American Bankers Association
ABA Securities Association
ABASA, an ABA subsidiary

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January 30, 2013

Recovery, Resolution and Redress Policy
Prudential Business Unit
Financial Services Authority
25 The North Colonnade
Canary Wharf
London E14 5HS
Attention: Mei Gant, cp12_23@fsa.gov.uk

Re: CP 12/23 – Addressing the Implications of Non-EEA National Depositor Preference Regimes

The ABA Securities Association ("ABASA") appreciates the opportunity to comment on Consultation Paper CP 12/23 – "Addressing the Implications of Non-EEA National Depositor Preference Regimes" (the "Consultation Paper"), released by the Financial Services Authority (the "FSA") on September 11, 2012. ABASA is a separately chartered affiliate of the American Bankers Association (the "ABA"),[1] representing those holding company members of the ABA that are actively engaged in capital markets, investment banking and broker-dealer activities. ABASA members also generally have significantly more international operations than their counterparts in the ABA, including many with full service branch, bank and capital markets operations in London.

I. Introduction and Executive Summary

The recent international financial crisis highlighted a number of critical issues for regulators and financial companies, including the interconnections among global markets, international regulatory inconsistencies, limited cross-border regulatory cooperation, and the importance of consistent frameworks for addressing cross-border crises and insolvencies. Given the events of 2008-2009, an international consensus has emerged on the necessity of improved cross-border cooperation for crisis management and resolution of large multinational financial institutions.

Our members recognize that national depositor preference has been raised in international discussions in the past as potentially impeding both international cooperation and coordinated cross-border resolution. Because of this, our members understand the impetus behind the Consultation Paper and the FSA's goal of eliminating or otherwise addressing, for U.K.

[1] The ABA represents banks of all sizes and charters and is the voice for the U.S. $13 trillion banking industry and its 2 million employees. The ABA's extensive resources enhance the success of the nation's banks and strengthen the U.S. economy and communities.

depositors, the perceived disadvantages caused by a national depositor preference regime applicable to non-U.K. banks.

Nevertheless, the approach taken by the FSA raises significant concerns among our members, and across the international financial community. Below we will address these concerns in greater detail.

Initially, we would like to emphasize the difficulties posed by the timeline over which the FSA proposes to finalize and implement the Consultation Paper. National depositor preference has been a part of U.S. statutory law for almost 20 years,[2] and we understand that the FSA and other U.K. government agencies have raised these issues with the U.S. government over time. While we understand the FSA's long-standing concerns, we believe that a more deliberative and extended period would best allow identification of the optimal solution and an orderly implementation of that solution or solutions. We are not aware of any particular triggering event that would have caused the FSA to believe that it would need to seek an immediate solution to this intergovernmental issue. This is particularly true when the origin of the issue is U.S. law, but the solutions proposed by the FSA will negatively impact both financial institutions and their customers and do not entail the cross-border coordination among regulators that may be most efficacious in achieving a solution.

In addition, if the proposals suggested were to be implemented on the timeline described in the Consultation Paper, both non-U.K. depository institutions and the U.K. and non-U.K. customers of their U.K. branches would see significant disruptions to their relationships and would incur potentially significant costs. As we will describe in this letter, there are many reasons why the implementation of the Consultation Paper proposals should be deferred to allow for greater coordination among U.S. and U.K. regulators and with the industry.

In sum, a final regulation early in 2013 and shortly after the close of the comment period, followed by application of the suggested disclosure and implementation timeline, does not permit appropriate international coordination nor does it take into account the myriad other structural changes being mandated by international regulatory reforms.

After careful consideration and significant discussion with many of the institutions that would be affected by the Consultation Paper, we have concluded:

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2 *See* Marino and Bennett, "The Consequences of National Depositor Preference," *FDIC Banking Review* 12, no. 2, pp. 19-38 (Oct. 1999). In fact, the national depositor preference was likely an unintended consequence of changes to the Federal Deposit Insurance Act intended to enable the Federal Deposit Insurance Corporation (the "FDIC") to contribute positively to the government budget through an elevation of the FDIC's subrogation rights above general creditors. The statute, however, already had a provision that excluded deposits payable outside the U.S. from receiving U.S. deposit insurance, and therefore the elevation of "deposit liabilities" over general creditors, as interpreted by the FDIC, inadvertently created a preference in receivership or conservatorship for deposits payable inside the U.S. *See id;* Curtis, "The Status of Foreign Deposits Under the Federal Depositor-Preference Law," 21:2 *U. Pa. J. Int'l Econ. L.* 237-271 (2000).While there are possible statutory interpretations that could avoid the issues raised by the FSA, the FDIC chose not to adopt them following enactment of the statute. Nevertheless, ABASA and its members are pursuing certain statutory interpretations as part of our advocacy efforts to address the issues of concern to the FSA.

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- A solution to the issues arising from national depositor preference should be undertaken in a coordinated manner, at the level of international discussions among regulators and potentially legislators, and implementation of the Consultation Paper requirements should be delayed to pursue such cooperation appropriately;

- The source of the issue lies within U.S. statutes and U.S. statutory interpretation, is not within the control of the banks, and regulatory agency efforts (in cooperation with the banking industry) to effect change at a statutory or regulatory level should be exhausted before imposing significant consequences on banking institutions and their customers;

- Implementation of the Consultation Paper should also be coordinated with ongoing, previously existing reform efforts, such as the U.K. Government Draft Financial Services (Banking Reform) Bill (the "Draft Bill"), the Capital Requirements Directive IV ("CRD IV") and the U.S. Dodd-Frank Wall-Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), among others, and the Consultation Paper should have a timeline that is extended until there is more certainty regarding the outcome of these existing efforts;

- The vast majority of our customers are major international corporations who are sophisticated market participants, are already aware of national depositor preference, would be inconvenienced by the proposed changes and, in fact, would not prefer the alternative arrangements suggested by the Consultation Paper. "Retail" deposits represent a tiny fraction of total deposits at the U.K. branches;

- The disclosure timeline is unrealistic based on logistical challenges and potential customer confusion regarding possible solutions; and

- The alternative arrangements suggested by the Consultation Paper impose significant costs and complexities that are underestimated.

II. A Solution Requires Coordination Between U.S. and U.K. Authorities, in Concert with Efforts by Financial Companies

The FSA proposes to address the negative consequences of national depositor preference rules by "prohibiting" the taking of deposits in the U.K. unless the financial institutions do so solely through subsidiaries or through an "alternative arrangement" that ensures that U.K. branch depositors are no worse off than depositors in the home country. The potential disadvantage to U.K. depositors in branches of U.S. financial institutions is a product exclusively of U.S. law and statutory interpretation. As a consequence, we believe that the most direct and efficacious way to address this issue is through a statutory change or appropriate interpretation in the United States. We believe that the goals underlying the Consultation Paper may be best achieved by coordinating more directly with U.S. authorities to identify the optimal solution to the problems created by national depositor preference and to seek changes to the depositor preference provisions or interpretations, rather than employing financial institutions as negotiation intermediaries on this issue. We believe that this approach should be exhausted before mandating large changes to existing structures which may have unintended consequences.

In an effort to bring an expedited solution to the issue, ABASA and its members have begun a dialogue with U.S. regulators on the potential for a legislative change to the statute or an interpretation of certain statutory language. We have urged them to pursue one or more of these actions. However, ABASA and its members cannot make any of these changes alone; rather, this power is held by the legislators and regulators.

Unfortunately, we are not aware of recent cross-border coordination or discussions to seek solutions to these issues between the U.S. and U.K. regulators. We would urge you to work with U.S. regulators before finalizing U.K. regulatory requirements or imposing a solution or solutions that would require such fundamental changes to business and structure as the Consultation Paper. The proposed approaches suggested in the Consultation Paper focus on requiring structural changes or other alterations to the business operations of non-U.K. financial institutions, and act as penalties on such institutions and potentially on customers. The primary flaw in the approach is that it is addressed at "fixing" the deposits at the U.K. branches of international banking institutions, rather than fixing the legislation or statutory interpretation that are the root cause of the FSA's concerns. There also is the danger that the Consultation Paper's proposal could yield a multitude of patchwork solutions to the issue, without directly addressing the problem. Different financial institutions could respond to the proposal in different ways, which could have a variety of consequences for U.K. depositors and business operations in the U.K. The resulting array of responses may create confusion for customers and undercut the evident goals of the FSA.

In addition to not addressing the root cause of the issue, the unilateral issuance of the Consultation Paper, as well as the potential solutions suggested therein, have a strong potential to undermine international cooperation generally. The importance of international cooperation has been underscored by the financial crisis and by the new international requirements for so-called living wills. Improved cross-border cooperation will assist U.S. and U.K. financial institutions and resolution authorities in relevant jurisdictions in developing effective resolution strategies and plans, without significantly weakening the institutions through balkanization of operations and capital flows. The FDIC and the U.K. authorities have recently reiterated their commitment to cooperation both in the current environment and in times of significant strain on international financial institutions.[3]This cooperation on resolution planning for the largest financial firms is encouraging. However, we are concerned that, to our knowledge, there has been very little, if any, coordination and collaboration on the depositor preference issues. Ultimately, coordination is essential for resolution planning and for a solution to depositor preference concerns.

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[3] FDIC and Bank of England, "Resolving Globally Active, Systemically Important, Financial Institutions," Dec. 10, 2012 at www.bankofengland.co.uk/publications/Documents/news/2012/nr156.pdf. Paul Tucker, Deputy Governor of the Bank of England, also stated, at the December 10, 2012 meeting of the Systemic Resolution Advisory Committee, that "United Kingdom authorities are prepared in principle to stand back and let you execute a resolution of the massive US groups which have massive operations in the UK and to leave it to you to do it, without our stepping in and interfering and grabbing the subsidiaries or the branches or the assets of the businesses that are domiciled in the UK. This is a journey that involves trust. The trust that is based on the standards and foundations which we will continue to need to build. And I say that because we are going to need to build those foundations with countries around the world and where it's important therefore, that we together set an example." Deputy Governor Tucker's statements are in stark contrast to the potential ring-fencing that would likely occur (in the form of subsidiarization or otherwise) if a cooperative solution cannot be found to the issues raised by the Consultation Paper.

Uncoordinated responses to either set of issues will impair the efficiency of regulation, preclude an orderly resolution of financial institutions with cross border operations, and be detrimental to the objective of ensuring financial stability.

The FSA suggested several possible ways to address national depositor preference, none of which included a cooperative approach among regulators or governments. The FSA's proposed solution of subsidiarization is most troubling in this regard. Subsidiarization would simply reinforce some trends toward a less, rather than a more, coordinated strategy for cross-border bank failures. The Consultation Paper, in effect, proposes to impose one form of ring-fencing (potential subsidiarization) to fight another form of ring-fencing (national depositor preference). An alternative proposal, dual payability of U.K. deposits, also imposes operational complexity for any institution with a significant U.K. branch structure, imposes further burdens on customers and limits the advantages of cooperation by forcing depositors to seek their own claims across borders. ABASA and its members are strongly opposed to laws and rules that will reduce international cooperation, and are particularly concerned about the explicit and implicit negative impact on cooperation from the Consultation Paper.

To address these flaws, we believe amore direct and cooperative approach would be to initiate discussions with the FDIC, the U.S. Department of Treasury, and the Board of Governors of the Federal Reserve System with the goal of achieving appropriate changes to the operative statutory provisions and/or regulatory interpretations. One effective solution to the potential issues created for depositors in foreign branches of U.S. banks by the U.S. depositor preference framework could involve the adoption of a binding interpretation or regulation by the FDIC providing that "foreign deposits" qualify as "deposit liabilities" under depositor preference. The FDIC has clear statutory authority to interpret the term "deposit liability," as used in Section 11(d)(11) of the Federal Deposit Insurance Act (the "FDIA"),[4] to include all the deposits of a U.S. bank whether made and payable at domestic branches or foreign branches. Under U.S. law, such a determination by the FDIC would receive deference from U.S. courts and be the binding interpretation of the statutory term. As a result, it would be effective to prevent any subordination of foreign depositors in any future receivership by the FDIC.

To encourage this dialogue, ABASA and its members have met with these U.S. regulators to encourage them to reach out to the FSA to begin discussions toward a solution. Given the statement in the Consultation Paper that 80% of the deposits in U.K. branches of non-U.K. institutions are held by U.S. institutions, we suggest that the U.S. agencies should be a main focus of the FSA.

Also, to accomplish this goal, we would urge a delay in finalization of the recommendations in the Consultation Paper until the prospect for changes to the national depositor preference provisions have been evaluated with U.S. authorities. Unfortunately, the proposed timing of the two principle components of the Consultation Paper does not afford that opportunity to the members of ABASA, regardless of what bilateral discussions may have occurred. ABASA and its members are fully willing to engage in a cooperative initiative with

[4] 12 U.S.C. § 1821(d)(11).

authorities in both countries to pursue legislative or regulatory changes to address the issue more directly.[5]

III. Changes to the Deposit Framework in the U.K. Also Should be Coordinated with Other Regulatory Reforms

The Consultation Paper comes at a time of great regulatory changes globally. Before proceeding to implement the proposal in the Consultation Paper, it is important to understand how the proposals in the Consultation Paper will operate in conjunction with other financial reforms. This is particularly true in the context of reforms that will require changes in the structure of financial companies' operations. New proposals and rules are being introduced and debated simultaneously, and it is important to ensure that these changes are complementary rather than conflicting. The changes suggested by the Consultation Paper cannot be analyzed or effected in isolation, and must be considered within the broader fabric of regulatory initiatives that may require structural changes.

For example, in the U.K., the Draft Bill was just published in October 2012.[6] The Draft Bill itself does not mandate implementation until 2019. The Draft Bill would implement the recommendations of the Independent Commission on Banking to ring-fence retail banking operations by locating them in independent subsidiaries that must separately meet capital and other regulatory requirements. The Draft Bill in its current form will almost certainly differ from any final legislation. Thus, an understanding of which activities may be undertaken within ring-fenced banks, which activities are to be prohibited, and to whom ring-fencing applies, are all matters that have not yet been determined.

While the U.K. Government is in the process of passing legislation to ring-fence retail banking, the October 2012 Liikanen report[7] has recommended the ring-fencing of trading activities from the deposit-taking operations of banks operating in the EU. However, this report has not yet been turned into concrete legislative proposals by the European Commission. The impact of both the Draft Bill and the Liikanen proposals on foreign banks operating in the U.K. and in the EU through branches and others structures is far from fully understood.

Other regulatory and statutory initiatives that may have significant structural implications for the business and organization of our members, in the U.K. and in other jurisdictions, remain unresolved.[8] For example, CRD IV has not yet been adopted by the European Union and the

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5 ABASA and its members have been actively considering the pros and cons of various potential statutory amendments. We note that the U.K. Draft Bill endorses an insured depositor preference framework. In addition, as noted above, ABASA and its members have been considering potential statutory interpretations and similar non-legislative solutions.

6 *See*www.hm-treasury.gov.uk/d/icb_banking_reform_bill.pdf.

7 *See*http://ec.europa.eu/internal_market/bank/docs/high-level_expert_group/report_en.pdf.

8 In addition to these examples of "in-process" regulatory reforms that are likely to have structural impacts, we also note that the U.K. regulatory agencies are changing their structure; pursuant to the Financial Services Act 2012, most of the regulatory and supervisory powers of the FSA in relation to banks will be transferred to a new Prudential Regulation Authority (PRA) at the Bank of England from April 2013. These significant changes will be

FSA has stated that capital legislation in the U.K. will not be implemented in early 2013, as previously anticipated.[9]In the U.S., a prime example is Section 716 of the Dodd-Frank Act (the so-called "swaps push-out" rule), which is likely to require the transition of customer relationships among entities in order to comply with restrictions on conducting certain swaps in insured depository institutions. The so-called "Volcker Rule's" structural impact and final implementation timetable await the final publication of rules by the U.S. regulators. As you know, there are other potential structural considerations throughout the Dodd-Frank Act, including with regard to the crafting of viable and credible resolution plans, and the U.S. regulators also have not finalized the U.S. capital rules. Therefore, analysis of the most appropriate and efficient structure for operation cannot be completed without more information concerning the final form and deadlines for these and other rules.

Should the FSA wish to finalize the recommendations in the Consultation Paper, we believe that the timetables for all the structural proposals should be coordinated, both within the U.K. and internationally. The rules contemplated by the Consultation Paper are expected to be in place shortly after the close of the comment period, with full compliance required starting in January 2015. Given all of the other implementation and structural variables, we believe that less than two years is insufficient time to conduct the required review of business models and to implement the new infrastructure necessary for compliance. We suggest that more time is necessary and defining appropriate deadlines in coordination with the longer timelines of several other regulatory reform proposals, while coordinating with the industry and U.S. regulators, is critical. We believe this approach will provide the best way forward and allow for improved harmonization of timetables for structural reform.

IV. The Preferences of U.K. Branch Customers May Argue for Different Solutions

We believe that an important consideration in adopting any "alternative arrangements" to the national depositor preference scheme should be the preferences of the customers of U.S. banks with branches in the U.K.

Large corporate and institutional customers constitute an overwhelmingly predominant proportion of customers typically doing business with the branches of ABASA members in the U.K. Retail deposits represent a tiny fraction of the deposits of our members. Many of our U.S. members have reviewed the composition of the deposits in their U.K. branches, and retail deposits are on average less than 2% of identified deposits.[10]

In our experience, the institutional and corporate customers value the benefits of doing business with branches because branches are supported by the balance sheet and liquidity of the bank as a whole, thus enabling products and credit limits that would exceed those of a local

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supplemented by secondary legislation to be introduced later in 2013. *See* http://services.parliament.uk/bills/2010-12/financialservices.html.

9 *See* http://www.fsa.gov.uk/library/communication/statements/2012/crd-iv.shtml.

10 Even this number overstates the amount, because our estimates include the first $250,000 of each wholesale account as well.

subsidiary. Customers also generally consider a branch of the main bank to be safer and of higher creditworthiness than a local subsidiary. The branch is perceived to be part of a larger, more diversified balance sheet, with greater amounts of, and access to, capital and liquidity. Such customers benefit from being able to transact with one global entity, and more specifically appreciate the ability to enter into single global, multi-branch agreements that permit both deposit and withdrawal capabilities, and that allow the netting of exposures and collateral, throughout the branch network. Global cash management, global liquidity and global product availability and consistency are paramount objectives for multinational clients that desire transacting with multinational banking institutions. These efficiencies and product offerings cannot be replicated with subsidiary structures.[11]

We are aware of no information that allows us to conclude that these customers prefer a change in their current relationship with the U.K. branches of our member banks. Since a large portion of the wholesale customer base is made up of non-U.K.-based multinational organizations, they are considered more "mobile" in terms of their international financial relationships, and therefore more likely to express their preferences by moving their business to other institutions and other geographies. Yet, we have not seen customers terminate their relationships with U.S. banks over the issue of national depositor preference. Furthermore, the various approaches outlined in the Consultation Paper will all lead to increased costs for our member institutions that are likely to be passed on to customers. In view of the expressed desire to conduct business with our branches, rather than separate subsidiaries, we have seen no evidence that customers would prefer to pay more for the elimination of national depositor preference.

Consequently, different approaches to protect wholesale and retail customers may be appropriate in any final FSA rule. This would complement the goals and recommendations of the U.K. Independent Commission on Banking on the segregation and separate treatment of the retail and wholesale operations of U.K. banks. For example, providing greater flexibility to wholesale customers of our member banks to continue without requiring insolvency treatment equivalent to U.S. depositors may be appropriate in light of their sophistication and expressed desire to transact with the global bank, whereas it may not be appropriate for retail customers. In this context, a notice-based approach for wholesale customers may suffice to ensure they understand and have accepted the advantages and disadvantages of current arrangements.

We would welcome a more nuanced approach to the FSA's concerns about national depositor preference. To this end, we suggest the commencement of discussions between the FSA and the banking industry on potentially addressing any issues for retail depositors separately. Retail customers are likely less aware of national depositor preference, but do not need services such as global cash management, liquidity management, global custody arrangements or payments. More broadly, we would respectfully urge the FSA to work with the industry to consider the composition of the customer base of the U.K. branches of non-U.K.

[11] For many of the same reasons cited above, sovereigns and their dependent agencies also often express a preference to transact with the branch network rather than a series of local subsidiaries.

banks and assess whether the proposed changes are consistent with the preferences of this customer base.[12]

V. The Disclosure Requirements Cannot be Achieved in the Three-Month Timeline Proposed and Should Be Met Through Simple Notices to Customers

The disclosure requirements create cumbersome and time-consuming approaches to informing depositors of the risks of national depositor preference. The Consultation Paper requires that branches "include information on their national depositor preference regimes in all contracts with new deposit customers" and that "[e]xisting customers should have their contracts governing their deposits replaced with new contracts that contain" similar information. We see no reason why negotiations over contracts and other transactional relationships would need to be "re-opened" in order to disclose this information to customers. Providing customers opportunities to renegotiate previously agreed upon terms would only serve to disadvantage the branches through costly negotiations and the potential departure of customers over unrelated terms.

Moreover, the Consultation Paper's implied requirement of positive contractual consent by each customer is not feasible in the timeframe set forth in the Consultation Paper. The Consultation Paper proposes a 90-day window to send disclosures following finalization of the rule. Positive consent from thousands of account-holders over a three-month timeframe is neither practicable nor practical. Any required FSA approval of such disclosures[13] would further delay the process, especially if approval requests from numerous banks lead to an administrative bottleneck that postpones delivery.

Rather than the suggested approach, we support a simplified, streamlined course of action based on notification and, at most, negative consent. Targeted and clear notice to customers should suffice, as there will be no real change to the contract, and notification will serve merely to highlight and clarify existing law. Depositors who wish to move their deposits elsewhere based on such notice could still do so without needing to re-open all contracts. This less costly, more efficient process would be to the advantage of the FSA, financial institutions, and their customers.

Industry and the FSA would also benefit from conceptual guidelines from the FSA to clarify expectations for disclosure content and form. Disclosure guidance, rather than FSA approval of every disclosure, would help to accelerate the timetable for customer disclosure and avoid administrative bottlenecks. However, the structure and form of bank relationships with customers vary on an institutional basis, and banks should therefore have the freedom to draft and execute disclosures to customers based on existing networks, infrastructure and customer relationships.

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[12] There are other reasons why a more nuanced approach to different types of depositors is critical and deserving of more consideration in the context of the overall goals of the Consultation Paper. As just one example, we would not think that inter-affiliate depositors would need to be covered by this proposal, but the Consultation Paper does not provide guidance on such considerations.

[13] *See* Consultation Paper at §4.5.

Furthermore, we would urge an extended compliance date for disclosures. A delay in the notice requirements would assist in avoiding customer confusion while a cooperative solution is sought for the FSA's concerns about national depositor preference. Given that the Consultation Paper requires some arrangement to be implemented by banks, customers will likely understand that this notice is not merely a formality, but is the prelude to potentially significant structural changes. Our member banks believe that it is highly likely that customers will clamor to understand the final approach to be taken by each bank, and may withdraw or reduce business, not because of the national depositor preference, but because of the ambiguity surrounding the final solution for their deposits. For these reasons, we believe that the disclosure should be delayed until the solutions developed through U.S., U.K. and industry coordination are more evident.[14]

VI. The Alternative Arrangements Suggested by the Consultation Paper Impose Significant Costs, Complexities and Inefficiencies and are Otherwise Not Workable

Although the Consultation Paper does not suggest increased international coordination, it does suggest other "alternative arrangements" that may satisfy the FSA that U.K. depositors are being treated on par with home country depositors. Unfortunately, all of these arrangements introduce substantial additional costs, create impediments to cooperation, divert attention from solutions targeted at the root cause and ultimately impair the efficient operation of the financial system.

Subsidiarization is the most problematic of the suggested options. It is worth reviewing the many drawbacks that were not identified in the Consultation Paper. In addition to ignoring the overwhelming customer preference for branches, this solution would impose significant costs on banking institutions and international capital and liquidity allocation. Separate subsidiaries inherently require separate capital and liquidity resources that cannot easily be deployed to address credit needs or even provide resiliency to the financial company during crises. Furthermore, separate subsidiaries require redundant corporate governance structures as well as separate infrastructure and operational platforms. This inefficient allocation of capital and liquidity traps resources that could otherwise be used to increase economic growth.[15]Furthermore, forced subsidiarization is inconsistent with international calls for additional cooperation and could potentially create an unwarranted precedent that ring-fencing and non-cooperation in a resolution are acceptable solutions in other jurisdictions. Lastly, subsidiarization would add several new U.K. banks that would further increase the aggregate size

[14] On the other hand, an alternate solution could be to implement the Consultation Paper through the disclosure notice only, and not require the structural changes to U.S. banks or to customers' accounts at U.S. banks. This solution would allow customers to decide for themselves the value of maintaining their banking relationship in the face of their treatment in the waterfall of creditors in a bank insolvency. Our members do not understand why there would need to be a rush to a structural change, or any structural change at all, if a notified customer either terminates its relationship with the bank because of the notice or, in fact, makes the choice to not terminate its relationship with the bank after receiving the notice.

[15] We also note that subsidiarization is overbroad in its attempt to address a deposit issue. It is not likely that only deposits will be moved to a subsidiary and other assets and liabilities will remain at the branch. This would then mean that all customer relationships would have to be assigned to a new entity merely to address an international governmental issue regarding deposits.

of local institutions to the UK economy. Without the capital and balance sheet of the larger international bank, however, subsidiarization will significantly decrease competition in an already highly concentrated U.K. market.[16]

Dual payability, which the FSA has identified as the expected choice for U.S. institutions, has significant drawbacks as well, and should not be assumed to be a simple change. The operational and technological costs associated with deposits payable in two countries are enormous. While we appreciate the cost evaluations contained in the Consultation Paper, detailed analysis by our members indicates that these estimates dramatically understate the true costs. The banks likely will need to modify their internal systems to separately identify time and demand deposits (for purposes of reserve requirements), and to avoid the potential for double payment of deposits by the bank or, in the event of a failure, of deposit insurance in the U.S. and in the U.K. Systems changes would also be required to address the payment of deposits in multiple currencies.

Issues similar to our concerns about disclosure would also arise as the branches may need to seek positive consent from account holders, or otherwise undertake actions necessary to satisfy contractual requirements and effect such change, depending upon each institution's agreements with customers. Finally, the operational and other issues that this could create for the FDIC and for the FSA have not been explored, nor has this approach been considered in the recovery and resolution planning processes in either country. The option of dual payability can lead to additional regulatory costs that would likely be passed on to customers.[17]It is also highly likely that putting in place dual payability arrangements will confuse customers as to its true intent. To provide customers with dual payability to address an arcane issue in the U.S. statute will not be simple to explain or to understand, and its benefits may be unclear to customers. On the contrary, it is fully expected that many customers will object to dual payability for unrelated reasons, such as potential international tax implications, subjecting transactions in the account to the jurisdiction of the U.S. government and other issues. Given these systems and policy issues, imposing dual payability would increase costs for customers and potentially for regulators. Therefore, at the least, this solution would benefit from international discussion and coordination.

The Consultation Paper also suggests a trust ring-fence structure as a possibility. Yet, there are few or no details about the assets or amounts that would be acceptable to the FSA. Without such details, it is not possible to calculate the costs of such a structure or to comment effectively on this structure. For example, the maintenance of a significant ratio of pledged

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[16] *See, e.g.,* John Fingleton, CEO, U.K. Office of Fair Trading, "Competition in U.K. Banking," Feb. 16, 2012 at www.oft.gov.uk/shared_oft/speeches/2012/speech0212.pdf.

[17] Under U.S. regulations, deposits also payable at a branch in the United States would be covered by U.S. deposit insurance up to the deposit insurance limit (currently $250,000). Additionally, such deposits are subject to U.S. reserve requirements, which currently impose a required reserve amount for deposits that are "demand" deposits with immediate withdrawal capabilities (but not "time" deposits or other deposits without such immediacy). Given the low amount of insurance coverage relative to a wholesale depositor's funds, customers don't value the receipt of insurance, and they have often expressed desires to not incur additional costs related to operating their accounts.

assets to total deposits could be even more costly and trap more capital and liquidity than the subsidiarization structure.

VII. Conclusion

London is one of the preeminent global financial centers. Our members value its central role in the global markets. Certainly, London is playing a critical role in rethinking the manner in which governments should protect the safety and soundness of their financial institutions, the stability of their economy and the wealth of their citizens. One clear lesson of the financial crisis is that any future crises will cross national boundaries and require coordinated and cooperative solutions. U.K. authorities have led the way in seeking cooperative approaches to addressing these issues and have strongly supported the focused attention of international standard setters, such as the Financial Stability Board, towards a more coordinated cross-border approach to crisis management.

We hope that the FSA will consider the potential that the recommendations in the Consultation Paper will lead to less, not more, coordination, that the alternatives are not attractive to the overwhelming majority of depositors that are targeted, and that the possibility of requiring adoption of any of the alternative approaches may negatively impact the conduct of business in London. Implementations of the recommendations could, at the very least, increase the costs to customers and reduce competition in the U.K. marketplace, while reducing the access to credit that underlies economic activity. We acknowledge that the U.S. national depositor preference statute has been in place for nearly 20 years and we are cognizant of the challenges of a statutory change. Nevertheless, we believe that a final cooperative effort to effect such change should be undertaken before resorting to non-cooperative and costly structural modifications. We would like to work closely with the FSA to achieve the goals of the Consultation Paper through changes to the statutory provisions, or to the regulatory interpretations of such provisions, requiring national depositor preference and thereby avoid these potential costs to all.

We urge the FSA to take additional time to consider these issues, work with the industry and U.S. regulators towards a more complete solution, and delay the implementation of the Consultation Paper's requirements and the disclosure and structural modification deadlines. While ABASA is grateful for the extension of the consultation period, it is far more important that these implementation deadlines be extended given the concerns expressed in this letter. As always, we would be willing to participate in any meetings or discussions that the FSA may find conducive to reaching an appropriate cooperative, coordinated and efficient solution to this issue.

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ABASA appreciates the opportunity to react and comment on the Proposal, and is hopeful that a more cooperative and negotiated solution can be found on this issue. Should you have any comments or questions, please feel free to contact Cecelia Calaby at (202) 663-5325.

Sincerely yours,

Cecelia Calaby
Executive Director and General Counsel
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cc: Ian Tower, Head of Overseas Banks Department, FSA

Cyrus Amir-Mokri, U.S. Department of Treasury

Art Murton, Federal Deposit Insurance Corporation

Barbara J. Bouchard, Board of Governors of the Federal Reserve System

Daniel Stipano, Office of the Comptroller of the Currency