DTCC
Securing Today. Shaping Tomorrow.

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Via email
Financial Stability Board
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Re: FSB Consultation on Guidance on Continuity of Access to Financial Market Infrastructures ("FMIs") for a Firm in Resolution

Ladies and Gentlemen:

The Depository Trust & Clearing Corporation ("**DTCC**") appreciates the opportunity to respond to the consultative document prepared by the Financial Stability Board ("**FSB**") entitled *Guidance on Continuity of Access to Financial Market Infrastructures ("FMIs") for a Firm in Resolution* (the "**Consultation Paper**"). The Consultation Paper builds on the FSB's earlier guidance regarding effective resolution regimes (referred to as the "**Key Attributes**"),[1] and focuses on the means to ensure continued access of systemically important firms to the FMIs in which they participate, as a key element to enable the firms to be able to continue providing their critical services and be resolved in an orderly manner, while minimizing the systemic impact of such events. We fully support the goals which the guidance seeks to achieve, and hope that our views will be taken into consideration when finalizing this guidance.

Introduction

DTCC is the parent company of National Securities Clearing Corporation ("**NSCC**") and Fixed Income Clearing Corporation ("**FICC**"), the U.S. cash market securities CCPs, as well as of The Depository Trust Company, the U.S. central securities depository ("**DTC**", and collectively with NSCC and FICC, referred to as the "**DTCC Entities**"). NSCC and FICC provide clearing and settlement services for multiple asset classes, including U.S. equities, corporate and municipal bonds, and government and mortgage-backed securities. DTC is the world's largest central securities depository and a registered clearing agency for the book-entry settlement of securities transactions for eligible securities and other financial assets. Collectively, the DTCC Entities provide the key infrastructure for the settlement of U.S. securities market transactions.

[1] Financial Stability Board, Key Attributes of Effective Resolution Regimes for Financial Institutions (Oct. 15, 2014), a*vailable at* http://www.financialstabilityboard.org/wp-content/uploads/R_141015.pdf.

The Consultation Paper is arranged in three sections, addressing proposed guidance on the arrangements required first, at the level of providers of critical FMI services, next at the level of the firms themselves and, finally, at the level of the relevant authorities of the firms and providers of critical FMI services. We respond below by focusing on each of these three areas in turn.

Executive Summary

DTCC understands the concerns raised in the Consultation Paper and the tensions it reflects between the financial stability objectives of the FMIs and their supervisors on the one hand, and the firms and their supervisory and resolution authorities on the other. We are committed to working with distressed SIFIs and their resolution authorities to facilitate orderly resolutions and limit the likelihood of systemic disruption to the global financial system. We think the best way to address these inherent tensions and facilitate continued access is for:

- FMIs to have sufficient tools and rights in their rulebooks to enable them to take prompt action and provide continued access, if appropriate, with sufficient safeguards. FMIs need to be able to exercise their judgment as to those tools that best address the particular facts involved in a given resolution situation.

For the reasons discussed more fully below, we do not believe it necessary or appropriate for FMIs to enumerate the actions they will take with granular specificity, but rather their rules and procedures should clearly provide the rights and tools they have, and thus the range or type of actions and protections that the FMI may take or apply to address a stress situation.

We agree that transparency is important and given that FMI rules are public, we agree that FMIs should work with their participants to facilitate their understanding of the *range* of risk management actions that FMIs may take.

- In order for FMIs to reach a considered and timely decision on what the appropriate actions to take and safeguards required, they will need comprehensive information.

- While firms seek to require FMIs to provide more transparency and specificity on the actions they will take should a participant firm enter resolution, firms themselves need to be more transparent with FMIs on how their plans, capital structure and liquidity arrangements can support their ability to perform their obligations to FMIs in a resolution event.

- Resolution and supervisory authorities have a key role in ensuring that FMIs receive the necessary information because much of the relevant facts and considerations will depend on what actions and approaches the resolution authority plans to take first, in stabilizing, and then in ultimately resolving the distressed firm going forward.[2]

- We believe that cooperation and advance planning are key and, accordingly, that the final guidance needs to provide more emphasis on the cooperation that resolution

[2] In a resolution event it is not clear that firms themselves will be best positioned to timely provide the relevant information because it is likely that there will be significant management turnover.

authorities are expected to have (i) with firm and FMI supervisors, and (ii) with the FMIs themselves.

We would ask that the final guidance emphasize the importance of resolution authorities working with FMIs in advance to understand the conditions, documentation and other actions that FMIs may expect of them over a "resolution weekend". Working with FMIs in advance should facilitate continued access and serve to level set expectations where practicable.

I. Continuity of access arrangements at the level of the provider of critical FMI services

The first part of the proposed guidance focuses on providers of critical FMI services. It directs them to take appropriate steps to consider and plan for the interaction between the resolution regimes of their participants and their own risk management framework, so as to clarify the actions they may take in a resolution scenario to support firms and their resolution and supervisory authorities.

Definitions and Scope. A key to understanding the proposed guidance and its implications understanding the scope of its intended application. The Consultation Paper refers to "firms" throughout, a term that is used sometimes interchangeably with "FMI participant"; it is defined as an entity with direct access to FMI services (that is, a direct participant), or with indirect access to an FMI through an FMI intermediary (e.g. a customer).[3] These are generic terms and are used, and generally understood, in the industry as encompassing *all* of an FMI's direct and indirect participants. Thus their use could imply a broad expansion of the continuity of access expectations and/or requirements imposed on FMIs from those addressed in the Key Attributes. However, the Consultative Report goes on to note that, the definition "covers those FMI participants or firms for which recovery and resolution planning is required under the Key Attributes." This is a subtle point: the scope of the Key Attributes is generally intended to cover global systemically important financial institutions ("G-SIBs"), so we understand that the expectations and requirements proposed in the Consultative Report would be limited to those G- SIB entities. Nevertheless, for the avoidance of doubt we would ask that the final guidance be more transparent as to those "firms" intended to be within its scope.[4]

Equally important, the Consultative Report adds a new concept: Rather than focusing solely on services provided by FMIs to their direct participants, it sets forth guidance and expectations for "providers of critical FMI services." "Critical FMI services" are defined to include clearing, payment, securities settlement and custody activities, functions or services for which a lack of continuity would prevent the distressed firm from providing its critical functions to its customers; it is intended to include those activities or services that are ancillary to the clearing, payment, etc. services, "but whose on-going performance is necessary to enable the continuation of the clearing, payment, securities settlement or custody." Such services may be provided directly by the FMI or custodian to a participant (referred to as direct access), or by an FMI intermediary that itself has direct or indirect access to an FMI through one or more other entities or firms ("indirect access").

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[3] Consultation Paper, Definition of key terms.

[4] This clarification is important because the definition of "resolution" contained in the Consultation Paper includes the exercise of resolution powers by "any resolution authority". . . *See*, Definition of key terms at 11. We note that the term "resolution" may have different, or broader, meanings in different jurisdictions and may cover a broader range of financial institutions.

We believe it is helpful to include indirect and third party providers of critical FMI services within the scope of the guidance, but we recognize the significant differences between the relationship of an FMI and its direct participants which is governed by a public rulebook and guiding principles, from what is essentially a bilateral commercial relationship between privately contracting parties. In this regard we believe it would be helpful for the final guidance to provide more clarity on the types of ancillary services sought to be captured within the definition, especially when used in conjunction with the term "FMI intermediary". In particular, it would be helpful to understand whether settling or nostro banks are intended to be included as FMI intermediaries. They may not, per se, provide indirect access to clearing, settlement or payment services, but rather are the vehicles through which both direct, and indirect, participants satisfy their payment obligations. We believe that it would be beneficial for firms to have greater clarity on the terms and conditions that would apply in such bilateral relationships in a resolution event, to the extent practicable. Further, FMIs would benefit from having transparency and understanding as to how ancillary relationships are likely to be affected in a resolution event when determining what risk management actions will suffice to provide the FMI and its participants with adequate safeguards so as to facilitate continued access.

FMI access. The Consultation Paper proposes that entry into resolution should not, by itself, constitute an event under the rules of the FMI (or the contractual arrangements of an FMI intermediary) that would enable the FMI or FMI intermediary to terminate or suspend access to critical FMI services, provided that payment and other obligations continue to be met. DTCC agrees that FMI rulebooks and procedures should contain provisions that can facilitate the continued access of systemically important firms. Towards this end, FMIs should have provisions that:

- Enable the FMI to understand and evaluate the situation and risks if a participant firm, or its parent or affiliate, becomes subject to a resolution event;
- Address the range of actions that the FMI may take to address the situation, including its suite of risk management tools and other actions that could provide safeguards to mitigate the risk of continued access; and
- Provide mechanisms for membership admission or transfers that can facilitate resolution authority actions under a number of different scenarios.

We understand that ensuring continued access to FMIs during resolution scenarios is a key policy objective of the FSB, and we believe that preserving the ability of an FMI to exercise its full range of risk-management rights is essential to enabling continued access while reducing systemic risk. Alternatively, prohibiting or impeding these actions could undermine the ability of an FMI to mitigate the risk related to the firm in resolution and thus prevent such risks from spreading to the FMI's other participants and the broader market. FMI rulebooks, as the FSB recognizes, generally contain a degree of discretion and flexibility. This is appropriate and key to facilitate effective outcomes for continued access.

Moreover, unlike other counterparties who, following a firm's entry into resolution and during pendency of any stay, are not obliged to continue to engage in new or additional transactions with a distressed firm, FMIs will generally be obliged to continue to accept and process new transactions from an entity as long as that entity is provided ongoing access. This means that the risks faced by the FMI will be dynamic and changing depending upon the nature, volume and risk profile of the transactions presented. For these reasons it is acutely important that the concept of "adequate safeguards" recognized in the Key Attributes in order for FMIs to provide continued access is understood as including the FMI's rights and tools to address dynamically the facts and situations they are presented with.

We believe that FMIs may address the planning and transparency expectations of firms and their relevant authorities in a number of ways, and that it is not necessary to require that FMIs have standardized rulebook approaches or provisions.[5] Rather the goal should be to ensure that FMIs have the needed flexibility in their rules and procedures to address a myriad of circumstances that will vary depending on the resolution scenario (e.g., ssingle point of entry ("SPOE"), multiple point of entry ("MPOE"), etc.) and the facts that precipitated it. The approach will likely differ across different types of FMIs, and even perhaps across different markets or asset classes served by FMIs, given that the challenges FMIs face differ materially. For example, some types of FMIs, particularly payment systems, may face same day risk that may be mitigated on an ongoing basis by prepayment or other protective measures. CCPs, however, are subject to multiple day exposure and their risk will vary dynamically from the point of trade acceptance through settlement; this includes potential future actions of others, such as settling or clearing banks that facilitate payment of margin and settlement funds over a multiday time horizon, that affect the FMI's ability to provide continued access.[6]

So, while we acknowledge that the key factor in providing continued access to a firm in resolution is that it continues to meet its payment obligations, this should not be the only consideration that factors into an FMI's decision on whether to continue to permit access to its services. Factors such as operational capacity and controls, continued viability of the legal entity that is the FMI participant, and the likely interaction of the participant with its critical ancillary service providers are also key considerations that need to be factored into their decision making process. Firms and resolution authorities need to be cognizant of the FMIs' valid concerns as to the likely impact on participants and the broader market should resolution ultimately prove unsuccessful; FMIs should not be prejudiced by a deterioration of their position viz-a-viz other creditors should their continued provision of services ultimately result in a financial default.

A key factor in facilitating an FMI's timely evaluation of a resolution situation is information. This encompasses not only an understanding of the broad resolution strategy (top of the house or below), but also:

[5] We are skeptical that standardized clauses, for example, limiting FMI termination rights "solely" as a result of a firm's entry into resolution would be readily workable. While we agree that decisions to terminate a firm's access should not be automatic in a resolution event, as discussed below, FMIs need the ability to evaluate the totality of the facts and circumstances and the effectiveness of relevant risk mitigants when considering whether, and how, to provide a firm with continuing access. In other words, the safe and orderly operation of an FMI should not be compromised by providing a firm with continuing access. Applicable law including temporary stays and limitations, which may vary depending on the resolution scenario and resolution authority, will of course also factor into the analysis and decision. Further, consistency of rights of members, and the FMI vis-à-vis its members, is an important feature of the FMI structure; so having special rules for systemically important participants may be perceived as discriminatory and possibly favoring large firms at the risk of smaller firms. For similar reasons, while we agree that FMI rules should not per se discriminate between domestic and foreign participants, FMIs will nevertheless need to carefully evaluate a given resolution event, including the applicable resolution regime and whether the regime's safeguards that would apply in the event fully protect the FMI.

[6] Given that firms are acting in commercial capacities when providing such services, their contractual requirements and expectations, even if transparent to FMIs, may or may not be sufficient for FMIs to guide their own actions. For example, if a settling bank agrees to continue to provide cash payment services so long as obligations are fully pre-funded by a specified time in advance of the bank's daily required performance, that may not provide sufficient comfort and protection to a CCP who takes in transactions on transaction date, but can find on settlement date - some days later, that the firm's settlement will not occur as the prefunding has not been done.

- the factors that precipitated the resolution event and in what entity or entities they occurred,
- how or whether such issues have been mitigated,
- the proposed transactions sought to be processed by the FMI participant during the stabilization phase and following, and
- the arrangements, including liquidity, capital and key personnel plans, for ensuring ongoing performance of both existing and future obligations.

As discussed in the following sections below, we believe that both firms and their resolution authorities play an important role in ensuring that FMIs are provided with the types of information that will facilitate their analysis and decision making process in a timely manner.

Given the concerns outlined above, and the firms' desire for more transparency from FMIs, we fully support the approach outlined in the Consultation Paper that FMIs should work with their participants to facilitate their understanding of the *range* of risk management actions that FMIs may take. FMI rules are public, and as a general matter participants are expected to review and be familiar with them, given that they form the contractual basis for their membership both in BAU and during times of stress. Changes to these rules typically involve a public consultation or approval process, with stakeholders having an opportunity to comment and provide feedback. Nevertheless, we appreciate that working with firms as part of their resolution planning process, whether as part of industry working groups or on a bilateral one-to-one basis, helps to foster an awareness and understanding of rules-based actions an FMI may take in response to a firm's entering resolution, together with the range of FMI risk management mitigants and how they might be applied to address different scenarios. Over the past several years the DTCC Entities have, in fact, devoted significant time and resources to discussions with their SIFI participants, both bilaterally and as part of industry and working group projects, to foster transparency and understanding on how to facilitate continued access to their services in distress situations.

Finally, we believe that authorities should be cautious in assigning—whether implicitly or explicitly - FMIs with the responsibility for understanding the systemic implication that their actions may have during a distress situation on the participant firm's affiliate or other customers, or on the marketplace as a whole, particularly where the FMI does not have a full ex ante understanding of the resolution authority's intended actions. Moreover, many FMIs do not have insight into the entire relevant market, or fully into the participant firm's affiliates or other customers. This is particularly true in the U. S. cash markets, where in-flight transactions are not deemed client transactions until settlement, segregation is maintained on the books of the broker-dealer, and transactions are risk managed at the FMI on an omnibus basis. In an effort to resolve the inherent tensions between FMIs and their membership, on the one hand, and resolution and supervisory authorities, on the other, the guidance should not impose a responsibility or liability on the FMIs for the potential knock-on effects of their actions or, as in the case of continued access, "inactions". Regulatory authorities should be more transparent about their intended actions and role in such a process.

II. Expectations and requirements applicable to firms

This section of the paper outlines the expectations and requirements for firms in planning how they would maintain continuity of access to providers of critical FMI services. This includes the expectation that firms should engage with providers of critical FMI services to understand how they are likely to respond during the runway to resolution and under different resolution scenarios, assessing the nature and likely extent of additional requirements. The FSB notes that firm contingency plans should also address operational governance and communications

arrangements, including the human resources that would be deployed to operationalize the plan during and after resolution. In addition, the paper focuses on contingency planning to meet liquidity requirements. This is likely to be a key, if not the most significant, factor in evaluating the ability of a firm to continue performing its obligations to an FMI during a resolution event.
DTCC fully supports these recommendations. We suggest, however, that the final guidance also address the importance of firms providing transparency and cooperating in this planning with the providers of critical FMI services themselves. That is, while much of the paper focuses on the need for FMIs to be more transparent to firms, we believe the reciprocal emphasis on firms being more transparent to FMIs about their resolution strategies, assumptions and contingency arrangements is equally important. To the extent that providers of critical FMI services must make a considered analysis of the risks they face by continuing to provide access to their services, their ability to realistically do so is significantly or largely dependent upon the timeliness and quality of information they are provided in the planning stages and in the actual event by both the firms themselves and their resolution authorities. We commend the FSB for the discussion of information requirements, including the Annex outlining basic standardized information the firms should be expected to maintain and provide their relevant authorities.

The final guidance should make clear that it is the responsibility of the firm (together with its resolution authority) to determine which FMI services are critical to the ability of the firm to perform its critical functions to its customers, and to so notify the relevant providers of FMI services to level set expectations. Second, to the extent practicable, firms should provide FMIs with transparency regarding ancillary service providers whose services are critical to the ongoing performance of the firm's obligations to the FMI, and the relevant contractual arrangements that would apply in a resolution scenario. As noted above, we believe this information is key to evaluating the third-party risks that may arise by virtue of providing continuing access. Third, firms should provide more information to FMIs about their strategies, assumptions and contingency arrangements. Bare-bone indicia of an SPOE or MPOE strategy is not, in and of itself, sufficient. We appreciate the sensitivity of much of this information, but under their rules FMIs have rights to seek significant information from their participants necessary to properly evaluate the risks they present. Such rules typically impose obligations on the FMIs to maintain sensitive information as confidential. We believe these protections should properly extend to the provision of such resolution planning information.

III. Cooperation among authorities regarding continuity of access to critical FMI services

This section of the paper focuses on the roles and expectations for cooperation among regulatory authorities regarding continuity of access to critical FMI services. This includes the supervisory authorities for firms, the supervisors of the providers of critical FMI services, and the relevant resolution authorities. The focus of this section is entirely on cooperation among these regulatory bodies, and the need to balance their different objectives as a means to address and balance the competing risks. The Consultation Paper provides that the authorities should seek, to the extent possible, to consider the competing objectives as part of resolution planning. Among the recommendations are periodic discussions between the relevant authorities on matters affecting continuity of access, including the preferred resolution strategy, the respective roles the various authorities would be expected to play in the run up to and during resolution, and why access to the applicable FMI's service is critical to the resolution plan.

The proposed guidance also recommends that the resolution and supervisory authorities should have appropriate information sharing arrangements in place along with the relevant authorities for providers of critical FMI services, and that they should seek to give each other as much

advance notice as possible about intended actions and possible risks regarding maintaining continuity of access. The Consultation Paper provides that "[r]esolution authorities should seek to agree in advance with the relevant FMI authorities what information to share and how that information maybe shared with the provider of critical FMI services or other stakeholders both in the lead-up to, and during, resolution."

We are fully supportive of these recommendations and believe they're important cornerstones to facilitating continued access to FMIs. We believe it would be helpful for this section of the Consultation Paper to more clearly address the important role resolution and supervisory authorities have in ensuring that FMIs receive full and timely information to enable them to evaluate the risks and appropriate safeguards they will require to continue to provide access to a firm that has entered into resolution. This is important because in a resolution event it is likely that there will be significant firm management turnover (and so it is not always clear that firms themselves will be best positioned to timely provide the relevant information), and also because the relevant facts and considerations will depend on what actions and approaches the resolution authority plans to take first, in stabilizing, and then in ultimately resolving the distressed firm going forward. FMIs will need to have an understanding of the steps and actions authorities will or plan to take, and how they anticipate carrying on or conducting the business of the affected member, both from an operational perspective and from a risk tolerance perspective. For this reason, cooperation and advance planning is key. We believe the final guidance should thus provide more emphasis on the cooperation that resolution authorities are expected to have (i) with firm and FMI supervisors, and (ii) with the FMIs themselves.

Finally, we would ask that the final guidance also consider the importance of resolution authorities working with FMIs in advance to understand the conditions, documentation and other actions that FMIs may expect of them over a “resolution weekend”. The fact that resolution authorities may have the statutory ability to effect a transfer of FMI membership to a bridge entity should not obviate them from complying with appropriate FMI rules-based requirements, and working with FMIs in advance to level set expectations where practicable. We believe this advance planning will greatly facilitate continued access by firms to those FMIs whose services are critical to firms’ performance of their own critical operations.

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We appreciate this opportunity to respond to the issues raised in the Consultation Paper and your consideration of the views expressed in this letter. We welcome the opportunity to discuss the Consultation Paper and our comments further, and to participate in any working or industry groups that the FSB may organize to carry forward the ideas addressed in this guidance. If you have any questions or need further information, please contact me at lthompson@dtcc.com.

Sincerely,

Larry E. Thompson