



Perbadanan Insurans Deposit Malaysia
Malaysia Deposit Insurance Corporation

**RESPONSE ON THE CONSULTATION PAPER ON
PROPOSALS TO ACHIEVE CONFIRMATION OF
“ENFORCEABILITY
OF CLOSE-OUT NETTING IN MALAYSIA UNDER THE MALAYSIA
DEPOSIT INSURANCE CORPORATION ACT 2005”**

Background

On 23 July 2007, Perbadanan Insurans Deposit Malaysia (“PIDM” or “the Corporation”) issued a Consultation Paper on Proposals To Achieve Confirmation Of “Enforceability Of Close-Out Netting In Malaysia Under The Malaysia Deposit Insurance Corporation Act 2005” to interested parties.

Written comments were invited from interested parties on the issues raised in the Consultation Paper, including the draft Malaysia Deposit Insurance Corporation (Financial Agreements or Transactions) Regulations 2007 (“the draft Regulations”) and the policy statement on Consent To The Mutual Set-Off Of Amounts Due And Payable Under Outstanding Transactions Under Any Eligible Financial Agreements Or Transactions Between An ‘Affected Person’ And Any Other Party (“draft Policy Statement”).

PIDM wishes to thank the respondents for their written comments on the Consultation Paper.

Comments from the respondents were centred on the draft Policy Statement, in particular, paragraph 6 on page 18 thereof.

A. POLICY STATEMENT

Paragraph 6 of the draft Policy Statement:

The Corporation reserves its right to affirm or repudiate any of the eligible Financial Agreements or Transactions within a reasonable time after the appointment of the conservator if the Corporation determines that such affirmation, disaffirmance or repudiation will promote the orderly administration of the affected person's affairs.

Comments Received

In general, the respondents have suggested for the deletion of paragraph 6 of the draft Policy Statement as it creates uncertainty about the status of or the enforceability of close-out netting provisions with respect to the eligible Financial Agreements or Transactions.

Alternatively, the respondents have further suggested that if deletion of the said paragraph 6 was not possible, the “reasonable time” within which PIDM will affirm, disaffirm or repudiate the eligible Financial Agreements or Transactions should be limited to one (1) week (or at most ten (10) days) after the appointment of the conservator.

Another respondent has suggested that paragraph 6 should be deleted, as the reference to a “reasonable time” would dissuade foreign counterparties from entering into transactions where there will be uncertainty.

PIDM's response

1. It is only after receipt of the relevant records and documents, would the conservator be in a position to determine if the affected person has entered into an eligible Financial Agreement or Transaction and if so, only then would the Corporation be able to determine whether there is a need to exercise its powers to affirm or disaffirm or repudiate the contract in question to promote the orderly administration of the affected person's affairs.
2. Pursuant to the Third Schedule of the Malaysia Deposit Insurance Corporation Act 2005, the affected person's employees are required to deliver to the conservator the relevant records or other documents of the affected person within seven (7) days after the conservator's appointment.
3. In practice, it would be difficult to revert within ten (10) days as suggested, for the following reasons. First, the appropriate processes to appoint a special administrator would need to be undertaken. The conservator in turn would need to carry out certain processes (e.g. notification of its appointment) before carrying out their duties. Second, in practice, despite the requirements of law, the conservator would not be able to quickly secure relevant documents and information from the officers of the company under administration.
4. In view of the comments received, and since the issuance of the Policy Statement is to help enable Malaysia achieve a “netting friendly jurisdiction” status, PIDM will postpone the issuance of the Policy Statement pending further consideration of the matter.
5. PIDM will, however, proceed with the necessary to gazette the Regulations referred to in the Consultation Paper, as there are no concerns or issues raised in relation thereto. As noted in paragraph 3.2 of the Consultation Paper, PIDM will, at a later stage, look into reserving certain powers under the Malaysia Deposit Insurance Corporation Act 2005 in relation to eligible Financial Agreements or Transactions.