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Thank you for the opportunity to comment on the consultation titled "*Strengthening of APRA's Crisis Management Powers" released in September 2012.*

State Street, based in Boston, is a leading provider of financial services to sophisticated institutional investors such as pension funds, mutual funds, endowments and sovereign wealth funds. State Street offers a suite of services that spans the investment spectrum, including investment management, research and trading, and investment servicing. As of 30 June 2012 State Street had USD 22.4 trillion in assets under custody and administration and USD 1.9 trillion in assets under management, operations in 29 countries, including Australia, and a geographic network that spans more than 100 markets. State Street is a large bank holding company under US Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd Frank") regulations and a Global Systemically Important Financial Institution ("G-SIFI") under international rules.

We do not have concerns about the bulk of the proposals. As set out in more detail below, we would, however, like clarity on how a foreign ADI with cross border business and one designated as a domestic and global SIFI should manage conflicting national regulatory requirements. We would also like APRA to consult closely with foreign ADI's before making a decision to intervene and to only appoint a Statutory Manager ("SM") as a last resort. In addition, we would like it to be made clear that the focus of the intervention is to achieve recovery rather than resolution. For foreign ADI's involved in a range of businesses in Australia and/or cross border business, intervention should also be limited to stemming the impact of any possible collapse on Australian creditors of the foreign ADI and the

Australian financial system. How the deposits of overseas clients will be treated also needs to be addressed.

Part A

This section deals with crisis resolution internationally and in other key markets. It notes that to ensure financial stability and orderly liquidation of entities with cross border subsidiaries international regulatory cooperation, particularly on who is going to lead and who is going to defer in what circumstances is crucial. As noted in the paper, the Financial Stability Board (FSB) *Key Attributes of Effective Resolution Regimes for Financial Institutions* includes recommendations that authorities have the power to enable cross-border coordination of bank resolution. The powers should either support a resolution carried out by a foreign home authority or, in exceptional cases, allow the local authority to take measures on its own. The consultation does, however, acknowledge that the FSB envisages these arrangements as part of a much higher level of international cooperation than currently takes place.

A key question for foreign ADI's is how they should proceed if the requirements of a home regulator, or for that matter, any other regulator, conflicts with those of APRA. As the paper notes, major markets have a range of regimes, for example the US, Europe, Canada. The FSB has also set out guidelines relating to global SIFIs. State Street as a US headquartered institution designated a large bank holding company under Dodd Frank and a G-SIFI under international rules would be subject to US requirements and those relating to G-SIFIs. It might also be subject to regulations in other markets where it does business. In introducing the proposed changes the Australian government needs to clarify how institutions should manage any conflicts in regulation. Ideally regulators can come to an agreement on how to proceed rather than the foreign ADI risking being in breach of local requirements with all the attendant consequences.

Section 3.1.1

This section proposes that APRA be empowered to appoint a SM to the Australian business of a foreign ADI and its non-ADI subsidiaries in Australia under certain conditions which are set out. It needs to be noted that extending the power of APRA to include related parties and subsidiaries has greater implications for foreign entities like State Street operating in Australia through both branches and subsidiaries than it does for Australian entities. This is because, for the most part, a subsidiary of a locally incorporated ADI will be directly controlled by the ADI, whereas the local subsidiary of a foreign entity is controlled by the entity as a whole, not the Australian branch. As such we recommend that the powers of the SM in respect of related parties and subsidiaries be limited having regard to

what is required to protect the creditors of the ADI and the stability of the Australian financial system.

We would also value clarification on the treatment of overseas creditors. The consultation paper states that Australia is seeking the proposed changes in part to manage a situation where a foreign ADI's home authorities take actions that prejudice the interests of creditors in Australia or the Australian financial system. A ring-fencing form of resolution by the home authorities is highlighted as a potential problem. This raises the question of how Australia will handle creditors from other countries and what the role of the foreign ADI will be in this respect. What happens to the deposits on the branch of the foreign ADI that belong to creditors overseas? Will APRA only access Australian client deposits in seeking to return funds to Australian creditors - not the deposits of foreign clients? If not, Australian creditors would gain preferential treatment over others which might discourage the transfer of assets to Australia.

Section 3.1.2

The proposal is that APRA be given the power to apply for the winding up of the Australian business of a foreign ADI under certain conditions. The conditions include a belief that the ADI is unable to meets its liabilities in Australia or in one or more jurisdictions where it carries on business and where an application for winding up or similar external administration has been initiated in another jurisdiction. It is noted that any winding up of the Australian business of a foreign ADI under this proposal would not extend to the business outside of Australia. We are pleased to see this clarified. We would, however, also like there to be an acknowledgment that the winding up would only occur as a last resort and in close consultation with the foreign ADI. The emphasis in any intervention should also be on recovery rather than winding up. Allowance also needs to be made for a situation where a profitable global business of a foreign ADI funds an unprofitable Australian business, or a profitable Australian business survives an unprofitable global business. An institution should also have the ability to contest the decision.

Section 3.2.1

This section aims to harmonize across the banking and insurance industry APRA's power to direct that a foreign branch not transfer assets out of Australia. As a result of the proposed changes the rights of APRA in relation to banks under the Financial Sector Legislation Amendment (Prudential Refinements and other measures) Act 2010 would apply to insurers. APRA would have the right to direct all foreign ADI branches not to transfer its Australian assets to an offshore head office or sister branch, nor to transfer liabilities into the Australian branch. There might be circumstances where these requirements conflict with those of the home

regulator or the regulator of another country. As under Part A, foreign ADIs engaged in cross border activities would value clear guidelines on how conflicting requirements should be managed. We would also value clarification on whether these provisions would apply only to foreign ADI branches or also to subsidiaries and non-ADI's.

Section 3.2.2

This section addresses the voluntary or compulsory transfer of all or part of a business of a foreign ADI to another ADI. We agree with the proposal that a foreign branch receive the same level of flexibility in relation to the voluntary transfer of business as locally incorporated counterparts. As for the compulsory transfer of the whole or part of an entities business to another entity, we would stress that this should again be done only as a last resort and in close consultation with the foreign-ADI. Foreign ADI's need to be assured that business will not be transferred except in the most extreme circumstances if they are to be comfortable about operating branches in Australia. In addition, for the reasons set out in response to section 3.1.1, extending the power in respect of related parties and subsidiaries should be constrained so that it only applies to the extent necessary for the protection of creditors of the ADI and the stability of the Australian financial system.

It should also be noted that separating out sections of Australian specific business for transfer could also be difficult if different functions reside in different entities and countries. In transferring business to another entity care also needs to be taken not to harm the viability of the overall business. Using State Street as an example, if APRA appointed a SM to the Australian branch and the deposits of the branch or sections of business were moved elsewhere prematurely, there could be significant consequences for a range of activities conducted through the branch to the detriment of the broader business and the local market:

- The Sydney branch provides overdraft facilities to custody clients. These are consistent although not large overdrafts. If the client deposits are moved, the branch would not be able to accommodate client overdrafts potentially negatively impacting the settlement cycle.

- The Sydney branch is the designating clearing bank in AUD for all State Street branches globally. There is a large volume of pays/ receives on a daily basis relative to the size of the balance sheet. It would be impossible to conduct this activity on a very small balance sheet.

- Sydney is the CLS settlement point for State Street globally, based on our location in the international time zone. Again, there are

significant payments that are made via the Sydney branch in this role that will not be possible on a very small balance sheet.

- The Sydney branch provides cash support to other businesses, e.g. transition management, which assists client transition from one investment manager to another, which would be curtailed if the client deposits were removed.

Section 4.1.1

In this section the proposal is to broaden the grounds for appointment a SM to enable earlier appointment. This would allow APRA to intervene before an ADI's situation becomes critical to increase the prospects of recovery. We understand the rationale for this and judge it appropriate. It is better to have the flexibility to intervene early if it allows for the institution to recover. On the question of safeguards, this measure should, however, again only be taken as a last resort and in close consultation with the foreign ADI and/or its parent. The foreign-ADI should also have the ability to contest the decision if it believes it has strong grounds for doing so. Further explanation of the conditions that would warrant early intervention might also be helpful.

Section 4.4.1

This section proposes that section 13C of the Banking Act be expanded to enable APRA to terminate its control or to remove an SM where APRA is satisfied that the ADI has been restored to a sound financial condition and that APRA's control or statutory management are no longer required, or where voluntary winding-up proceedings have been commenced. This is instead of terminating control or removing an SM just when the ADI's deposit liabilities have been repaid. In such a situation, depositors will not be repaid, other than under the normal contractual terms of their deposits. We support this proposal. As noted, the flexibility this change would give allows for restructuring or recapitalization which supports the continuation of business. The change would also allow for the termination of SM and APRA intervention at an earlier stage.

Section 5.2.2

This section proposes that section 14F of the Banking Act be amended to empower APRA to apply to the Court for the winding up of an ADI where APRA considers that the ADI is insolvent and could not be restored to solvency within a reasonable period, regardless of whether an SM has been appointed. We do not take issue with this proposal. Winding up, if demonstrated to be necessary should be able to occur whether an SM has been appointed or not.

As a final comment, ISDA raises valuable points about the legal certainty around the enforceability of the netting and collateral arrangements which we support. It also raises concerns about the undesirability of ring-fencing assets and discrimination against foreign creditors and echoes our points on the need for cooperation amongst regulators in cross border resolution.

Thank you once again for the opportunity to comment on the consultation. Feel free to contact us with any questions you might have on the above.

Yours sincerely

L. Clarke.

Louise A Clarke

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