



February 17, 2017

By electronic submission to fsb@fsb.org

Financial Stability Board
Bank for International Settlements
Centralbahnplatz 2
CH-4002 Basel
Switzerland

Re: Guidance on Continuity of Access to Financial Market Infrastructures for a Firm in Resolution

Ladies and Gentlemen:

The Clearing House Association L.L.C. (“**The Clearing House**”), the Securities Industry and Financial Markets Association (“**SIFMA**”) and the Futures Industry Association (“**FIA**”, together with The Clearing House and SIFMA, the “**Associations**”)¹ welcome this opportunity to comment on the consultative document entitled Guidance on Continuity of Access to Financial Market Infrastructures (“**FMI**s”) for a Firm in Resolution (“**FSB Guidance**”) published by the Financial Stability Board (“**FSB**”). The FSB Guidance proposes a set of arrangements to support continued access to providers of critical FMI services by an FMI participant in resolution. The Associations strongly support the FSB Guidance, which they believe is a well-considered and essential step towards increasing transparency and improving communication among FMIs, FMI intermediaries, FMI participants and their respective regulators to address one of the remaining tensions to the resolvability of a global systemically important financial institution (“**G-SIFI**”).

The ability of a G-SIFI to continue to perform its critical functions—defined in the FSB Guidance to capture activities that are vital to the functioning of the real economy—is essential to an orderly resolution, and a G-SIFI must be able to continue performing its critical functions in material financial distress and through a resolution. Access to critical services, including critical FMI services, is a key component of a G-SIFI’s ability to continue performing its critical functions.

Providers of critical FMI services, however, typically maintain a certain degree of discretion under their rules or contractual arrangements in order to manage their risks. As a

¹ See Appendix B for a description of each of the Associations.

result, FMIs have generally established rules that preserve their ability to terminate or suspend access to, or to impose potential heightened requirements as conditions of access to critical FMI services, including for an FMI participant that is a G-SIFI experiencing material financial distress or entering into a resolution event.² Furthermore, in order to maximize their flexibility to act in the event of an FMI participant's financial distress or other market event, providers of critical FMI services are generally unwilling to make representations about the likely range of actions that might be taken in a hypothetical risk-management scenario. This discretion and the resulting information asymmetry contribute to the difficulty faced by an FMI participant in making appropriate contingency arrangements to respond to these heightened requirements in advance of a stress event.

The Associations believe that the FSB Guidance represents a significant and important step towards resolving this tension by encouraging clarity surrounding the conditions for continued access to critical FMI services. By establishing clear expectations for engagement among FMIs, FMI intermediaries, FMI participants and their respective regulators, the FSB Guidance will enhance the resolvability of G-SIFIs by allowing FMI participants to make appropriate contingency arrangements to maintain FMI access in advance of any stress event. In addition, by clarifying that the entry of an FMI participant into resolution should not, in itself, constitute a cause for termination or suspension of the FMI participant's access to critical FMI services, the FSB Guidance will help facilitate not only the successful resolution or rehabilitation of the FMI participant, but it will also promote overall systemic stability. Increased coordination and transparency can help to avoid the potential collective action problems that may arise where multiple providers of critical FMI services may be incentivized to close out positions of an FMI participant rather than appropriately focusing on the underlying risks associated with the condition of the FMI participant.

The Associations believe that the FSB Guidance strikes a fair and careful balance between preserving necessary discretion for the providers of critical FMI services to allow for appropriate risk management and to facilitate FMI participants' efforts to maintain continuity of access to critical services in resolution. The Associations agree that a provider of critical FMI services should not unnecessarily hinder the orderly resolution of an FMI participant. Thus, an FMI participant experiencing material financial distress should be allowed continuous access to critical FMI services only so long as the FMI participant continues to meet payment and delivery obligations to the provider of critical FMI services when due. The FSB Guidance mandate that this goal be balanced with the goal of supporting financial stability and other public interest considerations, including the potential consequences of loss of access to critical FMI services by a G-SIFI, is welcomed by the Associations.

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In this letter, the Associations have generally referred to an FMI participant entering into resolution. Please note, however, that wherever this letter references an FMI participant in resolution, the point equally applies to scenarios where the FMI participant's parent or affiliate is entering into resolution proceedings,

The FSB Guidance also complements and serves to advance the existing recovery and resolution planning processes prescribed by both the FSB and some national regulators. More specifically, the FSB Guidance complements the “Key Attributes of Effective Resolution Regimes for Financial Institutions” (or “**Key Attributes**”)³ in Part II of II-Annex 1 of the Key Attributes on the Resolution of FMI Participants. The Key Attributes already recognizes that an effective resolution regime should ensure the continuity of critical services, including payment, clearing and settlement functions, even if an FMI participant enters resolution, subject to adequate safeguards to protect the safe and orderly operations of an FMI, including the condition that the FMI participant continues to meet its payment and delivery obligations when due. The FSB Guidance advances this theme by encouraging dialogue among relevant parties in order to facilitate continuity of access to critical FMI services by an FMI participant in resolution.

Furthermore, the FSB Guidance provides a useful forum to continue these engagements among the relevant constituencies, including the regulators of providers of critical FMI services across multiple jurisdictions, which may have had different approaches in their efforts to resolve this tension. For example, the Board of Governors of the Federal Reserve System (the “**Federal Reserve**”) and the Federal Deposit Insurance Corporation (the “**FDIC**”) identified, in their 2013 Guidance for both U.S. and non-U.S. G-SIFIs, the risk presented by uncertain FMI access to the rapid and orderly resolution of a G-SIFI.⁴ Since then, the Federal Reserve and the FDIC have asked G-SIFIs to provide information similar to the information listed in the FSB Guidance Annex on heightened requirements that may be imposed by a provider of critical FMI services on an FMI participant in resolution, as well as the actions or steps the FMI participant has taken or proposes to take to remediate or mitigate this obstacle.⁵ The Associations and certain of their members have participated in ongoing and regular engagements with providers of critical FMI services, particularly in the context of the FMI participants’ U.S. resolution planning requirements. Some regulators have gone further, implementing laws to facilitate continuity of access. For example, the U.K. implementation of the Bank Recovery and Resolution Directive

but the direct FMI participant remains outside of proceedings, as in the case of a single-point-of-entry resolution strategy.

³ FSB, Key Attributes of Effective Resolution Regimes for Financial Institutions (Oct. 2014).

⁴ Federal Reserve and the FDIC, Guidance for 2013 165(d) Annual Resolution Plan Submissions by Domestic Covered Companies that Submitted Initial Resolution Plans in 2012 (Apr. 15, 2013); *see also*, Federal Reserve and the FDIC, Guidance for 2013 165(d) Annual Resolution Plan Submissions by Foreign-Based Covered Companies that Submitted Initial Resolution Plans in 2012 (Apr. 15, 2013).

⁵ *Id.*; *see also* Federal Reserve, SR 14-1 Letter, Heightened Supervisory Expectations for Recovery and Resolution Preparedness for Certain Large Bank Holding Companies—Supplemental Guidance on Consolidated Supervision Framework for Large Financial Institutions (SR Letter 12-17/CA Letter 12-14), (Jan. 24, 2014) and accompanying appendix; *see also* Federal Reserve and the FDIC, Guidance for 2017 165(d) Annual Resolution Plan Submissions by Domestic Covered Companies that Submitted Resolution Plans in July 2015 (Apr. 13, 2016).

provides the Bank of England with the authority, in the event that a resolution event occurs with respect to an FMI participant, to ensure that the successor entity to a failed FMI participant, such as a bridge entity, maintains continuity of access to services and facilities necessary for the successor to successfully operate its business.⁶ It also provides the Bank of England with the power to temporarily suspend termination rights in contracts.⁷ Separately, as the supervisor of inter-bank payment systems, the Bank of England has authority to directly compel an FMI to act or prohibit it from acting in order to reduce the threat to the stability of the U.K. financial system.⁸

The Associations are strongly supportive of the goals of the FSB Guidance to promote transparency and communication regarding the potential heightened requirements that may be imposed by providers of critical FMI services on an FMI participant in resolution. The Associations also recognize that the FSB Guidance presents broad general principles, and they expect to work with national regulators to implement these principles at the national level.

Nevertheless, the Associations believe that certain modifications and clarifications should be made to the FSB Guidance, in order to ensure that it achieves its stated goals while also addressing certain technical issues. The clarifications and modifications are described in the attached Appendix A, and include:

- Permitting FMI intermediaries to meet the provisions of Section 1 to set out the rights and obligations of an FMI participant in resolution by any reasonable means or method appropriate under the particular circumstances of the FMI intermediary and its participants, not just solely via amending bilateral contracts (as long any alternative means or methods are equivalent in effect to a contractual amendment);
- Clarifying and modifying how the principles in the FSB Guidance would apply differently to FMI intermediaries, whose relationships with FMI participants are governed primarily by bilateral and bespoke contractual arrangements rather than rules and procedures used by FMIs, which are applicable to all FMI participants;
- Clarifying the role of custodians, which are included in the definition of FMI intermediaries, but are sometimes treated as separate from FMIs and FMI intermediaries at various places in the FSB Guidance;
- Clarifying that the range of risk management actions and potential heightened requirements that may be imposed by a provider of critical FMI services on an FMI

⁶ U.K. Banking Act 2009, s. 63–67 and 70C–70D.

⁷ *Id.*

⁸ *Id.*, s. 191.

participant should be tailored to reflect the risks inherent to the provider of critical FMI services based on the types of services it provides as well as the actual risks presented by the specific situation or circumstance; and

- Clarifying that to the extent that there are certain misalignments between the continuity principles of the FSB Guidance and existing legal and regulatory frameworks, including, but not limited to, local resolution planning regimes, those misalignments should be resolved at the national level.

The Associations recognize that the FSB Guidance, when finalized, will require implementation at the national level and international coordination in order for its principles to be operative. As a consequence, the Associations believe that these proposed clarifications and modifications will help to ensure the effectiveness of the FSB Guidance as a method of encouraging engagement among all of the constituencies and for purposes of national implementation. Therefore, the Associations respectfully ask the FSB to revise the FSB Guidance in accordance with the comments and suggestions reflected in Appendix A of this letter.

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The Associations would like to reiterate their support for the objectives of the FSB Guidance and are grateful both for the opportunity to comment, and for your consideration of our comments, on the FSB Guidance. Should you desire further information, please feel free to contact John Court (+1(202)649-4628; john.court@theclearinghouse.org), Carter McDowell (+1(202)962-7327; cmcdowell@sifma.org), or Jacqueline Mesa (+1(202)772-3040; jmesa@fia.org).

Respectfully submitted,



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APPENDIX A**Appendix to Cover Letter of Comment Letter on the FSB Guidance on
Continuity of Access to FMIs for a Firm in Resolution**

This Appendix supplements the cover letter to which it is attached (the “**Associations Cover Letter**”) and together with that cover letter constitutes the comment letter of the Associations (the “**Associations Comment Letter**”). All terms defined in the Associations Cover Letter have the same meanings in this Appendix.

I. Clarify That the Range of Risk Management Actions May Vary by FMI Type

Question 1: Does the consultative document appropriately address the tensions that may arise between the various financial stability objectives, with regard to the safety and soundness of providers of critical FMI services on the one hand and to the orderly resolution of the recipients of such services on the other?

The Associations believe that the FSB Guidance strikes a fair and careful balance between preserving necessary discretion for the providers of critical FMI services to allow for appropriate risk management and facilitating FMI participants’ efforts to maintain continuity of access to critical FMI services in resolution.

The Associations agree that, to the extent appropriate, each provider of critical FMI services should apply a common set of expectations and processes for dealing with its FMI participants in resolution. The Associations also recognize that continuity of access need not imply the same breadth of access as available to an FMI participant operating under business-as-usual conditions. Instead, continuity of access may have a variety of meanings under different resolution scenarios and may vary based on the risk posed by the FMI participant that is entering into resolution. Any heightened requirements imposed on an FMI participant in resolution, such as limitations on the range of services or types of trades available to the FMI participant, should not unnecessarily impede the FMI participant’s ability to undergo an orderly resolution process.

To clarify the potential treatment of an FMI participant in material financial distress or resolution, the FSB Guidance should revise Section 1.3 so that the range of risk management actions and any additional or heightened requirements that may be imposed by a provider of critical FMI services on an FMI participant must be tailored to the inherent risks to the provider based on the types of services it provides (e.g., if it is a central counterparty, central securities depository, a custodian or if it predominantly provides payment services or critical messaging services, etc.) and may be different between FMIs and FMI intermediaries. For example, a futures commission merchant may impose higher additional margin requirements because it faces more direct risk exposure from the financial distress of a customer or client, compared to a central counterparty with loss mutualization capabilities. Likewise, an FMI intermediary may interact with its customers and clients in a variety of capacities, meaning that its risk analysis and

risk management actions may be informed by a broader range of considerations than in the case of an FMI.

The range of actions may also vary depending on the type of FMI participant that is receiving these critical FMI services. Different heightened requirements may need to be applied depending on whether it is the FMI participant itself or a parent or affiliate that enters resolution, or on the resolution regime applicable to that entity, for example, if the entity entering resolution is a depository institution, a broker-dealer or some other type of entity. Risk-management actions should also be directly tailored to the specific risk posed by the FMI participant itself in resolution.

II. Clarify and Modify the Scope of the Guidance and Proposed Guidance

Question 2: Do you agree with the overall scope of the guidance and the proposed definitions, in particular the services and functions captured in the definition of ‘critical FMI services’? Should any of the definitions be amended? If so, please explain.

A. FMIs Owned and Operated by Central Banks Should Be Included

The FSB Guidance uses the same definition of “FMI” used in the Key Attributes.⁹ Since FMIs owned and operated by central banks are not subject to the Key Attributes,¹⁰ Section 1 of the FSB Guidance does not apply to these central bank FMIs either, although such FMIs may choose to take the FSB Guidance into consideration where appropriate.

Notwithstanding that central bank FMIs are not subject to the Key Attributes and therefore are not within the technical scope of this FSB Guidance, the Associations believe that central bank FMIs should voluntarily agree to adhere to Section 1 of the FSB Guidance. The main objective of the FSB Guidance is to ensure that an FMI participant that can continue to meet payment and delivery obligations to the provider of critical FMI services will not lose access to critical FMI services when experiencing material financial distress or in resolution. It is similarly critical for FMI participants to be able to engage in advanced planning and make contingency arrangements designed to enable them to maintain continuity of access to central bank FMIs. Adherence to the FSB Guidance by central bank FMIs could properly be modified to account for necessary public policy concerns to the extent that these concerns are different for FMIs owned and operated by central banks. Where central bank FMIs provide critical FMI services, however, they should be expected to engage with FMI participants to clarify expectations for maintenance of continuity of access through resolution.

⁹ The Key Attributes defines an “FMI” as “a multilateral system among participating financial institutions, including the operator of the system, used for the purposes of recording, clearing, or settling payments, securities, derivatives, or other financial transactions.” Key Attributes, at 5; *see also* FSB Guidance at 10.

¹⁰ Key Attributes, at 57.

B. Clarify the Role and Treatment of Custodians under the FSB Guidance

The treatment of custodians is inconsistent under the FSB Guidance. The definition of “FMI intermediary” used in the FSB Guidance includes a firm that provides “custody services to other firms” and as a result, includes custodians within its scope. This definition is in itself ambiguous and could capture custodians even if they provide services unrelated to FMI access. Further discussion of the definition of “FMI intermediary” is provided below in Section II.C.

At the same time, however, a “provider of critical FMI services” is defined as “an FMI, custodian or [an] FMI intermediary . . .” which implies that a custodian may be a provider of critical FMI services, separate from its role as an FMI intermediary. The definition of “critical FMI services” further confuses the role of custodian by stating that “[c]ritical FMI services may be provided either directly by an FMI or custodian to a participant (‘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’).”¹¹

In order to clarify its application to custodians, the FSB Guidance should be revised so that, for the purposes of this FSB Guidance only, custodians fall within the definition of “FMI intermediary,” as described in Section II.C below, and strike all separate references to custodians in the remainder of the document. Without such a change, the FSB Guidance may unintentionally conflate the roles and responsibilities of various entities within the chain of financial intermediation, in a manner that could undermine rather than support effective recovery and resolution planning.

C. Clarify the Definition of FMI Intermediary

The definition of an “FMI intermediary” under the FSB Guidance may be ambiguous. For the avoidance of doubt, the definition of FMI intermediary should be clarified so that it reads, in relevant part, as follows:

“An “FMI intermediary” is a firm that provides clearing, payment, securities settlement and/or custody services to other firms **in order to facilitate the firms’ direct or indirect access to an FMI.**”

This revision would be consistent with the sentence that follows in the definition of an FMI intermediary, which explains that FMI intermediaries are direct members of one or several FMIs and provide indirect access to the critical services offered by such FMIs. This clarification would also help distinguish a mere FMI participant—a firm with direct access to FMIs but that does not facilitate the direct or indirect access by another firm to an FMI—from an FMI intermediary, given that both types of members have direct access to FMIs.

¹¹ See also FSB Guidance, Question 8, at iv.

D. Clarify That Only G-SIFIs Are the FMI Participants Within the Scope of the FSB Guidance

For the avoidance of doubt, the FSB Guidance should clarify that only G-SIFIs are intended to be in scope for the FSB Guidance. The Key Attributes define “firm” as “any financial institution that could be systemically important or critical if it fails” and as a result, “should be subject to a resolution regime.”¹² The Key Attributes further specify that the resolution regime should require that at least all domestically incorporated G-SIFIs have a recovery and resolution plan in place.¹³ The FSB Guidance imports its definition of “firm” from the Key Attributes, and so it should accordingly be understood to apply to G-SIFIs. For the avoidance of doubt, the Associations believe that the FSB Guidance should make this understanding explicit. An unnecessarily broad application of the FSB Guidance to smaller firms would be counterproductive to the goal of improving the resolvability of the largest FMI participants and mitigating potential systemic impacts arising from the loss of access to critical FMI services. Requiring FMIs and FMI intermediaries to engage with all of their FMI participants to facilitate continuity of access would be extremely time-consuming, especially where given FMIs and FMI intermediaries may provide critical FMI services to a very large number of smaller firms, some of which may be subject to a less-stringent tier of resolution planning requirements in their local jurisdictions.

E. Clarify the Definition of “Critical FMI Services”

The FSB Guidance should clarify in the definition of “critical FMI services” that the onus to identify the providers of critical FMI services should be on the recipient of critical FMI services or the recipient’s resolution authorities. “Critical FMI services” are defined as “clearing, payment, securities settlement and custody activities, functions or services, for which a lack of continuity would lead to the collapse of (or present a serious impediment to the performance of) a firm’s critical functions.”¹⁴ Critical FMI services are thus defined with reference to the criticality of those FMI services to a given FMI participant. FMIs and FMI intermediaries are unlikely to have sufficient information to determine for which of their participants the services provided would be considered critical. The problem of identifying recipients of critical FMI services is further compounded by the breadth of the definition of “firm” in the FSB Guidance, as the number of firms receiving critical FMI services from FMIs or FMI intermediaries would be quite broad.

Therefore, even when FMIs and FMI intermediaries are prepared to engage with the recipients of those services, the FSB Guidance should clarify that the responsibility is on the

¹² Key Attributes, at 5.

¹³ *Id.*

¹⁴ FSB Guidance, at 11.

recipients of critical FMI services or the recipients' resolution authorities to reach out in the first instance to engage with the providers of critical FMI services and notify those providers that their services constitute critical FMI services with respect to the participants.

In addition, the FSB should provide a forum for coordination among national resolution authorities so that "critical FMI services" can be defined consistently across firms operating in multiple jurisdictions. The Associations recognize that a firm's critical functions may vary across jurisdictions, which may impact the definition of "critical FMI services" in each jurisdiction. Consistency in the definition of these services to the extent it is possible, however, will help streamline engagement efforts between providers of critical FMI services and FMI participants.

Separately, the definition of "critical FMI services" includes "activities, functions or services that are ancillary to such clearing, payment, securities settlement or custody but whose on-going performance is necessary to enable the continuation of the clearing, payment, securities settlement or custody."¹⁵ Examples of the types of activities that would be defined as ancillary services are provided in the Annex to the FSB Guidance, which includes payment-related services, securities lending, collateral management, access to other FMIs and operational services.¹⁶ The Associations believe that the definition of what might be an ancillary service, and whether continuity of access to that ancillary service is critical for any FMI participant in resolution may be highly dependent on the FMI, the FMI intermediary and/or the FMI participant as the recipient of those services. If access to ancillary services is considered to fall within the definition of "critical FMI services," it is unclear what additional benefit for resolution planning purposes would be derived from separate contingency planning efforts for the continuity of these ancillary services. The Associations believe that, to the extent any ancillary services are inextricable from the operations of critical FMI services, the need for continuity of those ancillary services is sufficiently captured in the requirements to plan for continuity of critical FMI services. The Associations therefore believe that once these ancillary services have been included in the definition of critical FMI services, the FSB Guidance should strike all subsequent references to ancillary functions or services, including with respect to the information requirements reflected in the Annex to the FSB Guidance.

F. Clarify the Definition of "Resolution"

The Associations believe that the FSB Guidance is intended to cover situations where a provider of critical FMI services may wish to terminate an FMI participant for reasons that are directly or indirectly connected to the resolution or the anticipated resolution of an FMI participant, or the parent or affiliate of the FMI participant. "Entry into resolution," however, is currently defined to include "any other measures taken by a provider of critical FMI services prior to resolution for which a statutory power exists to override or stay a right of termination or

¹⁵ *Id.*

¹⁶ FSB Guidance, Annex, at 30.

suspension.”¹⁷ Under the FSB Guidance, a provider of critical FMI services cannot terminate an FMI participant that is entering into resolution, but entry into resolution is defined in part by the actions a provider of critical FMI services may take.

To prevent a circular definition, “entry into resolution” should be defined as follows:

“For the purposes of this guidance, ‘entry into resolution’ also includes **the period of time prior to an actual resolution** for which a statutory power to override or stay a right of termination or suspension is in effect.”

III. Clarify Requirements for Providers of Critical FMI Services to Set Out Applicable Rights and Obligations of an FMI Participant in Resolution

Question 3: What are your views on the proposal in sub-section 1.1 of the consultative document that providers of critical FMI services clearly set out in their rulebooks or contractual arrangements the rights, obligations and applicable procedures in the event of an FMI participant entering into resolution?

A. Clarify that Changes to FMI Rules Should Be Made Pursuant to Discussions with FMI Participants

The Associations are strongly supportive of the principle in Section 1.1 of the FSB Guidance that providers of critical FMI services should clearly set out the rights, obligations and applicable procedures that could be triggered by entry into resolution of an FMI participant, its parent or affiliate. The Associations agree that the FSB Guidance correctly identifies FMI participants as having the ultimate responsibility to ensure that they have the financial and operational capabilities to meet the conditions of access to critical FMI services.¹⁸ The FMI participants can only realistically satisfy this responsibility, however, if the rights and obligations are clearly established and understood ahead of a stress event, so that the FMI participants can make appropriate contingency arrangements to maintain continuity of access. Although Section 1.3 of the FSB Guidance expects providers of critical FMI services to engage with FMI participants on the range of risk management actions that they may take in response to an FMI participant entering into resolution, engagement between the relevant parties should happen at an earlier stage. The best way to achieve the objective of making appropriate contingency arrangements is for any required changes to rulebooks and any other FMI documentation to also be made pursuant to engagements with FMI participants, so that the appropriate information can be memorialized in the rules with the right level of granularity for FMI participants to understand what their rights and obligations are if a resolution event occurs. The FMIs will similarly be able

¹⁷ *Id.*, at 11.

¹⁸ *See id.*, at 18.

to establish more effective rules and procedures that would govern an FMI participant in resolution if the FMIs are provided with more information from their participants.

B. FMI Intermediaries Should Be Able to Meet the Provisions of the FSB Guidance in a Number of Ways

The Associations agree that the FSB Guidance should apply to both FMIs and FMI intermediaries choosing to provide services to G-SIFIs. An expectation for both types of providers of critical FMI services to clearly set out applicable rights, obligations and procedures is an important step to providing recipients of critical FMI services adequate information for their contingency-planning purposes. The FSB Guidance should, however, take account of the different relationship that FMI intermediaries have with their customers. The FSB Guidance does consider the possibility that there may be circumstances where the contractual rights of FMI intermediaries to limit or terminate an FMI participant's access to critical FMI services are the subject of bilateral agreements with each customer.¹⁹ The FSB Guidance should, therefore, recognize that there may be other approaches for an FMI intermediary to meet the provisions of Section 1.1 that may be equivalent to contractual amendments but operationally less onerous to implement, and that compliance need not occur only via amending bilateral contracts with some or all of its customers.

An FMI's relationship with its members is governed by a common set of rules and applicable procedures. Amendment of these rules and procedures frequently require prior notice to its members and sometimes a comment period before final rules and procedures become effective. These final rules and procedures typically apply simultaneously to all of its members. An FMI intermediary, meanwhile, may have agreements with thousands of clients pursuant to which it provides FMI services, and may enter into a large number of contracts with each of its customers, which could be bespoke or have highly bespoke terms, including on a transaction-by-transaction or on a service-by-service basis. For some services, such as futures clearing, there is little—and in the case of some markets, no—standardization of agreements by FMI intermediaries. Amending contracts with each customer on a bilateral basis could be extremely time-consuming and onerous, especially when a customer of an FMI intermediary may have its own commercial or other reasons for not agreeing to such contractual amendments.

Expecting FMI intermediaries to amend contractual arrangements would also be especially burdensome if the scope of firms is not limited to focus on G-SIFIs, particularly if a common set of rules and procedures should be applied across all of an FMI intermediary's customers. The potentially broad range of firms in scope may result in an FMI intermediary imposing contractual amendments that do not contribute towards the objective of improving the resolvability of the largest FMI participants and mitigating potential systemic impacts arising from the loss of access to critical FMI services.

¹⁹ See *id.*, at 13.

In order to ensure that the FSB Guidance will be effective in achieving its goals, the Associations ask the FSB to clarify that FMI intermediaries can set out the rights and obligations of an FMI participant in resolution by means other than amending bilateral contracts if more appropriate to the circumstances, as long as such means are equivalent in effect to a contractual amendment.

IV. Set Clear Expectations Regarding Engagement Between Providers of Critical FMI Services and FMI Participants

Question 6: What are your views on the proposal in sub-section [1.3]²⁰ of the consultative document that providers of critical FMI services should engage with their participants regarding the range of risk management actions and requirements they would anticipate taking in response to the resolution of an FMI participant? Does this strike the right balance between the objectives of orderly resolution and the FMI or FMI intermediary's prudent risk management?

A. Discussions Between Providers of Critical FMI Services and FMI Participants Must Be on a Regular Basis

The Associations agree that a provider of critical FMI services must maintain reasonable discretion to take appropriate risk management actions, including imposing additional or heightened requirements in response to an FMI participant, or its parent or affiliate, entering into resolution. The Associations further agree that providers of critical FMI services should not only engage with the relevant authorities but also with the FMI participants directly, to ensure that the provider of critical FMI services consider and plan for the interaction between its own resolution planning regime and the regime applicable to FMI participants.²¹ The FSB Guidance should also set the expectation that this engagement should occur on a regular basis, so that FMI participants can satisfy their local resolution planning requirements and so that the information can be updated on a regular basis to reflect any changes in the provider's rules or procedures or the circumstances applicable to the FMI participant.

B. Clarify How Effectiveness Testing Requirements Will Be Applied In Practice

The Associations agree that a requirement for FMIs to regularly test the effectiveness of their relevant rules and procedures addressing a resolution scenario will be informative and helpful to the FMI participants. The Associations recognize that for FMIs, there will be a limited number of generally applicable resolution scenarios, and testing for those scenarios can provide

²⁰ The Associations believe that there was a typo in Question 6 and that Question 6 was meant to refer to Section 1.3 as opposed to Section 1.4. The Associations have, however, grouped their responses to Section 1.3 and 1.4 under the response to Question 6.

²¹ FSB Guidance, at 15–16.

information that would be broadly applicable and useful to many (and perhaps all) of its participants.

The FSB Guidance should also set the expectation that FMIs engaging in effectiveness testing should share their general assumptions and testing procedures with FMI participants ex ante to increase transparency. This will also allow FMI participants to understand opportunities for potential enhancements to improve contingency planning for continuity of access highlighted as a result of the effectiveness testing exercise. As a result, the outcomes of any effectiveness testing exercise should be considered opportunities for enhancements, rather than deficiencies in an FMI participant's contingency planning efforts. The results of this exercise should thus be kept confidential between the FMI and its participants, which will also facilitate regular open communications between them. Where applicable, the results of the effectiveness testing should be incorporated into the rules of the FMIs and the contingency plans of the FMI participants.

V. Consider Interactions Between Contingency Planning Requirements and Other Regulatory Requirements

Question 7: Do you agree with the proposal in section 2 of the consultative document that firms should be required to develop contingency plans to facilitate continuity of access in both the lead-up to, and upon entry into, resolution? Does the consultative document address all aspects of the information and analysis that may be required for such contingency plans?

A. Contingency Planning Requirements Should Be Coordinated with Local Resolution Planning Requirements

The FSB Guidance would expect an FMI participant to develop and document contingency plans for how the FMI participant would maintain continuity of access to critical FMI services in resolution and would further expect an FMI participant to share these plans with the relevant resolution planning authorities.²² The Associations strongly agree that this expectation will help FMI participants make appropriate contingency arrangements to facilitate continuity of access and improve their resolvability. The FSB Guidance should, however, clarify that any such contingency planning efforts should be performed in coordination with local resolution planning requirements.

Specifically, where there are misalignments between the FSB Guidance's expectations on resolution planning and local resolution regulations, the local regulatory requirements should govern. For example, the FSB Guidance lists specific types of resolution scenarios that FMI participants should consider and information that FMI participants should document in their

²² *Id.*, at 19.

contingency plans.²³ If the local resolution planning requirements call for FMI participants to provide different information regarding their contingency plans, then the FMI participant should not be expected to provide additional information for the purposes of meeting the expectations under the FSB Guidance.²⁴ Different national regulators may have a variety of public policy concerns and priorities that may result in different requirements. A purely accretive set of expectations with no accommodations for local frameworks may increase the compliance burden for FMI participants without significant benefit for resolution planning purposes.

B. Contingency Planning Requirements Should Consider Other Legal and Regulatory Regimes

The Associations are supportive of viewing contingency planning from the perspective of an FMI participant's arrangements to facilitate continued access to providers of critical FMI services, as it is consistent with local resolution planning requirements, such as the 2017 resolution planning guidance issued by the Federal Reserve and the FDIC.²⁵

The application of the FSB Guidance to the providers of critical FMI services should, however, consider the fact that providers of critical FMI services are subject to other legal and regulatory regimes. The Associations clearly support the objective that providers of critical FMI services should facilitate the participation of a successor entity to provide continuity of service. Providers of critical FMI services, however, including FMI intermediaries, are subject to AML obligations and prudential regulations in their local jurisdictions, which may constrain their ability to prospectively commit to providing services to an unknown entity at a later date. The Associations believe that the effectiveness of the FSB Guidance may be limited if it does not take into account other applicable legal and regulatory constraints.

Further, the FSB may need to engage with regulators at each local jurisdiction to consider how the FSB Guidance may operate within the requirements of these other regulatory regimes. Standard AML due diligence protocols during a resolution scenario may be unrealistic given the timelines within which the successor entity will need to be onboarded as a new member, and

²³ *Id.*, at 19–20; FSB Guidance, Annex: Indicative information requirements for firms to facilitate continuity of access to FMIs.

²⁴ For example, the Federal Reserve and the FDIC, in their 2013 Guidance, allows U.S. and non-U.S. G-SIFIs to use an idiosyncratic failure scenario for the purposes of their resolution plan submission. Federal Reserve and the FDIC, *Guidance for 2013 165(d) Annual Resolution Plan Submissions by Domestic Covered Companies that Submitted Initial Resolution Plans in 2012*, 8 (Apr. 15, 2013); *See also*, Federal Reserve and the FDIC, *Guidance for 2013 165(d) Annual Resolution Plan Submissions by Foreign-Based Covered Companies that Submitted Initial Resolution Plans in 2012*, 8 (Apr. 15, 2013). To the extent the FSB wants information that is different or in addition to the information required by local regulations, this should not result in an expansion of local resolution planning requirements.

²⁵ Federal Reserve and the FDIC, *Guidance for 2017 165(d) Annual Resolution Plan Submissions by Domestic Covered Companies that Submitted Resolution Plans in July 2015* (Apr. 13, 2016).

indeed may be unnecessary if the successor is merely continuing the business of the FMI participant. A bridge entity created by and operating under resolution authorities should also not pose the type of AML concerns that a truly new entity would. Furthermore, a successor entity assuming the accounts and positions of the predecessor FMI participant and its customers should be able to rely upon the completed KYC conducted by the predecessor FMI participant for the relevant customers and/or should benefit from certain indemnifications or where regulators allow for such reliance,²⁶ or at least temporarily until appropriate KYC due diligence can be conducted. If meeting the provisions of the FSB Guidance requires temporarily waiving standard AML due diligence protocols, then regulators and legislatures must coordinate at the international level to ensure that providers of critical FMI services can meet the provisions of the FSB Guidance without violating their other legal and regulatory obligations.

In addition, the FSB Guidance expects providers of critical FMI services to allow an FMI participant or a successor entity to maintain participation during a resolution process, and expects FMIs to facilitate a fast-track application process for the participation of a successor institution or a bridge entity. The Associations agree with the FSB Guidance on the inclusion of these expectations, but note that in many instances, the succession by another entity of particular functions or positions of the failed FMI participant requires prior approval or notification by both FMIs and local regulators. These prior approval or notification requirements should be temporarily waived where applicable, and only if a successor entity is succeeding to the relevant portions of the failed FMI participant's business, in order to facilitate the continuity of access to critical FMI services by a successor entity.

C. Clarify That the “Most Likely” Amount of Any Additional Requirements Should Be Calculated Based on FMI Participants’ Financial Modeling

The Associations agree that FMI participants should include in their contingency plans what the FMI participants determine to be the “most likely” amount of any additional financial requirements as well as the possible “maximum amount” under the contractual arrangements with or the rules of providers of critical FMI services. Allowing FMI participants to account for the most likely additional liquidity demands in the event of material financial distress or resolution rather than the more conservative—and, by definition, less likely—maximum amount will permit a more realistic analysis of liquidity demands in material financial distress. It also avoids a procyclical requirement to reserve an unreasonable excess of liquidity at the moment that an FMI participant may be experiencing a liquidity crisis.

The Associations believe, however, that the FSB Guidance should clarify that the determination of what may be the most likely amount should be based on the FMI participants’ internal assumptions and financial modeling using the previously agreed-upon requirements and

²⁶ See CCP Risk Management Subcommittee to the Market Risk Advisory Committee of the CFTC, Final Recommendations for CCP Default Management, 6 (Nov. 17, 2016), *available at* http://www.cftc.gov/idc/groups/public/@aboutcftc/documents/file/mrac111716_ccprecommendations.pdf.

obligations set forth in the FMIs' rules rather than derived from assumptions and information provided by the FMI. FMI participants are unlikely to have access to the FMI's assumptions and models, which will necessarily inform the assessments of what additional financial requirements, if any, are likely to be imposed in the event of material financial distress or resolution. FMIs are also unlikely to make representations as to the types of assumptions that they might make or to share the financial modeling that may be used beyond how the FMIs may generally respond to stress events, in order to preserve their flexibility to act in the event of an FMI participant's distress or other market event.

Notwithstanding the above, however, the results of the FMIs' effectiveness testing discussed in Section 1.4 of the FSB Guidance will also provide a basis for FMI participants to estimate additional margin or other financial requirements that might be imposed by a central counterparty, or other type of FMI. The Associations would therefore reiterate that the FSB Guidance should encourage FMIs to share the results of their effectiveness testing with their FMI participants.

VI. Clarify that the FSB Guidance Will Likely Apply Differently to FMIs and FMI Intermediaries

Question 8: Are there any aspects of the proposed guidance that should apply differently according to whether access to a critical FMI service is provided directly by an FMI or custodian, or indirectly by an FMI intermediary? If so, please describe with reference to the particular section(s) of the proposed guidance, and include your views on how that section(s) should differ.

The Associations believe that Section 1 of the FSB Guidance should also generally account for the differences between the relationship of an FMI intermediary and its customers on the one hand and the relationship between an FMI and its members on the other. As described in Section III.B, an FMI's relationship with its members is governed by a common set of rules and applicable procedures. An FMI intermediary may have agreements with thousands of individual clients and may enter into multiple contracts with each of its clients, among which there could be a high degree of variability. As a result, the FSB Guidance should apply differently to FMI intermediaries, including as follows:

- clarifying that an FMI intermediary may interact with its customers and clients in a variety of capacities, and its risk analysis and risk management actions may therefore be informed by a broader range of considerations than in the case of an FMI; for example, a futures commission merchant may face more direct risk exposure from the financial distress of a client, compared to a central counterparty with loss mutualization capabilities, as further discussed in Section I;
- specifying that FMI intermediaries provide services in order to facilitate FMI participants' direct or indirect access to an FMI in order to distinguish a mere FMI

participant from an FMI intermediary, given that both types of members have direct access to FMIs, as further discussed in Section II.C;

- allowing FMI intermediaries to meet the expectations laid out in Section 1.1 of the FSB Guidance by means other than amending bilateral contracts if more appropriate to the circumstances, as long as such means are equivalent in effect to a contractual amendment, as further discussed in Section III.B;
- not requiring FMI intermediaries to consult with the resolution authorities of FMI participants, especially where G-SIFI FMI intermediaries provide critical FMI services to G-SIFI FMI participants and there could be concerns about the sharing of confidential information of a failing G-SIFI with its competitors, as further discussed in Section VII.A; and
- leaving any potential misalignments between the continuity principles of the FSB Guidance and existing local and regulatory frameworks applicable to providers of critical FMI services, which may be different for FMI intermediaries, for resolution at the national level, as further discussed in Section VII.B.

In addition, as discussed in Section II.B, for purposes of this FSB Guidance, custodians should be included within the definition of an “FMI intermediary,” rather than separately referenced sporadically throughout the document, in order to avoid confusion in the treatment of custodians under this FSB Guidance.

VII. Clarify Requirements for Communications Between Relevant Parties for Key Decision Making During the Resolution of an FMI Participant

Question 10: Does the consultative document identify appropriate methods for providing the information and communication necessary for key decision making during the resolution of an FMI participant? Are there additional safeguards that could be put in place that would ensure adequate levels of transparency in the lead-up to, and upon resolution?

A. FMIs Should Be Required to Consult with Relevant Authorities

Section 1.3 of the FSB Guidance acknowledges that providers of critical FMI services may impose additional or heightened requirements on an FMI participant in resolution to ensure the safety of the FMI, financial stability and other public interest considerations and reinforces that flexibility to determine which additional or heightened requirement(s) to impose is a key aspect of effective risk management. Although the FSB Guidance indicates that this flexibility “may include communication with relevant authorities,”²⁷ this communication is not required.

²⁷ FSB Guidance, at 16.

Given the need to balance FMI risk management with public interest considerations that are typically better served by prioritizing continuity of FMI participation, the Associations believe that the FMIs should be required to consult with both FMI supervisory authorities and resolution authorities of the FMI participant. We understand that where rule changes are made in response to the FSB Guidance, consultation with relevant authorities may be required in any event under the existing laws of many jurisdictions, including in the European Union and in the United States.

Given that FMI intermediaries are also FMI participants and may be G-SIFIs themselves, there could be concerns with resolution planning authorities sharing confidential information of G-SIFIs with peer competitors. As a result, the Associations believe that this requirement to consult with relevant authorities should take into account concerns about the appropriate level of information sharing that should occur between competitors.

B. FSB Guidance Should Take Account of Other Legal and Regulatory Regimes

The Associations suggest that the FSB Guidance explicitly address situations where a provider of critical FMI services may be prohibited from satisfying certain elements of the FSB Guidance by local laws or regulations, separate and apart from resolution regimes.

As an example, the Associations are in agreement with the principle that as long as an FMI participant continues to meet its obligations to a provider of critical FMI services, the provider may be required to allow the FMI participant to maintain continuity of access to critical services, regardless of the participant's legal status, including whether it is in a formal resolution or otherwise part of a group that is undergoing resolution. The Associations believe that the FSB Guidance should recognize that implementation of that principle at the national level must take into account local considerations. Certain misalignments between the continuity principles of the FSB Guidance and existing legal and regulatory frameworks will need to be resolved at the national level.²⁸ Other misalignments between the principles of the FSB Guidance and local legal

²⁸ For example, under the risk-based capital rules of Basel III as implemented by the Federal Reserve, in order for an FMI intermediary that is a Federal Reserve-regulated institution to net exposures to a client for whom it clears derivatives, the FMI intermediary must conclude that its clearing agreement with the client is a "qualifying master netting agreement" that provides the FMI intermediary the right to "accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default, including upon an event of receivership, conservatorship, insolvency, liquidation or similar proceeding, of the [client], provided that, in any such case, any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions, other than (i) in receivership, conservatorship, or resolution under the Federal Deposit Insurance Act, Title II of the Dodd-Frank Act, or under any similar insolvency law applicable to GSEs or laws of foreign jurisdictions that are substantially similar to [such] U.S. laws . . . or (ii) where the agreement is subject by its terms to, or incorporates, any [such] laws . . ." 12 C.F.R. § 217.2 (as proposed by Notice of Proposed Rulemaking, Restrictions on Qualified Financial Contracts of Systemically Important U.S. Banking Organizations and the U.S. Operations of Systemically Important Foreign Banking Organizations; Revisions to the Definition of Qualifying Master Netting Agreement and Related

and regulatory frameworks—for example, the impact on risk-based capital (such as the inability to net) when an FMI participant is in a receivership, liquidation or other formal insolvency proceeding—may need to be taken account of at both the international level and the national level.

Further, the FSB Guidance should clarify that the sharing of information, whether between FMI participants and resolution authorities or between providers of critical FMI services and FMI participants, should be confidential to the extent required by law. In the United States, for example, a person who shares confidential supervisory information except as expressly permitted by the federal banking agencies or as provided by the relevant agency's regulations may be subject to criminal penalties.²⁹ Although it may be the case that both the FMI participant in resolution and the provider of critical FMI services would benefit from increased transparency regarding the condition of the FMI participant in resolution, the Associations would urge the relevant authorities to carefully weigh the benefits of such information sharing against the potential costs.

Separately, there may be commercial law requirements or principles in other jurisdictions that may be inconsistent with or prohibit a provider of critical FMI services from entering into a contract that would not allow the provider to terminate provision of services to an FMI participant entering into resolution. If the FSB Guidance, on a general level, does not consider these potential conflicts, a provider of critical FMI services may not be able to meet the expectations of the FSB Guidance absent local legislative or regulatory changes. The operation of the principles of the FSB Guidance may then reach beyond its stated scope of FMIs, FMI intermediaries and FMI participants.

C. There Should Be More Clarity Regarding Relationships Between Authorities

The Associations are strongly supportive of Section 3 of the FSB Guidance, which asks relevant authorities for providers of critical FMI services to engage with resolution authorities of FMI participants to share information and coordinate with each other in the event that an FMI participant enters into resolution. The Associations recommend, however, that the FSB Guidance provide more clarity regarding how this engagement should proceed. This may include clarifying

Definitions, 81 Fed. Reg. 29169, 29188 (May 11, 2016)). Given the qualifying master netting agreement definition, the FMI intermediary should be permitted to have a closeout netting right in the client's clearing agreement that could be exercised, subject to a stay of limited duration, if the client is placed in a receivership, insolvency or other liquidation proceedings, and the client's clearing agreement and transactions are not transferred to a bridge entity or other successor entity. Without such rights, the FMI intermediary may be unable to continue netting exposures to the client, making it potentially uneconomical, and possibly risk-promoting, for the FMI intermediary to continue providing the clearing services to such client.

²⁹ Interagency Advisory on the Confidentiality of the Supervisory Rating and Other Nonpublic Supervisory Information (Feb. 28, 2005).

whether the FMI supervisory authorities or the resolution authorities have the ultimate authority to make decisions about a distressed participant's continued access during a resolution event. Such clarification could be essential in a resolution scenario when the relevant authorities must decide between facilitating an FMI participant's continued access to critical FMI services or to prioritizing an FMI's risk management concerns for the safety of its own system and its other non-defaulting members.

Separately, the Associations believe clearer guidance on information sharing between the relevant authorities will also be helpful, for example, regarding how the information sharing responsibilities should be divided between FMI supervisory authorities and the resolution authorities. This may include some guidance on which authorities should initiate the information sharing process or by when must information be shared in the time frame leading up to an FMI participant's resolution.

The Associations also believe that information sharing between resolution authorities and FMI supervisory authorities should also be conducted only to the extent necessary to facilitate continuity of access to critical FMI services by an FMI participant in material financial distress or in resolution. The FMI participants, as firms subject to recovery and resolution planning requirements, share a significant amount of confidential information with their resolution authorities that should not be widely disseminated without consent by the FMI participants until it is necessary in order for the FMI participants to maintain continuity of access to critical services.

Similarly, although the Associations are supportive of the FSB Guidance's initiative to streamline communications by leveraging existing fora for multilateral discussions, such as the Crisis Management Groups, the Associations believe that the FSB Guidance should emphasize that confidentiality with respect to specific firms is paramount. In particular, the Associations ask that the FSB clarify that the suggestion to include FMI supervisors and overseers in appropriate multilateral discussions would not have the effect of establishing an informal supervisory relationship between FMI supervisors and FMI participants where none currently exists.

D. FSB Can Play a Unique Role in the Engagement Process

Finally, the Associations applaud the FSB for the important work that has been done so far. The Associations believe that the FSB is uniquely positioned to facilitate dialogue among the relevant parties on an international level—including the providers of critical FMI services, the FMI participants and the relevant authorities of each of the above—to help increase transparency and provide overarching guidance. The FSB should continue to play this role on a regular basis, including after the FSB Guidance has been finalized and implemented at the national level.

Appendix B

Description of Each of the Associations

The Clearing House. The Clearing House is a banking association and payments company that is owned by the largest commercial banks and dates back to 1853. The Clearing House Association L.L.C is a nonpartisan organization that engages in research, analysis, advocacy and litigation focused on financial regulation that supports a safe, sound and competitive banking system. Its affiliate, The Clearing House Payments Company L.L.C., owns and operates core payments system infrastructure in the United States and is currently working to modernize that infrastructure by building a new, ubiquitous, real-time payment system. The Payments Company is the only private-sector ACH and wire operator in the United States, clearing and settling nearly \$2 trillion in U.S. dollar payments each day, representing half of all commercial ACH and wire volume.

The Securities Industry and Financial Markets Association. SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over \$2.5 trillion for businesses and municipalities in the U.S., serving clients with over \$20 trillion in assets and managing more than \$67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit www.sifma.org.

The Futures Industry Association. FIA is a global organization with offices in the U.S., Europe and Asia. Its core members, many of which are banking organizations, are members of central counterparties. FIA's membership also consists of the major global futures exchanges, clearinghouses, trading platforms, and others that, together, make central clearing possible.