请联系 ASIFMA 董事总经理、股票及交易后主管赵荫人(邮箱：lchao@asifma.org；电话：+852 9826 8020)。本函件由会员君合律师事务所协助起草。君合主要联系人为合伙人谢青(邮箱：xieq@junhe.com；电话：+86 1300 214 8227)。

Yours faithfully,
此致，



Lyndon Chao 赵荫人

Managing Director – Head of Equities and Post Trade 董事总经理, 证券部主管
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