February 1, 2019

Financial Stability Board
Bank for International Settlements
CH-4002 Base, Switzerland

By E-mail (fsb@fsb.org)

Re: Financial resources to support CCP resolution and the treatment of CCP equity in resolution - Response to Consultation

Ladies and Gentlemen:

Intercontinental Exchange, Inc. (together with its subsidiaries, "**ICE**") appreciates the opportunity to comment on the Financial Stability Board's, 15 November 2018, discussion paper for public consultation on Financial Resources to Support CCP Resolution and the Treatment of CCP Equity in Resolution (the "Discussion Paper").

ICE is a leading global operator of regulated exchanges, clearing houses and listings venues, and a provider of data services for commodity and financial markets. ICE operates six central counterparty clearing houses serving the global derivatives markets in the U.S., U.K., continental Europe, Canada and Singapore.[1]

On 17 October 2016, ICE provided comments to the Financial Stability's Board's 16 August 2016 Discussion Note concerning Essential Aspects of CCP Resolution Planning. On 20 March 2017, ICE responded to the Financial Stability Board's 1 February 2017 Consultative Document concerning Guidance on Central Counterparty Resolution and Resolution Planning (the “Guidance”). ICE is grateful for the extent to which its observations have been carefully considered by the Financial Stability Board.

This letter contains ICE's responses to the specific questions raised in the Discussion Paper.

ICE also welcomes the ongoing involvement of the Financial Stability Board and its members in the important topics of clearing house recovery and resolution. ICE believes that the Discussion Paper raises significant questions concerning the operation of resolution proceedings in the context of a clearing house that warrant further consideration among clearing houses, their participants and users, regulators and other interested stakeholders, as presented in the responses below.

[1] The ICE clearing houses are ICE Clear Europe, ICE Clear US, ICE Clear Credit, ICE NGX, ICE Clear Singapore and ICE Clear Netherlands.

Financial resources for CCP resolution

1. Do you agree with the suggested five-step process to evaluate the financial resources and tools for resolution? What other elements, if any, should be considered?

We respectfully submit that the adequacy of CCP financial resources and the CCP tools related to a clearing member default have been thoughtfully and thoroughly vetted by the international regulators that oversee CCPs and are tested and reviewed by the CCP's and their local authorities on a regular and ongoing basis.

Furthermore, the CCP's existing clearing member default tools and resources have been: (1) developed in consultation with the CCPs' risk committees, clearing members and end-users (the marketplace); (2) designed in accordance with the international regulatory standards, the Principles for Financial Market Infrastructures ("PFMIs"); (3) formally agreed upon, by the clearing members pursuant to CCP rulebooks and member agreements and, where applicable, by customers pursuant to their clearing agreements; and, (4) codified in the CCP's publically available rulebooks for the purposes of transparency and market certainty.

Once a CCP enters into a clearing member default, we believe that the actions taken by the resolution authority should be in accordance with the CCP's existing rules and arrangements which have been agreed in advance and that have been carefully designed to facilitate recovery.

If a resolution authority acts in a manner that is inconsistent with the CCP's rules, it will harm certainty in the market, potentially subject members to liability for regulatory capital purposes, and risk undermining the incentives that have been designed to give effect to the CCP's recovery.

To ensure that appropriate incentives and market certainty are maintained, we suggest that the Financial Stability Board expressly endorse the centrality of the CCP's agreed recovery and default management processes within the recovery / resolution framework for clearing member default losses and remove discretion to disapply this process. This approach will increase certainty in the market, focus the mind of the resolution authority to the primary objective of this five-step process and reduce the risk of vested interests influencing resolution authorities away from the pre-agreed waterfall.

2. The discussion paper outlines a number of CCP and product specific factors that authorities should consider when assessing the adequacy of resources and tools in resolution. Are these factors appropriate or are there other factors that should be considered?

No comments.

3. Should the assessment of financial resources for CCP resolution take into account (a) different CCP ownership structures; (b) different CCP organisational structures; or (c) the products cleared by the CCP? If so, how?

The Discussion Paper raises the view that member owned and shareholder owned CCPs may need to be treated differently. We disagree with this proposition. Different ownership structures make no material difference to the financial resources available to CCPs. CCPs with all forms of ownership structures are strongly incentivised to ensure the continued success of the CCP and, specifically, will seek to capitalise the CCP adequately and in accordance with the PFMIs and Financial Stability Board standards. Ownership structure should therefore not factor into the resolution authority's assessment of a CCP's financial resources. By way of analogy, we are not aware of any distinction made in the context of bank resolution between wholly owned, listed or member-owned (cooperative) bodies. CCPs are not analytically different in this respect from banks.

4. Step 1: The discussion paper outlines a number of high-level default and non-default loss scenarios that might lead to resolution. Does this cover a sufficiently broad range of scenarios? What other relevant scenarios, if any, should authorities consider in resolution planning?

The Discussion Paper captures the high-level default and non-default scenarios.

However, as set out in our response to Q.1, we are of the view that the resolution authority should not be empowered to act in a manner that is contrary to the CCP's arrangements and rules. Such behaviour is likely to contravene “no creditor worse off than in liquidation” ("NCWOL") safeguards, mis-incentivises market participants, and upsets the pre-agreed arrangements set out in the CCP's rules. We would therefore propose amending, or deleting, items 1(iv) and 2(iv), as both contemplate default and non-default scenarios occurring when the CCP's recovery plan has not been exhausted.

Importantly, two of the hypothetical non-default loss scenarios could be eliminated if central banks would provide depository and custodian accounts for CCP margin and guaranty fund deposits. In the absence of such accounts, CCPs are left with no alternative but to place cash and securities with commercial custodians that are subject to insolvency and other risk. In order to manage the insolvency risk associated with cash deposits, CCPs invest (securitize) the cash by investing in overnight reverse repo transactions.[2] Ironically, by managing custodial risk in this manner, CCPs assume the different risk of an investment counterparty default. Again, the central banks could eliminate commercial custodial and investment risk by providing CCPs with depository and custodial accounts.[3]

5. Step 2: Are the considerations for conducting an evaluation of existing tools and resources appropriate and comprehensive? If not, what other considerations should be included?

We would reiterate, in accordance with the Discussion Paper and previous Financial Stability Board Guidance, that NCWOL considerations should be paramount in any assessment of recovery and resolution by the relevant resolution authority. We also strongly support a focus on "*incentives to support recovery or resolution*", as stakeholders' buy-in is key to a CCP's successful recovery and resolution.

---

[2] EMIR regulated CCPs are required by regulation to invest (securitize) 95% of cash deposits.

[3] ICE CCPs would forgo the financial returns associated with investing cash in the interest of the safety and soundness of maintaining cash at the central bank of issue.

"*Auctions and, if necessary, Partial tear-up tools*": We are of the view that auctions and, if necessary, CCP managed close-out of default-related positions (i.e., partial tear-up) should serve as the primary recovery tool for restoring a matched book. Default auctions can be designed to require participation and robust bidding, and, in our view, provide an efficient means for the CCP to return to a matched book and allocate losses based on actual bids made by market participants. Auctions also give members and end-users an opportunity to participate in default management and protect themselves against the use of recovery tools that they may view as unfavourable or undesirable, such as assessments, variation margin gains haircutting (VMGH), or tear-up. Auctions should be explicitly prioritised in the recovery/resolution toolbox and, unless subject to strong overriding consideration, should be proven unsuccessful prior to the use of any other, more drastic, tool.

"*CCP Equity*": Resolution authorities should limit their assessments of suitability to the subsidiary CCP itself. CCPs are stand-alone vehicles that must by their nature have a matched book. There should be no additional mandatory look beyond the CCP, by means of assessing the parent of a CCP or a third party because doing otherwise risks contagion. Under the common law, the legal separation of a company from its shareholders was established as far back as the 19th century. Maintaining the separate personality of a company from its shareholders is a cornerstone of corporate law—this "corporate veil" can only be "pierced" or "lifted" in very limited circumstances where there the legal separation has been abused by the shareholders of the company.

We agree, however, that resolution authorities should consider whether the CCP's parent is willing to make further voluntary financial contributions to the CCP in recovery / resolution. We would recommend that the CCP's parent has an opportunity (but not an obligation) to capitalise the CCP, prior to writing down existing equity or awarding equity to creditors in return for losses incurred in excess to those contemplated in the CCP's rules and arrangements.

6. <u>Step 3</u>: Are the considerations for analysing the hypothetical resolution costs (covering total losses and operational costs) appropriate?

Redistributions from the estate of a defaulting counterparty should be made to clearing participants and/or other markets participants who contributed to the loss allocation arrangements of the CCP in the reverse hierarchy to that in which they were applied to meet a loss as agreed upon ex ante in the CCP’s rulebook.

7. <u>Step 4</u>: Is there merit in relevant authorities and CMGs conducting quantitative analyses for the purpose of identifying and sizing potential additional tools or resources for resolution purposes? If so, what quantitative analysis should relevant authorities and CMGs conduct and how could they obtain the necessary data?

Authorities and CMGs should be cognizant of the amount of resources to be potentially generated during the course of the resolution process, according to the CCP’s rules and arrangements. However, it is important to note that, most CCPs premise their minimum prefunded default fund size on the basis of the international regulatory standard of the simultaneous default of the two largest clearing members ("cover 2"). In addition, many CCPs have assessment powers (that effectively provide for Cover 4+ coverage), skin in the game, margin haircutting and tear-up tools. Requiring CCPs to benchmark for an even more extreme event would need to be backed by compelling evidence and analysis, since this brings costs to the market and might have the unintended consequence of disincenting clearing and thereby increasing systemic risk. The Discussion Paper does not identify any risks to CCPs that have not been already identified and accounted for in previous evaluations of CCP resources. We are therefore of the view that there is no compelling argument for requiring CCPs to increase their prefunded default fund amount or hold other resources beyond cover 2 standard. In practice, there are no examples of a CCP needing to use any measures beyond its default fund, which suggests that there has been an appropriate understanding of the risks CCPs are subject to and that CCPs have been resourced accordingly in existing regulation and recovery and resolution situations in the market.

8. Step 5: Are the considerations regarding potential means to address funding gaps (including of any proposals to reserve resources for use in resolution) appropriate? Do they adequately address the issues of availability, costs and benefits, impact on and interaction with recovery and business as usual? If not, how should they be framed?

CCP's are designed by regulation and construct to avoid resolution by limiting a CCP's liability. (CCPs provide a predefined and substantial amount of capital known as SITG.) The limitation of liability and protection of CCP operating capital is designed to allow a CCP to continue its systemically important function notwithstanding an extreme and implausible clearing member default event. For example, consistent with the PFMIs, in the event that a CCP's default resources are exhausted due to an extreme and implausible clearing member default event, a CCP may tear-up the default-related contracts and continue to clear the balance of the CCP's book. A CCP may also limit its liability with respect to certain non-default events in order to be able to continue its systemically important function.

We disagree with the use of cash calls by resolution authorities beyond the CCP's rules. We believe that CCPs and market participants have the commercial and contractual right to understand the extent of their contractual liability.

Furthermore, in respect of "*Bail-in/write down powers*", we do not support initial margin write downs. This tool would represent a major loss of assets for users of financial markets and would risk major industry contagion. Practically, any margin write downs would require the impacted clearing members to immediately replenish their margin requirement to cover the risk of their associated open positions. Otherwise, the CCP would be clearing without being collateralized. Given the replenishment requirement, initial margin write downs effectively would serve simply as an additional cash call (assessment) obligation. Any powers to take such steps would also have serious effects on regulatory capital treatment of participants posting collateral. Such steps are probably unlawful or conflict with insolvency laws and customer asset protection regimes in many jurisdictions. We would therefore omit all reference to this power and encourage the Financial Stability Board to emphatically reject this concept.

The Discussion Paper does not currently contemplate if, and to what extent, the resolution authority may compel a third party (such as a committed repo provider) that owes obligations to a CCP in crisis to act. Resolution authorities should consider during their assessment whether critical service providers to CCPs may be forced to perform during a crisis situation and how this would be accomplished in an international context.

The Discussion Paper, differently from the Financial Stability Board Guidance, does not adequately consider whether recovery and resolution could take place whilst a CCP is in breach of regulatory capital requirements due to the exercise of resolution authority powers. Such a scenario should be avoided as it would put into question the entire recovery / resolution process and the willingness of participants to continue supporting the CCP in a crisis scenario, since the CCP's licence would be at risk of being revoked, regulators and central banks may be unwilling to allow it to continue operating.

In terms of regulatory capital, CCPs do not tend to have as many creditors as other financial institutions and they do not have material debt that is subject to bail-in because most CCPs are restricted to using Tier 1 capital and prevented from running a leveraged business model by regulation. In other words, CCPs essentially only have tier 1 equity, cleared contracts, some operational liabilities, margin, guaranty fund deposits, and SITG; any proposals to increase CCP financial resources would therefore be in the form of this "costlier" type of capital.

Finally, requiring CCPs to increase financial resources will ultimately make clearing more expensive and therefore less attractive. Cost considerations may mean market participants are less likely to voluntarily clear. Arguments in favour of requiring CCPs to increase their financial resources therefore need to be supported by compelling evidence of why this is necessary for the purposes of financial stability. Requiring CCPs to hold ever greater financial resources will increase clearing costs and may endanger financial stability, as increased prices are likely to mean market participants reduce the volume of their voluntarily cleared trades. As noted previously, this could have the unintended consequence of increasing systemic risk.

Treatment of CCP equity in resolution

9. Do you agree that the key issues to CCP equity bearing loss in resolution have been accurately identified? Are there other key issues regarding equity bearing loss? What are they and how should they be addressed?

We believe that the write-down and conversion of unsecured liabilities (e.g., losses to clearing members resulting from variation margin gains haircuts, VMGH) into equity could subvert and substantially weaken clearing participants' incentives to commit to the recovery phase in a way that would lend unhelpful momentum towards resolution. The incentive structures designed to manage a default or CCP recovery depend on putting all participants (CCPs and clearing members) at risk of greater loss for lack of participation in the process. Any compensation at the end of the resolution process must be designed to preserve these crucial incentives.

As a starting point, it should be appreciated that equity as a compensation tool will skew the incentive structure supporting the CCP's default management and recovery process. Allocating equity to the clearing members effectively creates an ownership opportunity for clearing members in a market stress event. If the CCP is approaching resolution, the clearing member will likely have suffered losses under the default management process. If bearing a relatively small amount of additional losses would result in an ownership stake in the CCP, there is a risk that clearing members would view it as more beneficial to artificially limit their participation in the default management process and encourage the resolution of the CCP to gain this ownership. In addition, awarding equity may also upset the CCPs structure, which is established to ensure that independent owners, clearing participants (through the risk committee), and CCP senior management are all incentivised to manage overall risk effectively.

In the event that a CCP operates multiple asset classes with unique clearing memberships, providing an equity stake would, at a minimum, be extremely complicated. Moreover, equity offerings could threaten the security of the other asset classes if defaults only occurred for certain asset classes and therefore allowed persons who were disadvantaged to have ownership over the entire CCP structure. There is also a risk that this compensation structure favours some clearing members while dis-incentivising others, who may not be permitted to take an ownership stake in the CCP.

10. Should the treatment of CCP equity in resolution take into account different ownership structures? If so, how?

As noted in our response to Q.3, we are of the view that different CCP ownership structures will play little difference in the practical success of recovery and resolution. All ownership structures are already strongly incentivised to ensure the continued operation of the CCP. As noted above, we are not aware of any distinction to the treatment of equity in the context of bank resolution between wholly owned, listed or member-owned (cooperative) bodies. Likewise, CCP equity is not analytically different from banks in this respect. Therefore, we do not believe the treatment of equity should be differentiated on the basis of ownership structure.

As described in our response to Q.11 below, we are of the view that existing owners of the CCP (be that members or shareholders) should, in the interests of the marketplace, be given an opportunity to recapitalise the CCP before existing equity is written down or losses are imposed beyond the CCP's rules and arrangements.

11. What are your views on the possible mechanisms for adjusting the exposure of CCP equity in bearing loss in resolution set out in Section A? What other possible mechanisms, if any, should be explored?

As identified in our response to Q.9, there are significant issues with using equity to reward clearing members for behaving in an appropriate manner during a default, recovery, or resolution. Therefore, we would strongly urge that if equity is to be awarded, this should only occur once:

- all loss allocation measures and recoveries from defaulting counterparties have been applied;
- and, the CCP's owners are unwilling or unable to recapitalise the CCP; and,
- that this sequence is respected in all instances.

As part of this process, NCWOL safeguards are integral in any resolution or recovery scenario. We therefore strongly support the Discussion Paper's view that in "*the context of CCPs, the assessment of whether participants, equity holders, and creditors have been made worse off than in liquidation should assume the full application of the CCP's rules and arrangements for loss allocation*." Ignoring this sequence would upset the agreed incentive and default structures, risks NCWOL repercussions and could prevent a CCP from being voluntarily rescued, if existing equity holders were not given an opportunity to recapitalise the CCP before equity was written-down or awarded to creditors.

Finally, to the extent the Financial Stability Board is considering rewarding members for participating in a CCP's recovery or resolution, we would agree with the Discussion Paper that compensation should be forthcoming only if they contribute "*in excess*" of their obligations under the CCP's rules and arrangements. Equity should only be exchanged for "new" money and only after pre-emption rights of existing shareholders are exhausted. For the avoidance of doubt, equity should not be supplied for meeting existing contractual commitments under the CCP's rules and arrangements.

12. Section B outlines different options for the point in time or in the waterfall for imposing losses on equity. What are your views on these options? Are there any other possible options?

We are of the view that the timing or sequencing of losses on equity should be determined in accordance with the CCP's rules and arrangements that have been agreed *ex ante*.

CCPs themselves, and their rulebooks, should focus principally on establishing tools and procedures to provide for CCP recovery – that is, the return to a matched book and full allocation of losses under a process run by the CCP. Resolution authorities should not be entitled or incentivised to interfere with, or override, the CCP's pre-agreed recovery process. Allowing such deviations may allow particular industry interests to leverage resolution situations to their benefit and detracts from legal and market certainty and as the Discussion Paper notes, risks interfering with incentive effects for stakeholders. As previously noted, the CCP's existing recovery procedures have been: (1) developed in consultation with the CCPs' clearing members and end-users; (3) designed in accordance with the PFMIs; (3) formally agreed upon, by the clearing members pursuant to CCP rulebooks and member agreements and, where applicable, by customers pursuant to their clearing agreements; (4) reviewed and approved by the CCPs' regulators; and, (5) codified in the CCP's rulebooks for the purposes of transparency and certainty. These procedures are expected to manage most, if not all, difficulties faced by a CCP.

CCPs should be given every chance to execute their recovery plans, as set forth in their rulebook, prior to resolution authority intervention. If intervention by the resolution authority is too prescriptively defined or too easily enacted and allows for deviation from the rulebook, this may constrain participation in recovery actions, militate against an effective recovery and incentivise lobbying and pressurising of authorities by particular interest groups. Triggers imposing losses on equity should therefore defer to the exhaustion of the pre-existing recovery process.

13. What are your views on the potential constraints and challenges described in Section C? Are there other challenges or constraints to equity bearing loss? What are they and how should they be addressed?

Distinct from any write-down of equity upon resolution, CCP owners are already liable for significant losses in addition to their equity on a CCP failure due to SITG, business, and reputational damage concerns. SITG amounts are agreed and pre-funded in the default fund and applied before assets of clearing members. CCP owners contribute to default funds in a commercially appropriate amount which, at a minimum, meets any relevant regulatory requirements and enhances confidence in the CCP's provision of service. Any mechanism which allows the agreed waterfall to be altered in order to impose losses on equity holders instead of those liable under the CCP's rules might create incentives on members not to participate in default management. Equity write down at such an early stage would eliminate regulatory capital and threaten CCP continuity prior to using pre-agreed tools, for instance, VMGH. Moreover, equity should not be written down where members have agreed in the rules to limited recourse (particularly where there are multiple clearing services, in other cases as well). No CCP rulebook or regulations of which we are aware propose such a structure today.

14. Section D outlines a number of policy considerations for the treatment of CCP equity in resolution. Are they appropriate and comprehensive? Would you suggest any additional policy considerations?

The Discussion Paper raises the prospect that CCPs, and in particular shareholder-owned CCPs, may not be properly incentivised if equity is not put further at risk. We strongly disagree with this suggestion and support the countering argument set out in the Discussion Paper that: "*shareholder-owned CCPs are likely to already have strong incentives to pursue effective risk management to avoid the reputational loss – and consequent loss of enterprise value – that would result from a risk management failure*."

The Discussion Paper identifies a number of issues that would arise in a resolution scenario due to the interconnectedness of affiliated entities within a corporate group and integration between a CCP and an exchange or infrastructure group. We would suggest that these arrangements are a strong reason for giving the CCP's shareholders or member-owners the opportunity to recapitalise the CCP prior to enacting mandatory equity write downs or awards of equity where members contribute funds in excess of the CCP's rules and arrangements. As the Discussion Paper notes "*if the CCP is fundamental to the operations of the exchange group or its failure could significantly harm the franchise value of the group, one would expect that the parent would provide funds, if it can, rather than lose ownership*."

15. Does the treatment of CCP equity in resolution appear clear under existing arrangements in your jurisdiction or in relation to CCPs you are familiar with?

UK law

CCP recovery and resolution is governed by the Banking Act 2009. To implement the EU's Bank Recovery and Resolution Directive (Directive 2014/59/EU) ("**BRRD**"), the Banking Act 2009 was amended to incorporate BRRD provisions but in a manner whereby such provisions would not apply to CCPs. Therefore, CCP resolution is currently governed by an earlier version of the Banking Act with similar rules as those applicable to UK banks before BRRD came into force.

Under the Banking Act, a stabilisation power may be exercised in respect of a CCP if the Bank of England is satisfied that the CCP is failing, or is likely to fail, to satisfy the recognition requirements applicable to CCPs under the Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges, Clearing Houses and Central Securities Depositories Regulations 2001 and if, having regard to timing and other relevant circumstances, it is not reasonably likely that (ignoring the stabilisation powers) action will be taken by or in respect of the CCP that will enable the CCP to maintain the continuity of any critical clearing services it provides while also satisfying the recognition requirements. In a CCP resolution, the Bank of England may transfer some or all the business of a CCP or its group undertaking to a commercial purchaser or transfer some or all the business of a CCP or its group undertaking to a bridge CCP (a company wholly owned and controlled by the Bank of England). Unlike in bank resolution, the bail-in tool and the asset management vehicle tool are not available. The Bank of England also has the power to transfer ownership of the CCP to any person.

The Financial Services and Markets Act 2000 (Recognition Requirements for Investment Exchanges, Clearing Houses and Central Securities Depositories) Regulations 2001 (the "**Recognition Requirements Regulations**") set out the recognition requirements applicable to clearing houses which are not authorised under EMIR (a "**recognised clearing house**") and central counterparties which have EMIR authorisation.

Under Schedule 1, Paragraph 24, a recognised clearing house must have default rules which, in the event of a member being or appearing to be unable to meet his obligations (or appearing *to be likely to become* unable to meet his obligations) in respect of one or more market contracts, enable action to be taken to close out his position in relation to all unsettled market contracts to which he is a party. The content of the recognised clearing house's default rules is further prescribed under paragraphs 25-28; *inter alia*, a recognised clearing house's rules must provide that once the rights and liabilities of a defaulter are aggregated or set off and a net sum is produced, in accordance with the recognised clearing house's rules, any sums owed by the defaulter to the clearing house are to be set off against any of the defaulter's margin and then its default fund contribution. To the extent any sum remains due after such set off, amounts owed by the defaulter are to be paid from such other funds, including the default fund, or other resources the clearing house may apply under its default rules.

Under Schedule 1, paragraph 36 of the Recognition Requirements Regulations, the default rules of a central counterparty must contain provisions ensuring that losses that arise as a result of clearing member default, which remain after the resources to which the central counterparty has access pursuant to Article 45 of EMIR have been exhausted, and that threaten the central counterparty's solvency are allocated with a view to ensuring that the central counterparty can continue to provide the services and carry on the activities specified in its recognition order. In respect of non-default losses, under paragraph 29A the central counterparty must maintain effective arrangements (which may include rules) for ensuring that non-default losses that arise and threaten the central counterparty's solvency are allocated with a view to ensuring that the central counterparty can continue to provide the services and carry on the activities specified in its recognition order.

EU law

The European Commission adopted a legislative proposal on CCP recovery and resolution in November 2016. This proposed legislation sets out provisions comparable to those in the framework applicable to banks and investment firms under EU law, but seeks to adapt them to the specific features of CCPs' business models and the risks they incur, including by determining how losses would be shared in scenarios where existing CCPs' pre-funded resources required under EMIR are exhausted. It remains to be seen when this legislation is ultimately brought into force and if so, whether in its current form.

Under the proposed legislation, a CCP should be placed in resolution when it is failing or likely to fail, when no private sector or supervisory alternative can avert failure, and when its failure would jeopardise the public interest and financial stability. Even if all of these conditions are not met, a CCP may be placed into resolution where the application of further recovery measures by the CCP could prevent its failure but could compromise financial stability in the process.

Resolution is to be undertaken by way of several tools which could be used separately or in conjunction: (i) sale of a CCP's entire or critical functions to a viable competitor, (ii) creation of a publicly controlled bridge CCP, (iii) allocation of losses and positions among clearing members and (iv) the write-down and conversion of the CCP's instruments of ownership and debt instruments or other unsecured liabilities. Where using the write-down and conversion tool, prior to reducing or converting the principal amount of debt instruments or other unsecured liabilities, the resolution authority shall reduce the notional amount of instruments of ownership in proportion to the losses and up to their full value, where necessary.

US law

The resolution of CCPs will either be determined by the Bankruptcy Code or in accordance with Title II of the Dodd- Frank Act. A CCP would need to be deemed a "financial company" under the criteria defined in Title II of the Dodd-Frank Act to fall within the Act. Under the Dodd-Frank Act, the resolution process of systemically important CCPs is undertaken by the Federal Deposit Insurance Corporation (FDIC).

If Title II does apply, then the FDIC can become the receiver of a CCP in the event that the Secretary of the Treasury, the Federal Reserve Board, and the FDIC find that there would otherwise be a risk of financial instability. In that case, the FDIC could liquidate the CCP, or alternatively could assign its assets and obligations to another CCP or to a bridge CCP. Under Title II, shareholders would rank last in the creditor waterfall.

Singapore law

The Monetary Authority of Singapore Act sets out specific powers available to a resolution authority relating to the counterparty transfer or restructuring of shares of financial institutions.

16. How could authorities reconcile the expectations that equity bears loss in resolution with the 'no creditor worse off than liquidation' safeguard?

We strongly support the Discussion Paper's description of the NCWOL counterfactual as it assumes the full application of the CCP's rules and arrangements for loss allocation. The counterfactual for both default and non-default losses assumes full application of the CCP's default or loss sharing arrangements, which means participants are not given mis-incentives which would encourage vested interests pushing to place a CCP into resolution prematurely, instead of promoting financial stability. The NCWOL safeguard is a primary pillar within the recovery and resolution framework and we strongly disagree with any insinuation that the NCWOL safeguard should be subverted to ignore the CCP waterfall in favour of particular members, creditors or shareholders. We are of the view that the only way to ensure that equity bears loss in resolution in a manner that is compliant with NCWOL safeguard is to make any appropriate amendments to the CCP's rules and arrangements *ex ante*.

17. What, if anything, should change with respect to the treatment of CCP equity in resolution either to clarify existing arrangements or to potentially adjust the exposure of equity bearing loss in resolution (for example, setting out any additional measures to have equity bear loss in resolution in CCP rulebooks)?

As described in response to Q. 11, we would strongly urge that if equity is to be awarded, this should only occur once:

- all loss allocation measures and recoveries from defaulting counterparties have been applied;
- the CCP's owners are unwilling or unable to recapitalise the CCP; and,
- that this sequence is respected in all instances.

* * *

ICE greatly appreciates the opportunity to comment on the questions raised in the Discussion Paper. ICE looks forward to continuing to work with the Financial Stability Board, its members, and other interested market participants to assist national resolution authorities as they develop their approach to the potential resolution of a CCP.