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Legislative Affairs Commission of the Standing Committee of the National People's Congress  
No.1, West Qianmen Street, Xicheng District  
Beijing, China  
100805

全国人大常委会法制工作委员会  
西城区前门西大街1号  
北京, 中国  
邮编: 100805

**To the Legislative Affairs Commission of the Standing Committee of the National People's Congress ("NPC")**

致: 全国人大常委会法制工作委员会(“全国人大”)

**The First Reading 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)》一读稿

On behalf of its members, the Asia Securities Industry & Financial Markets Association ("ASIFMA")<sup>1</sup> is pleased to submit to the Legislative Affairs Commission of the NPC Standing Committee our comments and suggestions on the *First Reading Draft of the Financial Stability Law of the People's Republic of China* ("**First Reading Draft**", and after the formal promulgation, "**Law**") published on the NPC's website<sup>2</sup>.

亚洲证券业与金融市场协会("ASIFMA")谨代表其全体会员, 就贵委员会网站上发布的《中华人民

<sup>1</sup> 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。

<sup>2</sup> Available at: <http://www.npc.gov.cn/flcaw/userIndex.html?lid=ff808181842c261c018561387f97009c>.

可于以下网址查阅: <http://www.npc.gov.cn/flcaw/userIndex.html?lid=ff808181842c261c018561387f97009c>.

# DEVELOPING ASIAN CAPITAL MARKETS

共和国金融稳定法(草案)》(以下简称“《草案一读稿》”, 一经公布则称为“《金融稳定法》”)向贵委员会提出意见和建议。

We welcome the NPC'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 the 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 Board<sup>3</sup> (“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委员会就在中国“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。

Based on feedback from our members, this letter sets out (a) our views on the First Reading Draft, (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 First Reading Draft and (d) our recommendations on the First Reading Draft.

根据协会会员的反馈, 本函载列了(1)我们对《草案一读稿》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《草案一读稿》某些条款的澄清请求, 以及(4)我们对于《草案一读稿》的一些建议。

## 1. Article 48: Scope of Application 第四十八条: 适用范围

Article 48 of the First Reading Draft provides that “[w]ith respect to risk prevention, risk mitigation and risk resolution of the branches of overseas financial institutions and overseas financial infrastructure operators established within the territory of the PRC, if laws and administrative regulations otherwise provide or the PRC and other countries or regions have reached other arrangements for maintaining financial stability, the relevant provisions or arrangements shall be followed”. First, it would be helpful if the NPC could further clarify whether the foregoing “overseas financial infrastructure operators” include local incorporated financial subsidiaries of foreign financial infrastructures. Then, according to this provision, we understand that unless otherwise provided, 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 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 First Reading Draft given their relatively limited impact on the PRC markets. The

<sup>3</sup> 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。

<sup>4</sup> 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。

key recommendation of our members would be proportionality. A “one-size-fits-all” approach would not be appropriate given that foreign financial institutions have a fundamentally different footprint from the local systemically-important institutions that have a significantly broader and deeper client base. In spite of the above recommendation, if the PRC regulators remain of the view that they prefer to have the benefit of broad legislation that applies to all entities, we would suggest that one-on-one supervisory discussions with the relevant financial institutions about how such rules should apply in their particular case would be helpful. Described below are recommendations we request the NPC consider specifying in the Law or implementation rules.

《草案一读稿》第四十八条第一款规定：“中华人民共和国境外金融机构、境外金融基础设施运营机构在中华人民共和国境内设立的分支机构的风险防范、化解和处置，法律、行政法规另有规定或者中华人民共和国与其他国家或者地区对维护金融稳定制度另有安排的，从其规定。”首先，我们希望贵委员会可以进一步澄清上述规定中的“境外金融基础设施运营机构”是否包括境外金融基础设施在中国境内注册设立的金融子公司。此外，根据该条款，我们理解除非另有规定，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《草案一读稿》所规定的某些恢复与处置措施。我们协会会员提议的重点在于相称性。考虑到境外金融机构的规模大小与那些拥有广泛、深度客户基础的、具有系统重要性的本地机构存在根本性区别，立法“一刀切”的做法并不合适。尽管提出上述建议，如中国的监管机构始终希望得益于立法调整范围的广泛性，涵盖所有实体，建议监管机构与相关金融机构就如何在其具体情境中落实这些规则进行一对一的监管讨论。以下是我们衷心期盼贵委员会在制定《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 First Reading Draft (“[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 resolving financial risks. ... The Financial Stability Security Fund consists of funds raised from financial institutions, financial infrastructure operators, 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 operators, 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 globally<sup>5</sup>.

从《草案一读稿》第二十九条(“国家设立金融稳定保障基金，由统筹协调机制统筹管理，作为处置金融风险的后备资金。……金融稳定保障基金由向金融机构、金融基础设施运营机构等

<sup>5</sup> 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>.

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、金融基础设施运营机构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<sup>6</sup>。

## 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 specified by the financial administrative departments 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 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 the NPC how this Article 15 would bring into the relevant provisions in the current effective *Interim Measures for the Implementation of Recovery and Resolution Plans for Banking and Insurance Institutions*<sup>7</sup>. Similarly, we also suggest that the NPC take into consideration the size and business model of financial institutions to de-scope smaller and non-systemically-important onshore entities of foreign financial institutions from this requirement of preparing recovery and resolution plans and allow them to rely on their home recovery and resolution plans.

除上述内容外，我们还注意到，《草案一读稿》第十五条要求国务院金融管理部门规定的金融机构应当按照要求制定恢复与处置计划，明确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委员会确认，该第十五条规定如何与现行正式有效的《银行保险机构恢

<sup>6</sup> 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>。

<sup>7</sup> 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.

复和处置计划实施暂行办法》的相关规定衔接<sup>8</sup>。同样地，我们也建议贵委员会在考虑不同金融机构的不同规模和业务模式的情况下，允许境外金融机构的小规模非系统重要性在华实体依据其母国的恢复与处置计划，从而免于制定本地恢复与处置计划。

In addition, considering that pursuant to Article 15, foreign financial institutions will be subject to both home and host recovery and resolution regimes, our members would like to confirm with the NPC whether PRC regulators may take into consideration the decisions made by the home resolution authority of foreign financial institutions, or at least try to cooperate and coordinate what they do with the home authority, so as to avoid any potential conflicting decisions.

此外，由于根据《草案一读稿》第十五条的规定，境外金融机构将同时受制于其母国和中国的恢复与处置制度，我们协会会员希望向贵委员会确认，中国监管部门是否会考虑境外金融机构母国主管机构所作决定，或是否至少尝试与境外金融机构母国主管机构就有关事项进行合作与协调，以避免任何潜在的冲突决定。

#### **Resolution Measures under Chapter III and Chapter IV 《草案一读稿》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.

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 the NPC could permit exceptions in this Law that the resolution actions under Chapter III and Chapter IV of this First Reading Draft

<sup>8</sup> 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)。

should not be applicable to the smaller onshore entities of foreign financial institutions, or that the NPC could authorize the relevant regulatory authorities to formulate implementation rules specifying the foregoing exceptions.

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，我们建议贵委员会可以在《金融稳定法》中规定例外情形，即《草案一读稿》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，或授权有关监管部门出台相关细则规定前述例外情形。

In addition, we note that the definition of “financial institution” in Article 47 of this First Reading Draft includes *“financial institutions in the banking industry, securities and futures industry, trust industry, and insurance industry that are established within the territory of the PRC, financial holding companies, and other institutions engaging in financial business that are established upon the approval of or recognized by the financial administrative departments of the State Council”*. We generally understand that this First Reading Draft 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《草案一读稿》第四十七条对“金融机构”的定义为“在中华人民共和国境内设立的银行业、证券期货业、信托业、保险业金融机构，金融控股公司，以及其他经国务院金融管理部门批准设立或者认定的从事金融业务的机构”。我们认为，《草案一读稿》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。我们建议贵委员会以更具体的方式对“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。

If the scope of application is not amended, we would be grateful if the NPC could further clarify what would happen to foreign financial institutions that are subject to the Law but then subsequently subject to their home jurisdiction's equivalent requirements at a later date, for example, whether they could be permitted to stop being subject to the Law then.

如果不予修改上述适用范围条款，我们希望贵委员会可以进一步澄清，对于那些需要受到《金融稳定法》约束的境外金融机构，其之后又需要遵守其母国司法管辖区同等要求的情况下应如何适用法律，例如，届时是否将允许其不再受《金融稳定法》的约束。

## 2. Article 31 (4): Stay of Close-Out Netting of Qualified Financial Transactions 第三十一条第四项：暂停合格金融交易的终止净额结算

Article 31 of this First Reading Draft provides that “[i]f the financial administrative departments of the State Council facilitate the restructuring of a financial institution or take over or act as the trustee of a financial institution, the following resolution measures may be taken according to the law depending on different circumstances and be announced:...(4) temporarily stay on the contractual early termination rights of qualified financial transactions, but the stay period shall not exceed 48 hours.”

《草案一读稿》第三十一条规定：“国务院金融管理部门促成金融机构重组或者对其进行接管、托管的，区别情形依法采取下列处置措施，并予以公告：……(四)暂停合格金融交易项下提前终止合约的权利，但最长不超过四十八小时；……”。

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 the NPC could (1) further clarify the wording "qualified financial transactions" in the Law or the relevant implementing rules, and (2) specify that 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委员会在《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，贵委员会可以在《金融稳定法》或实施细则中(1)进一步澄清“合格金融交易”的含义，以及(2)明确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 the NPC 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。我们希望贵委员会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. Clarification on no restriction after the expiry of the stay period  
暂停期届满后不受限的澄清

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. In addition, we would be grateful if the NPC could further clarify that the Law would safeguard the legal validity of close-out netting and related financial collateral agreements which were recognized by laws such as the FDL and the relevant normative documents such as the CBIRC notice on the relevant matter.

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。此外，我们还希望贵委员会进一步澄清《金融稳定法》的相关规定不会对《期货和衍生品法》以及相关规范性文件如银保监会的通知等已经确认的终止净额结算和相关金融担保协议的有效性产生不利影响。

Therefore, our members propose the following wording of Article 31(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《草案一读稿》第三十一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 31(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三十一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 31(5) & Article 33: Write-Down of Equities and Liabilities** **第三十一条第五项及第三十三条：权益减记及其责任**

Article 31 of this First Reading Draft states that “*[i]f the financial administrative departments of the State Council facilitate the restructuring of a financial institution or take over or act as the trustee of a financial institution, the following resolution measures may be taken according to the law depending on different circumstances and be announced:...(5) if the financial institution meets the conditions prescribed by the financial administrative departments of the State Council, write-down of equity and creditor’s rights and debt-to-equity swap.*”. Article 33 further provides for requirements for write-downs.

《草案一读稿》第三十一条规定：“国务院金融管理部门促成金融机构重组或者对其进行接管、托管的，区别情形依法采取下列处置措施，并予以公告：……(五)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；……”。《草案一读稿》第三十三条进一步规定了减记要求。

We would be grateful if the NPC 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 the NPC could consult with domestic systematically important financial institutions to formulate more details, to the extent possible, on its interpretation of how this would be implemented in practice.

如以上所提出的建议，我们希望贵委员会能够进一步澄清，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，我们也希望贵委员会能够向国内系统重要性金融机构征求意见，并在相关解释中做出尽可能具体的规定予以明确。

#### **4. Article 31(6): Suspension of Cross-Border Payment** **第三十一条第六项：中止跨境支付**

Article 31(6) of this First Reading Draft (“...[r]equiring 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.

《草案一读稿》第三十一条第六项(“……要求被处置金融机构按照规定调回境外资产”)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 are concerned 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 that the NPC 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，我们建议贵委员会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 31 (7): Systemically Important Financial Institution** **第三十一条第七项：系统重要性金融机构**

Article 31 of this First Reading Draft provides that “[i]f the financial administrative departments of the State Council facilitate the restructuring of a financial institution or take over or act as the trustee of a financial institution, the following resolution measures may be taken according to the law depending on different circumstances and be announced:...(7) when dealing with risks of 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.”.

《草案一读稿》第三十一条规定：“国务院金融管理部门促成金融机构重组或者对其进行接管、托管的，区别情形依法采取下列处置措施，并予以公告：……(七)处置系统重要性金融机构风险的，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 the NPC 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.

我们建议贵委员会可以澄清“系统重要性金融机构”的范围。同时，我们希望向贵委员会确认，《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 14: Requirements for Dividends Distribution

### 第十四条：股息红利分配要求

Article 14 of this First Reading Draft 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 connected transactions, fraud litigation or improper dividends distribution”.

《草案一读稿》第十四条规定：“金融机构、在金融市场融资的非金融企业不得通过关联交易、虚假诉讼、不当分配股息红利等方式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 the NPC 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.

我们希望贵委员会能够提供具体指引，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。

## 7. Article 20: Early Correction and Supervision by Regulatory Authorities

### 第二十条：监管部门早期纠正和监管

We note from Article 20 (“[i]n the event of a financial institution experiencing abnormal fluctuations in prudential regulatory indicators such as capital and risk management, the financial administrative departments of the State Council shall issue a risk warning, may, based on their needs, interview directors, supervisors, senior managers, or 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 prudential 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 the stable operation of financial institutions.

根据《草案一读稿》第二十条(“金融机构发生资本和风险管理等审慎监管指标异常波动的，国务院金融管理部门应当提出风险警示，根据需要约谈董事、监事、高级管理人员或者主要股东、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，或者审慎监管指标恶化、危及金融机构稳健运行的，监管部门可以继续采取进一步措施。

We would also be very grateful if the NPC 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.

我们衷心希望贵委员会能够在《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 the NPC 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 – China Capital Markets Committee at ASIFMA, at [lchao@asifma.org](mailto: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](mailto:xieq@junhe.com), phone: +86 1300 214 8227).

我们很乐意与贵委员会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。如果贵委员会有任何疑问，请联系亚洲证券业与金融市场协会董事总经理、中国资本市场委员会主管赵荫人(邮箱: [lchao@asifma.org](mailto: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](mailto:xieq@junhe.com); 电话: +86 1300 214 8227)。

Yours faithfully,  
此致，



Lyndon Chao 赵荫人  
Managing Director 董事总经理  
China Capital Markets Committee 中国资本市场委员会  
Asia Securities Industry & Financial Markets Association 亚洲证券业与金融市场协会  
(ASIFMA)