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Via email

Financial Stability Board  
Email: [fsb@bis.org](mailto:fsb@bis.org)

**Re: Financial Stability Board (“FSB”) Thematic Peer Review on Resolution Regimes**

Ladies and Gentlemen:

CLS Bank International (“**CLS**”), the operator of a financial market infrastructure (“**FMI**”) that is the predominant settlement system for foreign exchange transactions (the “**CLS System**”), appreciates the opportunity to provide feedback regarding certain issues it has noted with respect to the implementation of the Key Attributes of Effective Resolution Regimes for Financial Institutions (the “**Key Attributes**”), as applicable to FMIs.<sup>1</sup>

### **Background**

CLS is a special purpose corporation organized under the laws of the United States of America and supervised by the Board of Governors of the Federal Reserve System and the Federal Reserve Bank of New York. CLS is subject to cooperative oversight by 22 central banks whose currencies are settled in the CLS System, pursuant to a Protocol for the Cooperative Oversight Arrangement of CLS<sup>2</sup> organized and administered by the Federal Reserve. The CLS System has been designated under European Directive 98/26/EC and has been designated as a systemically important financial market utility by the United States Stability Oversight Council.

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<sup>1</sup> Please refer to Annex 1 of Appendix II of the Key Attributes (Resolution of FMIs and FMI Participants) (the “**Annex**”).

<sup>2</sup> [http://www.federalreserve.gov/paymentsystems/files/cls\\_protocol.pdf](http://www.federalreserve.gov/paymentsystems/files/cls_protocol.pdf)

## **FMI Resolution**

- In light of the critical role of FMIs in the financial system, CLS agrees with the approach taken in the Annex, which addresses special considerations for resolution regimes for FMIs and provides that such regimes must be appropriately tailored given that the standard objective of an insolvency proceeding, to maximize value for creditors, may be inconsistent with the policy of stability and the goal of the continuation of an FMI's services. However, many jurisdictions have not yet implemented laws that take into account these considerations, and should be encouraged to do so.
- When implementing KA 3.1 "entry into resolution," authorities should take into account that some FMIs (such as the CLS System) are international in scope. CLS therefore suggests that for such FMIs, any resolution regime should: (i) only be triggered in cooperation and coordination with the FMI's primary regulators in the jurisdiction of the FMI's operator and under no circumstances be commenced without notifying the FMI and its primary regulators in advance, and (ii) contain clear triggers that are consistent across jurisdictions (and global authorities should coordinate the establishment of such triggers), so that recovery measures will not be inadvertently disrupted. Jurisdictions should carefully consider the need for such coordination in advance of both implementing and invoking laws on FMI resolution.
- The Annex provides a choice of resolution powers for FMIs in distress. However, when implementing these powers, authorities should consider adopting a limited resolution approach for foreign FMIs, which would allow the authorities to take appropriate steps to ensure that such FMIs will continue to provide their critical services. In order to accomplish this goal, the authorities' powers should include (i) powers to enforce contractual terms notwithstanding clauses for termination upon resolution,<sup>3</sup> and (ii) stays to protect the FMI's assets that are used for its systemically important function, wherever held.<sup>4</sup>
- In order to ensure the continuity of an FMI's services in resolution, it is imperative that any resolution regime or authority respect the rules or other contractual relationships between the FMI and its participants in all circumstances (before, during and after a resolution). The Annex provides powers to allocate losses and allocate or terminate contracts. However, these powers should be carefully utilized so that participants are not subject to losses unless such losses are controllable and pursuant to ex ante arrangements. If an FMI's loss

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<sup>3</sup> Some FMIs may use vendors, or even other FMIs such as RTGS systems, that are critical to the performance of their service, and therefore such third party's refusal to provide services would affect the financial community at large. Thus, CLS supports affording resolution authorities the flexibility to ensure the continued performance by third parties under their existing agreements with FMIs, assuming the FMI also continues to perform under such agreements.

<sup>4</sup> The principle of "no creditor worse off" should apply notwithstanding such stays, however, protections from creditor actions for an appropriate time period may be necessary to maintain market confidence while the resolution authorities resolve the FMI in an orderly way to prevent systemic disruption.

sharing arrangements are insufficient, this should be addressed as part of the recovery planning process.

- FMIs are required to undertake recovery planning, as described in the CPMI-IOSCO's report: *Recovery of financial market infrastructures* (October 2014) framework for recovery planning. However, in addition to recovery planning, the CPSS-IOSCO's *Principles for financial market infrastructures* require FMIs to undertake wind-down planning, an exercise for which almost no guidance exists. CLS requests that the FSB consider the need for more leadership in this area.

### **Resolution of FMI Participants/ Advance Notice**

The Annex emphasizes the importance of notice to FMIs regarding the resolution of a participant, including advance notice. The Annex specifically stipulates that “resolution authorities should inform FMIs as soon as possible of the resolution of a participant, and ***if possible in advance of the firm's entry into resolution***” [emphasis added].

CLS believes that advance notice to FMIs in all resolution scenarios, but in particular in transfer of membership scenarios, is critical for the following reasons:

- FMI's role as provider of information. If notified, the FMI will be able to provide the resolution authority with comprehensive up-to-date information regarding that participant, and potentially its clients, including information about the participant's role in the FMI ecosystem that will increase the likelihood of a successful resolution. For example, many participants in the CLS System play multiple roles with respect to the system (e.g., act as a nostro agent for other members in multiple currencies, act as liquidity provider, act as a third party service provider, and participate in ancillary CLS services).
- Time for FMI to obtain sufficient assurances regarding ability to comply with obligations. FMIs need sufficient time to ensure that a participant in resolution will be able to comply with its obligations. In the case of the CLS System, for example, timely funding is critical for settlement to occur and to ensure that CLS will not need to invoke its default arrangements. In light of the importance of timely funding, CLS plans to require assurance from the relevant resolution authority and possibly nostro agents prior to the start of the next settlement session that the participant in resolution will be able to comply with its funding obligations in up to seventeen currencies (as applicable), based upon the projections provided to the authority (which can only be provided if CLS has advance notice of the resolution). If CLS does not receive advance notice, it will not have the opportunity to interact with the resolution authority to (i) confirm that funding obligations and other requirements will be met; and (ii) determine whether or not the participant in resolution will continue to play various roles in the system, which will also have systemic ramifications that must be carefully managed.

- Time for FMI to undertake necessary steps. In order to accommodate the continued participation of a successor institution in a compressed timeframe, such as over a weekend, FMIs will require sufficient time to undertake a long list of internal steps and processes, including operational (e.g., confirming the transfer of all relevant BICs by SWIFT, where necessary), liquidity, credit, and legal-related assessments and actions, and confirming that fundamental participation requirements will be met. With respect to the CLS System, it is difficult to imagine that these requirements could be met over a weekend if CLS did not receive advance notice and the opportunity to coordinate with the resolution authority.
- Application of mitigants. FMIs require the time to assess the need to apply appropriate mitigants (including the need for a guarantee or collateral) in a resolution scenario, where normal participation requirements may not be met, so that the safety of the FMI and its participants will not be comprised.

CLS has not seen any references to “advance notice, if possible” in the legislation implementing the Key Attributes that CLS has reviewed.”<sup>5</sup> Given the importance of notice, and the fact that it is in the interest of the regulatory authorities to provide advance notice to FMIs to maximize the likelihood that a participant in resolution will be able to continue to participate in such FMIs, CLS suggests that the FSB explicitly review FMI-notification requirements, in order to ensure that resolution authorities have considered this issue.

Please do not hesitate to contact us if you have any questions regarding this letter.

Best regards,



Alan Marquard

cc: Dino Kos, Executive Vice President, Head of Global Regulatory Affairs, CLS Bank International  
Lauren Alter-Baumann, Managing Director, Legal and Regulatory Strategic Affairs, CLS Bank International  
Andrea Gildea, Director, Assistant General Counsel, CLS Bank international

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<sup>5</sup> For example, Article 83(2)(k) of the European Bank Recovery and Resolution Directive expressly requires that resolution authorities provide notice to operators of designated systems after taking a resolution action, but is silent with respect to advance notice.