ISDA Safe, Efficient Markets

October 18, 2016

Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
400 7th Street SW
Suite 3E-218, Mail Stop 9W-11
Washington, DC 20219

By email: regs.comments@occ.treas.gov

Re: Notice of Proposed Rulemaking: Mandatory Contractual Stay Requirements for Qualified Financial Contracts

Ladies and Gentlemen:

The International Swaps and Derivatives Association, Inc. ("**ISDA**")[1] appreciates the opportunity to provide the Office of the Comptroller of the Currency (the "**OCC**") with comments and recommendations regarding the notice of proposed rulemaking (the "**OCC Proposed Rule**") promulgated by the OCC regarding mandatory contractual stay requirements for qualified financial contracts ("**QFCs**") of federally chartered and licensed financial institutions that are members of systemically important U.S. banking organizations and the U.S. operations of systemically important foreign banking organizations (together, "**Covered Banks**").[2]

ISDA supports the objectives of the OCC Proposed Rule, and of the companion rules proposed by the Board of Governors of the Federal Reserve System (the "**Board**")[3] and the Federal Deposit Insurance Corporation (the "**FDIC**"),[4] of ensuring the orderly resolution of large financial institutions and protecting the stability of the U.S. financial system. ISDA also supports the efforts of the OCC, together with the Board and the FDIC, to promote a standard, market-wide solution to comply with their final rules to ensure consistency and transparency for regulators and market participants. ISDA and its members worked closely with U.S. regulators and other members of the Financial Stability Board in developing the ISDA 2015 Universal Resolution Stay Protocol (including the Securities Financing Transaction Annex and the Other

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1 Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 67 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org.

2 81 Fed. Reg. 55381 (Aug. 19, 2016).

3 81 Fed. Reg. 29169 (May 11, 2016) (the "**Board Proposed Rule**").

4 Restrictions on Qualified Financial Contracts of Certain FDIC-supervised Institutions (not yet published in the Federal Register) (the "**FDIC Proposed Rule**," and together with the OCC Proposed Rule and the Board Proposed Rule, the "**Proposed Rules**").

Agreements Annex, the "**ISDA 2015 Universal Protocol**"), adherence to which would be safe harbored as a means of compliance with the requirements of the OCC Proposed Rule and the other Proposed Rules, and the ISDA Resolution Stay Jurisdictional Modular Protocol (the "**ISDA JMP**").

As a practical matter, global systemically important banking ("**GSIB**") groups that have members that are federally chartered and licensed financial institutions and their counterparties will need to comply with all three Proposed Rules.[5] Because market participants will be subject to multiple rules at any time, it is crucial that the agencies take a consistent approach in each of their respective final rules to reduce the compliance burden and uncertainty about parties' rights under QFCs. In this regard, we applaud and fully endorse the OCC in making the substantive requirements of the OCC Proposed Rule nearly identical to those of the Board Proposed Rule and the FDIC Proposed Rule, even though the scope of entities covered by each Proposed Rule is different.

ISDA's comments on the OCC Proposed Rule seek to address concerns raised by certain market participants about using the ISDA 2015 Universal Protocol as the market-standard means of compliance. We propose that the OCC coordinate with the Board and the FDIC to provide under its and their final rules a safe harbor for complying with the rules' requirements by adhering to a U.S. Jurisdictional Module to the ISDA JMP based on the terms of the ISDA 2015 Universal Protocol, but with certain important changes that would address concerns raised by buyside participants about adhering to the ISDA 2015 Universal Protocol. We believe this approach is consistent with the OCC's, Board's and the FDIC's policy objectives and will be more likely to lead to widespread use of a market-standard approach. In addition, we propose narrowing the scope of the Proposed Rules to eliminate the substantial compliance burden of remediating contract and transaction types that do not raise the concerns identified by the agencies as motivating the Proposed Rules. Finally, we propose several clarifications and changes to the Proposed Rules that we believe are also in line with the agencies' policy objectives, but will make compliance more feasible and efficient for market participants.

I. The OCC should, in consultation with the Board and the FDIC, revise the OCC Proposed Rule in accordance with ISDA's comments on the Board Proposed Rule.

On August 5, 2016, ISDA submitted a comment letter to the Board in response to the Board Proposed Rule, which is attached as Appendix A (the "**ISDA Board Comment Letter**"). The ISDA Board Comment Letter includes comments and recommendations for the Board to consider to address concerns raised by ISDA members regarding the Board Proposed Rule. Because the substantive requirements of the OCC Proposed Rule are nearly identical to those of

[5] Under the OCC Proposed Rule, a Covered Bank is required to conform its legacy QFCs entered into before the compliance date, if the Covered Bank or any of its affiliates that is a Covered Bank or a "covered entity" under the Board Proposed Rule enters into a QFC with the counterparty or any of its affiliates. See OCC Proposed Rule, section 47.4(a)(2). The Board Proposed Rule and FDIC Proposed Rule have mirror provisions. See Board Proposed Rule, section 252.83(a)(2); FDIC Proposed Rule, section 382.3(a)(2). As a result of these provisions, if a counterparty enters into a new QFC after the compliance date with a Covered Bank or covered entity, it will have to conform its QFCs with all Covered Banks and covered entities in a GSIB group.

the Board Proposed Rule, these comments apply equally to the OCC Proposed Rule and we urge the OCC to address these comments and recommendations in their final rule.

In addition, in order to reduce the compliance burden on the market, and to reduce uncertainty, it is important for the substantive requirements of each of the Proposed Rules to remain consistent. We therefore urge the OCC to coordinate with the Board and the FDIC to ensure that the same revisions are made to each of the Proposed Rules so that the substantive requirements remain the same.

II. The OCC, together with the Board and FDIC, should clarify the interaction of the Proposed Rules.

A. Coordinate to ensure that individual entities are not subject to the requirements of more than one rule.

Although the scope of entities that must comply with each Proposed Rule is different, the rules do overlap and there are entities that would be required to comply with multiple rules. For example, under the Board Proposed Rule, all subsidiaries of U.S. GSIBs and the U.S. operations of all non-U.S. GSIBs would be "covered entities" (as defined in the Board Proposed Rule[6]), other than "covered banks."[7] However, subsidiaries of "covered banks" are not excluded from the Board Proposed Rule. As a result, subsidiaries of Covered Banks would be subject to the requirements of both the Board Proposed Rule and the OCC Proposed Rule.[8] We urge the OCC and the Board to coordinate in order to ensure that only a single set of regulations apply to any entity within a GSIB group.

B. Eliminate the uncertainty and burden caused by the definition of affiliate and instead use the GAAP financial consolidation standard to define groups.

The OCC Proposed Rule, like the Board Proposed Rule and the FDIC Proposed Rule, requires a GSIB group to conform its covered QFCs with a counterparty on a group-by-group basis in order to continue trading with that counterparty. This means that a Covered Bank must conform its existing QFCs with a counterparty if any of its affiliates that are Covered Banks (or "covered entities" under the Board Proposed Rule) enter into a QFC with the counterparty or any affiliate

[6] Board Proposed Rule section 252.82(a).

[7] Board Proposed Rule, section 252.81, 82. This definition would include national banks, Federal savings associations, federal branches and federal agencies.

[8] See OCC Proposed Rule, section 47.3(a)(i) (the definition of Covered Bank includes "any subsidiary of a national bank or a Federal savings association"). We note that section 47.3(b), which requires subsidiaries of Covered Banks to comply with the substantive provisions of the OCC Proposed Rule, appears to be redundant with the definition of Covered Bank and that the defined term "subsidiary of covered bank" is not used in any provision of the OCC Proposed Rule. If these sections and terms are intended to have different effects, we urge the OCC to provide clarification in its final rule.

of the counterparty.[9] This aspect of the Proposed Rules requires, at a minimum, that GSIBs identify not just their own affiliates, but also those of each of their counterparties.

As discussed in Sections III.E and III.F of the ISDA Board Comment Letter, this requirement of the Board Proposed Rule with its reliance on the Bank Holding Company Act's ("**BHCA**") definitions of "affiliate", introduces burdens and uncertainty that far outweigh the benefits to resolvability from these provisions. First, it would be particularly challenging and burdensome for non-bank counterparties to apply the BHCA definition (a definition not used by such entities to define affiliation) to identify the relevant entities that would be considered affiliates under the Board Proposed Rule. Second, the BHCA definition would require a GSIB to ensure the compliance of entities they are deemed to control but that are not functionally controlled by the GSIB. To address these concerns, ISDA recommended that: (1) the Board eliminate the requirement to conform existing QFCs with affiliates of counterparties in order to continue trading with a single counterparty; and (2) that the Board adopt a test for affiliation based on the financial consolidation standards under U.S. Generally Accepted Accounting Principles ("**GAAP**"), rather than relying on the BHCA definition, and explicitly exclude certain other entities that may be consolidated under GAAP in certain circumstances, such as merchant banking portfolio companies, section 2(h)(2) companies, sponsored funds, securitization vehicles, DPC branch subsidiaries, joint ventures of which a "covered entity" is a part owner or other entities in which a "covered entity" holds only a minority interest and over which it does not exert a controlling influence (such entities, "**Excluded Subsidiaries**"). These comments apply equally with respect to the OCC Proposed Rule.

Moreover, these concerns would be exacerbated by the discretion retained by each of the OCC, the Board and the FDIC to determine the scope of affiliates subject to their rules. Given the overlapping nature of the Proposed Rules, the discretion retained by each of the regulators under its own definition of "affiliate" would create uncertainty and increase the burden associated with ensuring compliance with the rule requirements. This added complexity undermines the goals of certainty and transparency that motivate the Proposed Rules and further supports the need for a clear, commonly used definition of affiliate. We therefore urge the OCC, together with the Board and the FDIC, to adopt a single, common definition of affiliate under each of their final rules that is based on the GAAP financial consolidation standard and to eliminate Excluded Subsidiaries from the scope of the GSIB group. We note that the OCC, as well as the Board and the FDIC, have used a financial consolidation test to define "affiliate" in their final margin rules for uncleared swaps entered into by covered swap entities.

C. Clarify how the final rules would apply to transactions between entities that are all subject to the such rules.

The interaction between the OCC Proposed Rule and the Board Proposed Rule also raises questions about which Proposed Rule would apply to a QFC in certain circumstances. We understand that the intent of section 47.7(b) of the OCC Proposed Rule, section 252.88(b) of the Board Proposed Rule and section 382.7(b) of the FDIC Proposed Rule is to ensure that a QFC is excluded from the scope of one rule if it is conformed to the requirements of another. However,

[9] See OCC Proposed Rule, §§ 47.4(a)(2), 47.5(a)(2). The Board Proposed Rule and the FDIC Proposed Rule have parallel provisions.

as ISDA explains in Section V.G of the ISDA Board Comment Letter, the interaction between these provisions, as drafted, is unclear. For example, in the case of a QFC between a Covered Bank and a "covered entity," section 47.7(b) of the OCC Proposed Rule states that the Covered Bank is not required to conform such QFC if it is conformed by the "covered entity" in accordance with the Board Proposed Rule. Likewise, section 252.88(b) is a mirror provision that states that the "covered entity" is not required to conform the QFC if the Covered Bank conforms it in accordance with the OCC Proposed Rule. We believe that the intended outcome in this scenario is for both the Covered Bank and the "covered entity" to mutually agree to modify their rights under the QFC as provided by the Proposed Rules. The same issue is present with respect to section 382.7(b) of the FDIC Proposed Rule. However, this outcome is not clear from the current text of the Proposed Rules and we ask the OCC, Board and the FDIC to clarify the intention of these provisions in their final rules.

III. The OCC should coordinate with Board and FDIC to safe harbor the Proposed U.S. Jurisdictional Module to the ISDA JMP as described in the ISDA Board Comment Letter.

We support the OCC's inclusion of a safe harbor for compliance with the OCC Proposed Rule by adherence to the ISDA 2015 Universal Protocol. We believe that the use of a market-standard ISDA protocol provides an efficient, consistent and transparent means for compliance on a broad scale. However, chief among the recommendations in the ISDA Board Comment Letter is ISDA's request for the final rule to also include a safe harbor for compliance with the final rule by adhering to a U.S. Jurisdictional Module of the ISDA JMP. In that letter, ISDA identified a set of principles developed by the ISDA working group that would form the basis of such a U.S. Jurisdictional Module (the "**Proposed U.S. Jurisdictional Module**"), which include certain modifications to the terms of the ISDA 2015 Universal Protocol that would encourage adherence by a broader scope of market participants, including buyside institutions.[10]

In the preamble to the OCC Proposed Rule, the OCC notes with approval that the ISDA 2015 Universal Protocol provides a market-standard approach to compliance and can address potential impediments to resolution "on an industry-wide basis" and in a manner that "increase[s] market certainty, transparency, and equitable treatment."[11] As discussed in the ISDA Board Comment Letter, the ISDA JMP would also provide such benefits and is better suited than the ISDA 2015 Universal Protocol to serve as a means of market-wide compliance with the Proposed Rules. The ISDA JMP addresses certain concerns of market participants (particularly those that are not directly subject to the Proposed Rules) and provides a more tailored means of compliance with regulatory requirements than the ISDA 2015 Universal Protocol.

ISDA believes that the means to maximize transparency and adherence by market participants and reduce the costs of compliance with the Proposed Rules is for ISDA to develop a single U.S. Jurisdictional Module, with the terms of the Proposed U.S. Jurisdictional Module, that would satisfy safe harbors in each of the Proposed Rules. To facilitate this outcome, we urge the OCC, the Board and the FDIC to each safe harbor such a U.S. Jurisdictional Module for compliance

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[10] See ISDA Board Comment Letter, Section I.A.

[11] 81 Fed. Reg. 55393.

with each of their respective rules. Because the rules are nearly identical, as are the concerns that these rules are attempting to address, a single U.S. Jurisdictional Module would address all of the agencies' concerns in a manner that is more convenient and transparent for market participants. It would also reduce the administrative and educational burden on ISDA and market participants that would result if there were multiple Jurisdictional Modules, all with similar terms.[12] With this in mind, we urge the agencies to coordinate with each other to ensure that each agency's final rule safe harbors such a U.S. Jurisdictional Module.

If the OCC, the Board and the FDIC do not each adopt an explicit safe harbor for the Proposed U.S. Jurisdictional Module, the OCC should, at a minimum, create a streamlined process for such a module to be a means of compliance following adoption of final rules, as discussed in the ISDA Board Comment Letter. Alternatively, we ask that the process for approving "enhanced creditor protection conditions" be modified to facilitate the approval of the Proposed U.S. Jurisdictional Module as a means of compliance. As discussed in Section I.C of the ISDA Board Comment Letter, we ask for clarification that this process would allow ISDA to submit the Proposed U.S. Jurisdictional Module for approval as a means of compliance with all aspects of the Board's final rule.[13]

Although it is our understanding that the Board, OCC and the FDIC intend to apply the same criteria for approving an alternative means of compliance with the Proposed Rules, we note that the standards of review are stated differently.[14] We believe that these differences are not intended to lead to material differences in outcomes when considering the approval of alternative means of compliance. If the OCC believes that these standards could lead to differences in outcomes, ISDA and its members would appreciate the opportunity to discuss these issues further with the OCC, Board and the FDIC.

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[12] This would be especially onerous for entities that would be subject to multiple regulations, such as subsidiaries of Covered Banks.

[13] See Section I.C of the ISDA Board Comment Letter for a description of certain ambiguities that we believe exist in this process and that we urge the Board to clarify. In addition, ISDA requested a streamlined process for the Proposed U.S. Jurisdictional Module as the Board, like the OCC, has already acknowledged that the ISDA 2015 Universal Protocol satisfies the policy objectives of the Proposed Rules. The terms of the Proposed U.S. Jurisdictional Module would only differ slightly from the terms of the ISDA 2015 Universal Protocol and are consistent with the policy objectives of the Proposed Rules.

[14] The OCC's standard is stated as follows: to "promote the safety and soundness of federally chartered or licensed institutions by mitigating the potential destabilizing effects of the resolution of a global significantly important banking entity that is an affiliate of the covered bank, at least to the same extent." 81 Fed. Reg. 55401. The Board's standard is stated as follows: to "prevent or mitigate risks to the financial stability of the United States that could arise from the failure of a global systemically important BHC, a global systemically important foreign banking organization, or the subsidiaries of either and would protect the safety and soundness of bank holding companies and state member banks to at least the same extent." 81 Fed. Reg. 29192. The FDIC's standard is stated as follows: "promote the safety and soundness of covered FSIs by mitigating the potential destabilizing effects of the resolution of a global significantly important banking entity that is an affiliate of the covered FSI to at least the same extent." FDIC Proposed Rule, section 382.5(c).

ISDA appreciates the opportunity to provide these comments. We hope that the OCC finds our comments useful in its continuing deliberations on the implementation of contractual stays in financial contracts.

Please do not hesitate to contact Samantha Riley (sriley@isda.org) or the undersigned if we can provide further information about the derivatives market or other information that would assist the OCC in its work in relation to the OCC Proposed Rule.

Yours sincerely,

Katherine T. Darras
ISDA General Counsel

cc: Thomas J. Curry
Comptroller of the Currency, OCC

Valerie Song
Assistant Director, OCC

Scott Burnett
Attorney, Bank Activities and Structure Division, OCC

Rima Kundnani
Attorney, OCC

Ron Shimabukuro
Senior Counsel, Legislative and Regulator, OCC

Janet L. Yellen
Chair, Board

Stanley Fischer
Vice Chairman, Board

Lael Brainard
Governor, Board

Jerome H. Powell
Governor, Board

Daniel K. Tarullo
Governor, Board

Michael S. Gibson
Director, Division of Banking Supervision and Regulation, Board

Mark E. Van Der Weide
Deputy Director, Division of Banking Supervision and Regulation, Board

Scott G. Alvarez
General Counsel, Legal Division, Board

Barbara J. Bouchard
Senior Associate Director, Division of Banking Supervision and Regulation, Board

Keith Ligon
Adviser, Division of Banking Supervision and Regulation, Board

Constance M. Horsley
Assistant Director, Division of Banking Supervision and Regulation, Board

Felton Booker
Senior Supervisory Financial Analyst, Division of Banking Supervision and Regulation, Board

Mark Savignac
Supervisory Financial Analyst, Division of Banking Supervision and Regulation, Board

Will Giles
Counsel, Legal Division, Board

Lucy Chang
Attorney, Legal Division, Board

Martin J. Gruenberg
Chairman, FDIC

Thomas M. Hoenig
Vice Chairman, FDIC

Richard Cordray
Director, FDIC and Consumer Financial Protection Bureau

Ryan Billingsley
Acting Associate Director, FDIC

Alexandra Steinberg Barrage
Senior Resolution Policy Specialist, FDIC

David N. Wall
Assistant General Counsel, FDIC

Cristina Regojo
Counsel, FDIC

Phillip Sloan
Counsel, FDIC

Greg Feder
Counsel, FDIC

Michael Phillips
Counsel, FDIC

Appendix A

ISDA. Safe, Efficient Markets

August 5, 2016

Robert deV. Frierson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

By email: regs.comments@federalreserve.gov

Re: 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 Definitions (FRB RIN No. 7100 AE-52; FRB Docket No. R-1538)

Ladies and Gentlemen:

The International Swaps and Derivatives Association, Inc. ("**ISDA**")[1] appreciates the opportunity to provide the Board of Governors of the Federal Reserve System (the "**Board**") with comments and recommendations regarding the notice of proposed rulemaking (the "**Proposed Rule**") promulgated by the Board regarding restrictions on qualified financial contracts ("**QFCs**") of systemically important U.S. banking organizations and the U.S. operations of systemically important foreign banking organizations (together, "**Covered Entities**").[2]

ISDA supports the Proposed Rule's objectives of ensuring the orderly resolution of large financial institutions and protecting the stability of the U.S. financial system. ISDA also supports the Board's effort to promote a standard, market-wide solution to comply with the final rule to ensure consistency and transparency for regulators and market participants. ISDA and its members worked closely with the Board, other U.S. regulators and other members of the Financial Stability Board ("**FSB**") in developing the ISDA 2015 Universal Resolution Stay Protocol, including the Securities Financing Transaction Annex and the Other Agreements Annex (the "**ISDA 2015 Universal Protocol**"), adherence to which would be safe harbored as a means of compliance with the requirements of the Proposed Rule.

ISDA's comments on the Proposed Rule seek to address concerns raised by certain market participants about using the ISDA 2015 Universal Protocol as the market-standard means of

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1 Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 800 member institutions from 68 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's web site: www.isda.org.

2 81 Fed. Reg. 29169 (May 11, 2016).

compliance. We propose that the final rule also provide a safe harbor for complying with the rule's requirements by adhering to a U.S. Jurisdictional Module to the ISDA Resolution Stay Jurisdictional Modular Protocol ("**ISDA JMP**") based on the terms of the ISDA 2015 Universal Protocol, but with certain important changes that would address concerns raised by buyside participants about adhering to the ISDA 2015 Universal Protocol. We believe this approach is consistent with the Board's policy objectives and will be more likely to lead to widespread use of a market-standard approach. In addition, we propose narrowing the scope of the Proposed Rule to eliminate the substantial compliance burden of remediating contract and transaction types that do not raise the concerns identified by the Board as motivating the Proposed Rule. Finally, we propose several clarifications and changes to the Proposed Rule that we believe are also in line with the Board's policy objectives, but will make compliance more feasible and efficient for market participants.

I. The Board Should Allow Covered Entities to Comply with the Final Rule by Adherence to the ISDA Resolution Stay Jurisdictional Modular Protocol.

ISDA supports the Board's effort in the Proposed Rule to promote compliance with the final rule's requirements through industry standard documentation, which would promote consistency and transparency for regulators and market participants alike. As the Board notes, the ISDA 2015 Universal Protocol provides a market-standard approach to compliance and can address impediments to resolution "on an industry-wide basis" and in a manner that "increase[s] market certainty, transparency and equitable treatment with respect to default rights of non-defaulting parties."[3] In that regard, we support the Board's endorsement of the ISDA 2015 Universal Protocol as a means of satisfying the Board's policy objectives and the inclusion of the safe harbor in section 252.85(a) of the Proposed Rule. However, as described in Section II, we request that the Board make certain changes to the safe harbor to clarify its operation.

While the ISDA 2015 Universal Protocol was developed as a voluntary, reciprocal arrangement among global systemically important banks ("**G-SIBs**"),[4] ISDA has developed a separate protocol to facilitate industry-wide compliance with regulations, including those contained in the Proposed Rule. The ISDA JMP creates a single framework that enables parties to comply precisely with the requirements in various jurisdictions by adhering to different "Jurisdictional Modules."[5] These Jurisdictional Modules differentiate between those entities that are subject to regulations (referred to in the ISDA JMP as "Regulated Entities") and those entities that are

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3 81 Fed. Reg. 29183.

4 As the Board notes in the preamble to the Proposed Rule, the ISDA 2015 Universal Protocol was developed by ISDA and a working group of its members, in consultation with the Board, other U.S. regulators and non-U.S. regulatory agencies, as a protocol mainly intended for voluntary adherence by the largest global derivatives dealers. See, e.g., FSB, Press Release, November 12, 2015, available at, http://www.fsb.org/wp-content/uploads/20151111-Contractual-stays-press-release.pdf (noting that "[a]n initial set of 18 G-SIBs and other large dealer banks adhered to the [ISDA 2014 Resolution Stay Protocol, on which the ISDA 2015 Universal Protocol is based] covering OTC bilateral derivatives in November 2014. The FSB subsequently called on all G-SIBs and other firms with significant derivatives exposures to adhere to the protocol by the end of 2015, and requested that such contractual terms be incorporated into other financial contracts with resolution-based termination features rights.").

5 For information on the ISDA JMP and the available Jurisdictional Modules, see https://www2.isda.org/functional-areas/protocol-management/protocol/24.

adhering for the purpose of satisfying the regulatory requirements applicable to their Regulated Entity counterparties (referred to in the ISDA JMP as "Module Adhering Parties"). This approach provides market participants, particularly those that are not Regulated Entities, a more tailored means of complying with applicable requirements. In the preamble to the Proposed Rule, the Board noted, with reference to the ISDA JMP, that "[a] jurisdictional module for the United States that is substantively identical to the Protocol in all respects aside from exempting QFCs between adherents that are not covered entities or covered banks would be consistent with the current proposal."[6]

Considering the advantages of the ISDA JMP as a means for facilitating market-wide compliance, we urge the Board to include in the final rule a safe harbor for compliance with all of the requirements of the final rule through adherence to a U.S. Jurisdictional Module to the ISDA JMP. While ISDA and its members generally agree that the ISDA 2015 Universal Protocol should serve as the basis for the terms of such a module, we believe that certain changes to the scope of such terms would maintain the benefits of the ISDA 2015 Universal Protocol and satisfy the Board's policy objectives while substantially increasing the likelihood that such a U.S. Jurisdictional Module would lead to market-wide adherence.

A. Terms of a Proposed U.S. Jurisdictional Module.

The ISDA working group is composed of a wide variety of market participants representing a broad range of perspectives, including U.S. and non-U.S. G-SIBs, other large international and domestic banks, custodial and agent banks, asset managers, investment funds and large end users. While there is general support for promoting the resolvability of G-SIBs, the group has expressed an equally wide variety of views on how the risks and burdens of compliance with the Proposed Rule should be allocated, particularly with respect to the exercise of contractual default and related rights. Notwithstanding these differences, the position of the ISDA working group is that a greater number of market participants will adhere to a U.S. Jurisdictional Module for purposes of complying with the final rule if it is limited in scope to just U.S. resolution and insolvency regimes and allows adherents to identify in advance the other market participants with which they would be amending their contracts on a "universal" basis. Developing a U.S. Jurisdictional Module that has these features would increase the possibility that non-Covered Entities use the U.S. Jurisdictional Module to comply with the final rule. Widespread adherence to such a module would provide a market-standard means of compliance that would substantially reduce the compliance burden on both Covered Entities and their counterparties and enhance the transparency of compliance to both regulators and the broader market.

To address these issues, ISDA and the working group have developed a set of principles, described below, that would form the basis of a U.S. Jurisdictional Module (the "**Proposed U.S. Jurisdictional Module**") that we believe would encourage broader adherence. Considering the Board's support of the ISDA 2015 Universal Protocol, we have used the terms of the ISDA 2015 Universal Protocol as the starting point and only modified provisions where members believe doing so is important to facilitate broad-based adherence without compromising the Board's policy goals.

6 81 Fed. Reg. 29181, note 106.

1. Section 1: All of the provisions of Section 1 of the ISDA 2015 Universal Protocol would apply, but be limited in their application:

    (a) Only to Covered Entities,[7] as defined in the final rule; and

    (b) Only with respect to resolutions under the Orderly Liquidation Authority provisions of the Dodd-Frank Act ("**OLA**") and the Federal Deposit Insurance Act ("**FDIA**").

2. Section 2: All of the provisions of Section 2 of the ISDA 2015 Universal Protocol would apply, but be limited in application only to Covered Entities, as defined under the final rule.

3. Scope of Covered QFCs: The Proposed U.S. Jurisdictional Module would amend all QFCs that are required to be amended by the final rule, i.e., the definition of "Covered Agreement" would refer to the definition of "covered QFC" (or the equivalent) under the final rule.

4. Universal Opt-in: Module Adhering Parties would amend all of their existing covered QFCs with all "Regulated Entities" (i.e., all Covered Entities that adhere) on a "universal" basis, provided that:

    (a) The list of Regulated Entities included within the scope of universal adherence is limited to a static list of such entities that is made available to market participants for review prior to adhering to the Proposed U.S. Jurisdictional Module, which would enable market participants to fulfill due diligence obligations related to adherence;

    (b) Other than as described below with respect to permitted assignees, adherence with respect to any entities that are not on the static list described above, but that subsequently adhere as Regulated Entities, would be on an "entity-by-entity" basis, which would likewise enable market participants to fulfill due diligence obligations related to adherence;[8]

    (c) If a covered QFC subject to the terms of the Proposed U.S. Jurisdictional Module is transferred to an affiliate by means of assignment (as permitted by the terms of such QFC) or novation, the terms of the Proposed U.S. Jurisdictional Module would "move with" the QFC and apply equally with respect to the transferee, regardless of whether the transferee was included on the static list described above; and

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[7] ISDA anticipates that the Proposed U.S. Jurisdictional Module would also apply to Covered Banks. ISDA urges the Board to coordinate with the Office of the Comptroller of the Currency (the "**OCC**") on the publication of final rules so that the Proposed U.S. Jurisdictional Module can efficiently facilitate compliance with all applicable requirements.

[8] Note that the ISDA JMP provides mechanics facilitating entity-by-entity adherence, which are available when adhering to the UK (PRA Rule) Jurisdictional Module and the German Jurisdictional Module.

(d) In those cases where an entity becomes a Covered Entity because it is acquired by a G-SIB group subject to requirements of the final rule, (i) such entity would benefit from the "grace period" provided under section 252.82(b)(1), during which time it could adhere as a Regulated Entity and counterparties could, as described under item 4(b) above, adhere with respect to it on an entity-by-entity basis, and (ii) during such grace period, Covered Entity affiliates in the G-SIB group would not be considered out of compliance with the requirements of the rule, and would not be prohibited from entering into new transactions or QFCs with counterparties of the newly acquired entity, if they are otherwise in compliance with the requirements of the rule.

Although the terms of the Proposed U.S. Jurisdictional Module would differ slightly from the terms of the ISDA 2015 Universal Protocol, we believe they would be consistent with the policy objectives of the Proposed Rule. Importantly, the Proposed U.S. Jurisdictional Module would retain the "universal" adherence mechanics, identified by the Board as a "desirable feature" of the ISDA 2015 Universal Protocol,[9] while providing buyside participants with certainty about the entities that they would be adhering in respect of. Similarly, limiting Section 1 to U.S. resolution and insolvency regimes supports the resolvability of U.S. G-SIBs and U.S. operations of non-U.S. G-SIBs while narrowing the scope of relevant regimes, easing the market education and compliance burden for buyside entities. In particular, this modification would promote widespread adoption by eliminating the need for buyside participants to address the potential uncertainty introduced by the possibility that adhering parties would opt in to "Protocol-eligible Regimes" that may be enacted in non-U.S. jurisdictions in the future.[10]

In addition to the modifications identified above, in incorporating the provisions of the ISDA 2015 Universal Protocol into the Proposed U.S. Jurisdictional Module, certain other modifications, of a more technical nature, may also be required. These changes could relate to the provisions of the ISDA 2015 Universal Protocol other than Sections 1 and 2 or to adapting the ISDA 2015 Universal Protocol to the context of the ISDA JMP. We do not anticipate such changes as being contrary to the Board's identified policy objectives. One such clarification

9 81 Fed. Reg. at 29182 (noting that additional creditor protections in the ISDA 2015 Universal Protocol "do not appear to materially diminish the prospects for the orderly resolution of a GSIB entity because the Protocol includes a number of desirable features that the proposal lacks. First, when an entity (whether or not it is a covered entity) adheres to the Protocol, it necessarily adheres to the Protocol with respect to all covered entities that have also adhered to the Protocol rather than one or a subset of covered entities (as the proposal may otherwise permit).").

10 The Board notes that the inclusion of non-U.S. special resolution regimes in the ISDA 2015 Universal Protocol "should help facilitate the resolution of a GSIB across a broader range of scenarios." 81 Fed. Reg. at 29183. However, we believe these concerns are addressed by the fact that other jurisdictions have already adopted, or are in the process of adopting, measures to accomplish similar outcomes as the Proposed Rule and the ISDA 2015 Universal Protocol. Financial Stability Board, Removing Remaining Obstacles to Resolvability: Report to the G20 on progress in resolution (November 9, 2015), available at http://www.fsb.org/wp-content/uploads/Report-to-the-G20-on-Progress-in-Resolution-for-publication-final.pdf. These jurisdictions include Germany, Japan, Switzerland and the United Kingdom. See Section 60a of the German Recovery and Resolution Act (Germany); Article 12 paragraph 2 of the Draft Banking Ordinance (Switzerland); Prudential Regulation Authority, PRA Rulebook: CRR Firms and Non-Authorized Persons: Stay in Resolution Instrument 2015, PRA2015/82 (Dec. 11, 2015, available at http://www.prarulebook.co.uk/rulebook/LegalInstrument/Amending/318771/22-07-2016) (United Kingdom); Financial Services Agency, Draft amendments to the "Comprehensive Guidelines for Supervision of Major Banks, etc."(June 22, 2016, available at http://www.fsa.go.jp/en/newsletter/weekly2016/201.html) (Japan).

would be to ensure that, as described in item 4(c) above, if QFCs are transferred internally in a G-SIB family, including to a newly formed subsidiary, any amendments made by a Proposed U.S. Jurisdictional Module to such QFC would likewise move with such QFC and apply with respect to the transferee, subject in all cases to any restrictions on transfers that exist in the QFC.

We believe that the Proposed U.S. Jurisdictional Module satisfies the Board's primary policy objectives, but does so in a manner that reduces barriers to widespread adoption by the market (which is also an objective of the Board). We therefore encourage the Board to provide a safe harbor for the Proposed U.S. Jurisdictional Module in the final rule.

B. The Board should confirm that entities newly acquired by G-SIB groups, and that therefore become Covered Entities, have until the first day of the calendar quarter immediately following one year after becoming Covered Entities to conform their existing QFCs.

We believe that, as drafted, section 252.82(b)(1) of the Proposed Rule provides that if a G-SIB acquires a new Covered Entity, the newly acquired entity would have at least one year to conform its existing QFCs to the rule's requirements.[11] We believe that this interpretation is consistent with the plain text of the Proposed Rule. In addition, this grace period for newly acquired Covered Entities is an important feature of ongoing compliance to ensure that market activity can proceed without major disruptions in trading and dislocation of market liquidity.

The Proposed Rule requires Covered Entities to conform a broad number of agreements with all of their counterparties. As the Board acknowledges through its proposed conformance period of at least one year, conforming all such agreements will require significant effort on the part of the Covered Entity, which will include education of its counterparties about the rule requirements and the methods for compliance. The same efforts will be required when G-SIBs acquire new entities.[12] As such, allowing newly acquired Covered Entities the same conformance period of at least one year is likewise required to allow the G-SIB to conform existing QFCs in an orderly fashion. Requiring immediate compliance for newly acquired entities could impair the ability of Covered Entities to engage in corporate activities that are unrelated to the Proposed Rule.

We therefore ask the Board to confirm that if a Covered Entity acquires an unaffiliated entity, the newly acquired Covered Entity would have until the first day of the first calendar quarter immediately following one year from the date of its acquisition to conform its existing QFCs. We further ask that the Board clarify that, during such conformance period, Covered Entity affiliates would not be considered out of compliance with the requirements of the rule and would not be prohibited from entering into new transactions or QFCs with counterparties of the newly acquired entity if they otherwise satisfy the requirements of the rule.

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11 The newly acquired entity would become a "Covered Entity" once it is acquired by the G-SIB, and, pursuant to section 252.82(b)(1), it must comply with the requirements of section 252.83 and 252.84 by "the first day of the calendar quarter immediately following 365 days (1 year) after becoming a covered entity."

12 In particular, as described in item 4(d) of Section I.A above, under the ISDA working group's proposed approach, in order for the QFCs of such a newly-acquired entity to become subject to the terms of the Proposed U.S. Jurisdictional Module, the entity would first need to adhere as a Regulated Entity, at which time its counterparties could choose to (but would not be required to) adhere with respect to it on an entity-by-entity basis.

We also note that the ISDA working group has agreed to the "universal" opt in with respect to a static list of Covered Entities on the assumption that newly acquired Covered Entities and their Covered Entity affiliates would be allowed a conformance period of at least one year to comply with the rule's requirements. Therefore, the terms of the Proposed U.S. Jurisdictional Module described above are contingent on the Board confirming our interpretation of the Proposed Rule.

C. The Board should provide a streamlined approval process under the final rule for the Proposed U.S. Jurisdictional Module.

If the Board does not adopt an explicit safe harbor for the Proposed U.S. Jurisdictional Module, it should, at a minimum, create a streamlined process for such a module to be approved by the Board as a means of compliance following adoption of the final rule. ISDA believes that section 252.85(b) of the Proposed Rule is intended to facilitate such a process. However, certain aspects of that provision should be clarified to ensure that the Proposed U.S. Jurisdictional Module could be approved in an efficient manner.

First, section 252.85(b) provides that a Covered Entity may request the Board to approve amendments to covered QFCs that include "enhanced creditor protection conditions" for purposes of section 252.84. However, the Proposed U.S. Jurisdictional Module, like the ISDA 2015 Universal Protocol, on which it would be based, would include provisions that are not completely aligned with the requirements of the Proposed Rule but that are not related directly to enhanced creditor protections. For example, Section 2 of the ISDA 2015 Universal Protocol is limited to only certain "U.S. Insolvency Proceedings," whereas section 252.84 of the Proposed Rule would apply if an affiliate of a Covered Entity entered into any proceedings, whether or not they occurred in the United States. Similarly, the provisions of Section 1 of the ISDA 2015 Universal Protocol may operate differently from the specific requirements of section 252.83. The Board should therefore clarify that a set of amendments that includes provisions not directly related to enhanced creditor protections, such as would be included in the Proposed U.S. Jurisdictional Module, may be submitted and, if approved by the Board, would satisfy all of the requirements of the final rule, not just those related to section 252.84.

Second, because the Board has acknowledged that the ISDA 2015 Universal Protocol satisfies the Board's policy objectives, it should not require that the administrative requirements set out in section 252.85(b)(3) be satisfied when seeking approval of a U.S. Jurisdictional Module with terms that are substantially identical to those of the ISDA 2015 Universal Protocol, such as the Proposed U.S. Jurisdictional Module described above. The Board has already conducted the analysis required by this provision in deciding to provide a safe harbor for the ISDA 2015 Universal Protocol, and requiring the duplication of such analysis would unnecessarily increase the cost and time required to comply with the final rule.

Finally, the Board should clarify that entities other than Covered Entities, such as trade associations, can seek approval for an alternative means of compliance by Covered Entities, even though they are not themselves Covered Entities.

II. The Board should clarify that adherence to the ISDA 2015 Universal Protocol or the Proposed U.S. Jurisdictional Module satisfies all requirements of the Proposed Rule.

As discussed above, ISDA supports the Board's use of a safe harbor to allow market participants to satisfy the rule requirements by adherence to the ISDA 2015 Universal Protocol and urges the Board to safe harbor the Proposed U.S. Jurisdictional Module. However, the current safe harbor, as proposed, leaves several questions about compliance unanswered and should be clarified.

A. Safe harbor compliance with all rule requirements, including section 252.83 of the Proposed Rule.

Section 252.85(a) of the Proposed Rule provides that a covered QFC does not need to be conformed to the requirements of section 252.84 if it is amended by the ISDA 2015 Universal Protocol. The Board should expand the scope of this safe harbor to make clear that, if a covered QFC is amended by the ISDA 2015 Universal Protocol or the Proposed U.S. Jurisdictional Module, such covered QFC would be in compliance with all requirements under the Proposed Rule, including section 252.83.

Although section 252.83 of the Proposed Rule is substantially similar to Section 1 of the ISDA 2015 Universal Protocol, without an explicit safe harbor, there is ambiguity as to whether Section 1 of the ISDA 2015 Universal Protocol would satisfy the requirements of section 252.83. In particular, there are certain technical differences between the operation of Section 1 and the requirements of section 252.83 of the Proposed Rule. Absent clarification, there would be uncertainty about whether covered QFCs subject only to the terms of the ISDA 2015 Universal Protocol (or the Proposed U.S. Jurisdictional Module, which will include these provisions of Section 1) would comply with section 252.83 of the Proposed Rule.

In the preamble to the Proposed Rule, the Board notes that the ISDA 2015 Universal Protocol "enables parties to amend the terms of their [contracts] to contractually recognize the cross-border application of special resolution regimes applicable to certain financial companies"[13] and that, as a result of adherence to the protocol, "a covered entity would comply with the proposed rule with respect to all of its covered QFCs."[14] Because Section 1 would appear to meet the policy goals set out by the Board, we request that the Board expand the scope of the safe harbor provided under section 252.85(a) to clarify that covered QFCs subject to the terms of the ISDA 2015 Universal Protocol or the Proposed U.S. Jurisdictional Module satisfy all requirements of the Board's final rule.

B. Clarifying application of the safe harbor to covered QFCs incorporating the ISDA 2015 Universal Protocol or the Proposed U.S. Jurisdictional Module by reference.

As between two Adhering Parties, the ISDA 2015 Universal Protocol only amends agreements between the Adhering Parties that have been entered into as of the date that the Adhering Parties adhere (as well as any subsequent transactions thereunder), but it does not amend agreements

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[13] 81 Fed. Reg. 29181, note 107 (citing to an ISDA press release regarding the ISDA 2015 Universal Protocol).

[14] Id.

that Adhering Parties enter into after that date. The ISDA JMP operates in the same manner. If Adhering Parties wish for their future agreements to be subject to the terms of the ISDA 2015 Universal Protocol or a Jurisdictional Module under the ISDA JMP, it is expected that they would incorporate the terms of the ISDA 2015 Universal Protocol or the relevant Jurisdictional Module by reference into such agreements.[15]

As currently drafted, it is unclear how section 252.85(a) would apply to QFCs entered into between Adhering Parties after their adherence to the ISDA 2015 Universal Protocol or the Proposed U.S. Jurisdictional Module. In particular, it is unclear whether QFCs incorporating, e.g., the terms of the ISDA 2015 Universal Protocol are "amended by" the ISDA 2015 Universal Protocol, as required under section 252.85(a). If they are not, such QFCs would not be within the scope of the safe harbor.

We note that in the preamble to the Proposed Rule, the Board states that "[i]f a covered entity intends to continue to comply with the requirements of the proposal through the [ISDA 2015 Universal Protocol] alternative after its initial adherence, the covered entity should ensure that future master agreements and credit enhancements also become subject to the terms of the [ISDA 2015 Universal Protocol]."[16] QFCs entered into by Adhering Parties after their adherence to the ISDA 2015 Universal Protocol or the Proposed U.S. Jurisdictional Module that incorporate their terms by reference would "become subject to" their terms. Though incorporation by reference is consistent with the Board's discussion in the preamble, it is not clear that the text of the Proposed Rule is. Therefore, the Board should clarify that, for parties who have adhered to the ISDA 2015 Universal Protocol or the Proposed U.S. Jurisdictional Module, QFCs that incorporate their terms by reference are within the scope of the safe harbor.

III. The Board should narrow the scope of the Proposed Rule in ways that would decrease the substantial compliance burden on Covered Entities and their counterparties without undermining the policy objectives of the Proposed Rule.

A. The definition of covered QFC should exclude certain transaction types.

The Proposed Rule would require that Covered Entities conform all of their QFCs with counterparties. Because of the breadth of the definition of QFC, the Proposed Rule would require Covered Entities to conform transaction types and agreements that do not raise the policy

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15 See ISDA 2015 Universal Resolution Stay Protocol, "Frequently Asked Questions," available at http://assets.isda.org/media/f253b540-88/b5d497ff-pdf/ ("If you adhere, the ISDA 2015 Universal Protocol will apply to all Covered Agreements between you and any other Adhering Party that are entered into on or prior to the date ISDA has received adherence letters from both you and the other Adhering Party (the Implementation Date)... Parties may subject any Covered Agreements entered into subsequent to the Implementation Date to the ISDA 2015 Universal Protocol by using language that incorporates the ISDA 2015 Universal Protocol by reference."). See, also, ISDA JMP, "Frequently Asked Questions," available at https://www2.isda.org/functional-areas/protocol-management/protocol/24 ("Parties may amend any agreements entered into after the Implementation Date with respect to a Jurisdictional Module by using language that incorporates such Jurisdictional Module and the ISDA Jurisdictional Modular Protocol by reference.").

16 81 Fed. Reg. 29183, note 124.

concerns that the Board is attempting to address. We therefore request that the Board exclude the following types of QFCs from the definition of covered QFC:

- Cash transactions for the purchase and sale of securities and foreign exchange ("**FX**") spot transactions;
- Underwriting agreements and customer on-boarding documentation;
- Warrants and similar securities;
- QFCs that do not contain any default rights or transfer restrictions;
- For the purposes of section 252.83, QFCs governed by U.S. law; and
- For the purposes of section 252.84, QFCs that do not contain default rights or transfer restrictions of the type prohibited under section 252.84.

The Board states that the Proposed Rule is aimed at addressing the concern that the resolution or insolvency of one legal entity within the corporate group of a G-SIB could "trigger disruptive terminations" of contracts with that legal entity and "other entities within the same firm." The Board's concern is that such terminations could cause counterparties to "lose confidence in the GSIB quickly and in large numbers, [could] destabilize the financial system and potentially spark a financial crisis through several channels."[17] However, the Board's concern about the disruptive effects of termination rights in financial contracts is relevant for only certain types of QFCs—generally, term transactions with termination rights against a Covered Entity, such as over-the-counter swaps, derivatives and securities finance transactions. However, the definition of QFC includes a substantial number of financial contracts and transaction types that do not raise these same concerns. The Board should exclude such contracts, including contracts in connection with cash transactions for the purchase and sale of securities and FX spot transactions (including "securities conversion transactions" as defined by the Commodity Futures Trading Commission ("**CFTC**") in any rule, regulation or guidance, as may be amended from time to time).[18]

It is not market standard (and in fact would be highly unusual) for contracts in connection with such cash transactions to contain contractual default rights or transfer restrictions. These kinds of transactions are typically not documented with master agreements, but only confirmations detailing financial terms. In addition, certain types of customer agreements that Covered Entities typically enter into with retail customers, such as brokerage and advisory customer agreements, while QFCs, also generally do not contain default rights that may be exercised by the non-Covered Entity counterparty, and it is not market practice for such customer agreements to

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17 81 Fed. Reg. 29170.

18 In general, a securities conversion transaction is a transaction for the purchase or sale of an amount of foreign currency for the purpose of purchasing or selling a foreign security where the security and related foreign currency transactions are executed contemporaneously in order to effect delivery by the relevant securities settlement deadline and actual delivery of the foreign security and foreign currency occurs by such deadline.

contain transfer restrictions. Further, these types of contracts are not the types that raise concerns about the resolvability of Covered Entities.

ISDA members that would be Covered Entities have raised concerns about the substantial time and resources it would take to conform all of their QFCs to the requirements of the Proposed Rule. For certain transaction types, such as cash securities transactions, FX spot transactions and retail QFCs, such a requirement could require an overhaul of existing market practice and documentation that affects hundreds of thousands, if not millions, of transactions occurring on a daily basis, with customers that are unlikely to be aware of the requirements of the final rule. Compliance would therefore require Covered Entities to educate the market generally and develop entirely new documentation structures. We believe these compliance efforts would be not only overly burdensome, but also entirely unnecessary considering that the transactions at issue do not contain default rights or transfer restrictions. As such, in the event of a resolution of a Covered Entity, counterparties to such QFCs would not be able to exercise contractual default rights against a Covered Entity related to that resolution.

In addition, ISDA requests that the Board exclude all QFCs that do not contain any default rights against the Covered Entity or transfer restrictions from the scope of covered QFCs that must be conformed to the requirements of the final rule. Such QFCs would have no relevant contractual provisions, so any remediation efforts would yield no resolvability benefit. Lacking such benefit, any related compliance costs and burden would therefore be unjustified.

In addition, underwriting agreements and customer on-boarding documentation typically contain no default rights that may be exercised by the non-Covered Entity counterparty, and termination of such contracts is unlikely to be disruptive to the Covered Entity group. Therefore, underwriting agreements and customer on-boarding documentation are not the types of contracts that raise concerns about the resolvability of Covered Entities and should be excluded from the scope of the final rule.

Finally, ISDA asks that the Board exclude instruments issued in the capital markets that may fall within the definition of QFC, such as warrants and similar securities, which are issued to multiple investors whose identities are often not known to the issuing entity because of secondary market trading. As such "counterparties" are not identifiable (without significant changes to market practice and infrastructure), it would not be possible for a Covered Entity to ascertain whether a given investor is also a party to another QFC with the Covered Entity or one of its affiliates. In addition, the large numbers of investors in or holders of these instruments makes it extremely difficult, if not impossible, to remediate the QFC through amendment of an outstanding issuance.

For purposes of section 252.84 of the Proposed Rule, ISDA requests that the Board clarify that if QFCs do not contain default rights or transfer restrictions of the type prohibited under section 252.84, they do not need to be conformed to the requirements of section 252.84.[19] Likewise, the Board should clarify that, even if QFCs must be conformed to the requirements of

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[19] Section 252.84 only prohibits transfer restrictions related to a covered affiliate credit enhancement, any interest or obligation under such covered affiliate credit enhancement or any property securing the covered affiliate credit enhancement.

section 252.84 because they contain default rights or relevant transfer restrictions, if they are governed by U.S. law, they do not also need to be conformed to the requirements of section 252.83.[20] The text of section 252.83 requires that a covered QFC "explicitly provide" that the conditions in sections 252.83(b)(1) and (2) are satisfied. This would appear to require that a Covered Entity amend all QFCs, even those governed by U.S. law. We believe that such a requirement would impose excessive costs without yielding any benefit. If a covered QFC is already governed by U.S. law, then the provisions of section 252.83 would be redundant, as the default right stays and overrides provided under the FDIA and OLA would already apply and the concerns identified by the Board would not be relevant. Therefore, ISDA asks the Board to clarify that, if a QFC is governed by the law of the United States or a State thereof, it satisfies the requirements of section 252.83 and does not need to be amended for purposes of complying with section 252.83.[21]

To the extent the breadth of the scope of contracts subject to the Proposed Rule is motivated by a desire to ease the Board's monitoring of compliance with the final rule, we suggest that effective compliance monitoring can be achieved in far less burdensome and costly ways. Further, the criteria above provide clear guidance for both Covered Entities when identifying which contracts must comply with the final rule and the Board when monitoring compliance. We urge the Board to consider alternatives that would address the Board's concerns about being able to monitor compliance without imposing excessive and unnecessary costs.

B. ISDA supports the exclusion of demand transactions from the scope of covered QFCs subject to section 252.84.

ISDA supports the Board's exclusion in the Proposed Rule's definition of "default right" of rights that allow a party to terminate a QFC "on demand or at its option at a specified time, or from time to time, without the need to show cause."[22] As the Board notes, this exclusion is "consistent with the [Proposed Rule's] objective of restricting only default rights that are related, directly or indirectly, to the entry into resolution of an affiliate of the covered entity, while leaving other default rights unrestricted."[23] For certain types of QFCs, these non-default termination rights are a core feature of the transaction and are important for the counterparties' ability to meet their investing and risk management objectives. Indeed, in certain cases, there are regulatory requirements that a counterparty be able to terminate at any time without cause at fair value. Overrides of demand rights would substantially alter the economics and operation of these trades (particularly for existing trades) and related markets and introduce substantial

[20] We note that, under the ISDA 2015 Universal Protocol, an Adhering Party is not able to elect to amend its Covered Agreements by only Section 1 or Section 2. As such, if an entity chose to comply with the requirements of the final rule through adherence to the ISDA 2015 Universal Protocol, its Covered Agreements would be amended by both Section 1 and Section 2.

[21] We note that QFCs governed by U.S. law would still be required to comply with section 252.84. However, if such QFCs do not have default rights or relevant transfer restrictions, they should also be excluded from complying with section 252.84, as we discuss above. The combination of these requested changes to the scope of the QFCs that must be conformed to the requirements of the Proposed Rule would significantly reduce the burden and cost of complying without undermining the Board's policy objectives.

[22] 81 Fed. Reg. 29177 (the Board asked for comment on this exclusion in Question 8).

[23] 81 Fed. Reg. 29177.

uncertainty into the market, as it is unclear when demand rights would become exercisable after the expiration of the temporary stay. The exclusion also aligns the definition of "default right" under the Proposed Rule with that used in Section 2 of the ISDA 2015 Universal Protocol.

C. The definition of covered QFC should exclude transactions entered into with certain counterparties.

Section 252.88(a) of the Proposed Rule provides that a Covered Entity is not required to conform a covered QFC to which a central counterparty ("**CCP**") is a party. ISDA supports this exclusion, and believes that it should be expanded to exclude transactions with other counterparties as well, including other financial market utilities, sovereigns and central banks. We note that the stay regulations adopted in the United Kingdom and Germany exclude contracts entered into with a broad variety of financial market utilities, not just CCPs, and exclude contracts entered into with governmental entities as well. We urge the Board to broaden the exceptions from the requirements of the final rule consistent with the approaches being taken in other jurisdictions.

1. Financial Market Utilities

Stays on termination rights in the context of QFCs entered into with or through financial market utilities raise complex issues that are not fully addressed by the Proposed Rule. As such, ISDA urges the Board to exclude from compliance with the final rule all transactions with financial market utilities and all transactions where such compliance would require an amendment to the rules of a financial market utility.

The Board notes in the preamble that, while the issues the Proposed Rule is intended to address also exist in the context of centrally cleared QFCs, there are key differences between cleared and non-cleared QFCs with respect to "contractual arrangements, counterparty credit risk, default management and supervision" and that cleared transactions raise "unique issues related to the cancellation of cleared contracts."[24] In light of these considerations, the Board excludes cleared QFCs because it is "considering whether to propose a regulatory regime that would address the continuity of cleared QFCs during the resolution of a GSIB within the broader context of safeguarding GSIB access to financial market utilities, including central counterparties, during the orderly resolution of the GSIB."[25] QFCs with other financial market utilities raise similar issues and are more like cleared QFCs than they are like the over-the-counter transactions that are the primary focus of the Proposed Rule.

In particular, QFCs entered into or processed by financial market utilities are subject to the terms of a common rulebook and are not bilaterally negotiated. These rulebooks apply to all transactions entered into or processed by the financial market utility and not just those of Covered Entities. As a result, Covered Entities would not be able to modify these terms unilaterally and would need to seek generally applicable amendments, which typically require consultation with and approval by the relevant regulators of the financial market utilities (assuming the requested amendments are acceptable to the utility and its members or

[24] 81 Fed. Reg. 29176.

[25] Id.

participants). Absent such amendments, Covered Entities would be prohibited from accessing critical market services.

In addition, there are different considerations related to orderly resolution for the relationship between a G-SIB and a financial market utility, on the one hand, and a G-SIB and other counterparties, on the other hand. As noted above, the Board states that it is already considering resolution concerns related to all financial market utilities and not just CCPs. As such, ISDA believes it would be prudent to exclude all financial market utilities from the scope of the final rule until such a regime is developed.

Finally, we note that the efforts that went into developing the ISDA 2015 Universal Protocol did not focus on transactions with CCPs or other financial market utilities. While it was recognized that these transactions presented their own resolution concerns, it was acknowledged that such financial market utilities were not expected to adhere to the ISDA 2015 Universal Protocol (nor would it be feasible for them to do so, given the nature of their membership and rulebooks). Concerns about transactions with financial market utilities were therefore excluded from consideration during these efforts based on regulator assurances that these concerns would be the subject of a separate work stream. At the international level, we understand that the work of developing a comprehensive framework to balance the needs of G-SIBs to have access to financial market utilities during resolution as compared to the needs of financial market utilities to protect themselves, their members and the broader market from the risks of a failed member or participant remains ongoing, and an international consensus has not yet emerged.[26]

2. Central Banks and Sovereigns

The stay regulations adopted in the United Kingdom exclude contracts entered into with central banks and central governments (including any agency or branch of a central government), and the stay regulations promulgated in Germany exclude contracts entered into with central banks. Central banks and sovereigns are not ISDA members and were not a focus of the process that led to the development of the ISDA 2015 Universal Protocol.

It is unclear whether central banks or governmental entities would be permitted by applicable statutes or rules from entering into transactions on such terms (or adhering to a relevant ISDA protocol) or whether they would find doing so to be acceptable. As of the date of this letter, no central banks have adhered to the ISDA 2014 Resolution Stay Protocol or the ISDA 2015 Universal Protocol. In addition, our dealer members have experienced significant difficulty engaging with central bank and sovereign counterparties in document remediation efforts in connection with Title VII of the Dodd-Frank Act. There is no indication that such entities would

[26] See Financial Stability Board, Removing Remaining Obstacles to Resolvability: Report to the G20 on Progress in Resolution, page 17 (2015) ("The FSB therefore agreed to undertake further work on this issue and in particular consider the synchronisation of G-SIB resolution planning and FMI rules and actions (including changes to collateral eligibility or haircuts in stressed conditions); coordination between the resolution authority responsible for a participant and the FMI and the relevant authorities responsible for oversight or supervision of the FMI; continuity of access where critical functions have been transferred to a bridge institution and in particular any cross-border issues (e.g. legal recognition, coordination with overseas authorities) in maintaining continuity of access in a manner that does not compromise the safe and orderly operation of the FMI. The FSB expects to submit a report and, if appropriate, a proposal for guidance by the end of 2016.").

be more willing to cooperate in the context of remediation efforts related to the Proposed Rule. Absent a willingness and ability to trade with G-SIBs on the terms provided under the Proposed Rule (or to adhere to a relevant ISDA protocol), G-SIBs would be prohibited from transacting with these entities, who are significant providers of liquidity, including during periods of market stress. We note, however, that many of these institutions are themselves sensitive to financial stability concerns and the goals of resolvability and may therefore not exhibit counterparty behavior that would undermine an orderly resolution.

ISDA therefore requests that the Board expand the scope of the carve out in section 252.88(a) to include QFCs entered into with central banks and sovereign entities.

D. The Board should modify the requirements applicable to covered QFCs that are multi-branch master agreements to reduce compliance burdens.

Under section 252.86(a) of the Proposed Rule, a U.S. branch or agency of a non-U.S. Covered Entity would be required to conform master agreements that are covered QFCs to the extent that transactions under the agreement are booked at such U.S. branch or agency or payment or delivery may be made at such U.S. branch or agency. The Board explains that the reason for limiting compliance to just those transactions, payments and deliveries is to "avoid imposing unnecessary restrictions on QFCs that are not closely connected to the United States."[27]

We agree that QFCs that are not closely connected to the United States should not be subject to the requirements of the Proposed Rule. In order to accomplish this, we believe that section 252.86(a) of the Proposed Rule should be further limited to exclude QFCs that are booked to a non-U.S. branch or agency of a non-U.S. Covered Entity, even if payments or deliveries may be made by the U.S. branch or agency. The Proposed Rule would apply to, e.g., a U.S. dollar-denominated QFC under an English-law multi-branch master agreement between an EU financial institution trading with EU-based counterparties and booking transactions in the EU if the QFC provided for payment or delivery in a U.S. branch. In practical terms, the requirement to include new contractual terms in QFCs where the only connection to the United States is payment or delivery in a U.S. branch or agency would require non-U.S. institutions to amend tens of thousands of additional QFCs booked abroad, many of which must also be amended to comply with contractual stay requirements of such non-U.S. institutions' home-country regulatory regimes. This would impose a significant burden on non-U.S. Covered Entities with no benefit to U.S. financial stability.[28]

Further, such QFCs are likely to be subject to similar resolution regimes with stay provisions in both the home jurisdiction of the non-U.S. Covered Entity and the booking jurisdiction that should adequately address the concern about disruptive terminations within the group. We therefore urge the Board to limit the requirements of the Proposed Rule to only those

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27 81 Fed. Reg. at 29176.

28 The Proposed Rule does not articulate a benefit to U.S. financial stability that would result from subjecting QFCs under multi-branch master agreements that are not booked to a U.S. branch or entity to the Proposed Rule's requirements, simply because payment or delivery could be made by or to the branch or agency. We are not aware of any such benefits, but our non-U.S. members that would be Covered Entities under the Proposed Rule would appreciate the opportunity to analyze and respond to any purported benefits to U.S. financial stability of doing so.

transactions under a multi-branch master agreement that are actually booked to a U.S. branch or agency that is a Covered Entity.

E. The Proposed Rule should not require a Covered Entity to identify and conform QFCs with all affiliates of a counterparty, which is impractical and imposes an unnecessary administrative burden.

Under the Proposed Rule, if a Covered Entity enters into a QFC with a counterparty, the following agreements would be required to be conformed:

(i) All existing QFCs between the Covered Entity and the counterparty;

(ii) All existing QFCs between affiliates of the Covered Entity and the counterparty; and

(iii) All QFCs between the Covered Entity or an affiliate of the Covered Entity and each affiliate of the counterparty.

This third requirement imposes an impractical and onerous burden on Covered Entities to identify all affiliates of their counterparties. The Proposed Rule would require that Covered Entities identify all of the affiliates of a counterparty when a QFC is entered into after the final rule becomes effective. The information necessary to do so is information that parties to QFCs typically do not exchange, and using this more granular standard may require counterparty covenants to alert a Covered Entity if the counterparty's corporate organization changes to add new affiliates (or divest existing ones). Such a requirement would impose burdens on the Covered Entities as well as their counterparties. In addition, counterparties may be reluctant to disclose such detailed information about affiliations within their corporate groups or may be prohibited from doing so as a result of non-disclosure agreements or non-U.S. privacy laws. This is of particular concern for asset managers and investment funds. Covered Entities would also not be in a position to verify information they receive from their counterparties without extensive and costly due diligence prior to entering into any QFC.

ISDA believes that these additional burdens on Covered Entities and their counterparties would far exceed any benefit of requiring Covered Entities or their affiliates to conform QFCs of their counterparty's affiliates. Therefore, ISDA recommends that the QFCs identified in clause (iii) above be excluded from the requirement to conform existing QFCs when a Covered Entity enters into a new QFC with a counterparty.

If the QFCs identified in clause (iii) above are not excluded from the requirement to conform existing QFCs, the Board should adopt a test for affiliation based on the financial consolidation standards under U.S. Generally Accepted Accounting Principles ("**GAAP**") for determining affiliation. As described more fully in Section III.F below, the Proposed Rule's use of a test for affiliation that incorporates an untailored definition of "control" under the Bank Holding Company Act of 1956 (the "**BHCA**") exacerbates the already significant operational burdens on both Covered Entities and their counterparties.[29] This definition, without appropriate calibration,

[29] The Proposed Rule would be codified in Regulation YY, which has a definition of "affiliate" that incorporates the BHCA definition of "control." Under the BHCA definition of "control," a subsidiary of a bank holding company Covered Entity would include any entity as to which the bank holding company: (i) directly or

would incorporate complicated legal and factual determinations (particularly under the "controlling influence" prong of the definition) that would substantially increase the burden for Covered Entities and their counterparties to comply with the Proposed Rule. Entities may be defined as "affiliates" under the BHCA standard even if one does not exercise operational control over the other. While Covered Entities do track certain counterparty affiliations for a variety of purposes, they do not track it at the level required by the Proposed Rule, and they typically do not use the granular BHCA definition of control. As a practical matter, it may not be possible for one such counterparty to ensure that its BHCA affiliate conforms QFCs with a Covered Entity and its affiliates in a timely manner (or at all). In fact, as many counterparties are not bank holding companies, counterparties may not even use the BHCA definition of control to determine their affiliates. As discussed below in relation to defining the scope of Covered Entities, GAAP financial consolidation is a more appropriate standard that more accurately reflects the interconnectedness of a counterparty group.

F. The Proposed Rule should use GAAP financial consolidation as the standard to define the scope of Covered Entities within a G-SIB group rather than relying on the BHCA definition of "control."

The Proposed Rule as currently drafted would require a G-SIB group to ensure that all of its affiliates conform their covered QFCs in order to continue trading with a counterparty. For a bank holding company, all "affiliates" means each of its subsidiaries and other affiliates as defined in the BHCA and incorporating the BHCA's definition of "control." However, the Proposed Rule's use of the BHCA definition of "control" to define the scope of entities in a Covered Entity group that are required to comply with the Proposed Rule raises significant operational challenges and costs without yielding benefits to financial stability. As such, we urge the Board to adopt a test for affiliation based instead on the GAAP financial consolidation standard for purposes of defining the scope of entities included in a Covered Entity group and to explicitly exclude certain other entities that may be consolidated under GAAP in certain circumstances, such as merchant banking portfolio companies,[30] section 2(h)(2) companies,[31] sponsored funds, securitization vehicles, DPC branch subsidiaries, joint ventures of which a Covered Entity is a part owner or other entities in which a Covered Entity holds only a minority

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indirectly, or acting through one or more other persons, owns, controls or has power to vote 25 percent or more of any class of voting securities of the entity, (ii) controls in any manner the election of a majority of the directors or trustees of the entity or (iii) exercises a controlling influence over the management or policies of the entity. 12 U.S.C. § 1841(a)(2).

However, these definitions under Regulation YY are permissive and not required. The lead in to the definitions section provides that, "[u]nless otherwise specified, the following definitions apply for purposes of this part…" 12 C.F.R. § 252.2(a) (emphasis added).

[30] Under the rules governing investment in merchant banking portfolio companies, financial holding companies are generally prohibited from routinely managing or operating any portfolio company in which the financial holding company has invested under its merchant banking authority. See 12 C.F.R. §§ 225.170-177.

[31] Similar considerations as relevant to merchant banking portfolio companies support the exclusion of U.S. commercial companies that a foreign banking organization controls under section 2(h)(2) of the BHCA. As with merchant banking portfolio companies, the U.S. operations of section 2(h)(2) companies are limited to commercial activities and are not integrated into the U.S. financial operations of the foreign banking organization that controls them.

interest and over which it does not exert a controlling influence (such entities, "**Excluded Subsidiaries**"). This test would address many of the challenges a Covered Entity would face in ensuring compliance across entities that are not operationally or administratively integrated with the Covered Entity. Such a test would also more closely align the scope of the final rule with the ISDA 2015 Universal Protocol.

The BHCA definition of control is designed, and has long been administered by Board staff, to address other circumstances and policy considerations, for example, to enforce appropriate separation between banking and commercial activity. However, the Proposed Rule is focused on different policy goals where such a broad test of control may not be appropriate. A broad definition of "control" based on the BHCA definition would include entities with respect to which a Covered Entity would not exercise operational control. In particular, a Covered Entity would be deemed to control an entity of which it owned or controlled 25% or more of a class of voting stock, but less than 50%. Further, a Covered Entity would be deemed to control entities with even lower ownership percentages over which it was determined to exercise a "controlling influence," a qualitative and highly subjective test subject to ongoing discretionary interpretation by Board legal staff. Although these entities would be considered subsidiaries under the BHCA definition, they are unlikely to raise the types of concerns for orderly resolution that the Board has identified. Because of the limited economic interest in, and financial interconnections with, these entities, their failure would be unlikely to result in financial distress at the broader G-SIB group or impede an orderly resolution.

In addition, under the Proposed Rule the definition of "control" is material to the affirmative steps that a Covered Entity must take to ensure that it is in compliance with the requirements of the final rule. The broad BHCA definition of control raises two primary concerns in the context of the Proposed Rule. First, G-SIB groups must ensure that all Covered Entities within the group (i.e., all subsidiaries and other affiliates subject to the Proposed Rule) are in compliance with respect to each of such entity's covered QFCs. Second, Covered Entities must amend their legacy covered QFCs if they, or an affiliate, enter into a new covered QFC with a counterparty. To ensure compliance with these aspects of the rule, G-SIBs must be able to direct the actions of the relevant entities and be able to access counterparty and trade level information from such entities. Although certain minority-owned, but nevertheless "controlled," entities would be "subsidiaries" under the BHCA, they may not be operationally integrated with and otherwise may have accounting, financial, control, documentation and other administrative functions separate from the Covered Entity. Given G-SIB's lack of operational control over and integration with such entities, requiring G-SIBs to ensure that such entities' QFCs are in compliance with the Proposed Rule's requirements would pose significant compliance challenges. As a practical matter, Covered Entities generally do not and cannot employ the type of operational management or systems integration with respect to Excluded Subsidiaries required to comply with the Proposed Rule.

Further, determining relevant "affiliate" status by reference to the BHCA definitions would differ materially from the standard market terms that Covered Entities use in QFC documentation for purposes of cross-default provisions. For example, in the standard 1992 and 2002 ISDA Master Agreements, the term "affiliate" uses a definition of "control" based on majority voting power ("For this purpose, 'control' of any entity or person means ownership of a majority of the voting power of the entity or person."). Since the BHCA definition of "affiliate" is not typically used in transactions, it would be unnecessarily broad and burdensome to use it in defining the scope of the Proposed Rule's requirements. The definition of "control" used in the ISDA Master Agreement is also used in the ISDA 2015 Universal Protocol. This means that, under Section 2 of the ISDA 2015 Universal Protocol, a Covered Entity's counterparty would be agreeing not to exercise certain default rights only if the "Affiliate" (as defined in the ISDA 2015 Universal Protocol) entered into bankruptcy proceedings. Similarly, the all-or-none creditor protections in the ISDA 2015 Universal Protocol operate on the basis of this definition. Since the Board has endorsed the ISDA 2015 Universal Protocol, including the scope of entities it is applicable to, it would be consistent to likewise align the definition of "affiliate" in the Proposed Rule.

ISDA therefore urges the Board to use the GAAP financial consolidation standard (with an explicit carve out for Excluded Subsidiaries) to ensure that the appropriate entities within a G-SIB group are required to comply with the final rule, without creating overly burdensome compliance requirements for Covered Entities.[32] The purpose of the GAAP financial consolidation standard is to aggregate businesses that are sufficiently financially and operationally integrated to justify treating such businesses as a whole. As such, GAAP consolidation more accurately reflects which subsidiaries would expose a Covered Entity parent to material risk and be relevant to the resolution of a Covered Entity than the BHCA definition of control. In addition, subsidiaries that are financially consolidated under GAAP are generally fully integrated into the Covered Entity parent's systems, tailoring the substantial compliance burdens of the Proposed Rule appropriately.

If a GAAP financial consolidation standard is not adopted, at a minimum, the final rule should exclude Excluded Subsidiaries from the definition of "affiliate," as it would be extremely challenging for a Covered Entity to ensure the compliance of such entities with respect to which the Covered Entity does not exercise operational control.

G. U.S. subsidiaries of a non-U.S. G-SIB that are exempted from the intermediate holding company requirement should not be required to comply with the requirements of the final rule.

With respect to non-U.S. G-SIBs that are required to establish an intermediate holding company ("**IHC**"), the Board should exclude any entities that are not required to be held under the IHC from the scope of Covered Entities, even if such entities would be consolidated under the GAAP financial consolidation standard. In addition to the general exemptions for section 2(h)(2) companies or DPC branch subsidiaries discussed above in Section III.F, certain non-U.S. G-SIBs have received entity-specific exemptions for entities that otherwise would have been required to be held under the IHC. The few exemptions that have been provided tended to be in situations where the G-SIB did not have sufficient operational control over the entity to ensure its

[32] We note that, in other contexts, the Board has applied a financial consolidation test to the definition of affiliate. For example, in the Board's Margin Rules (defined below), the Board defines "affiliate" as a company that is consolidated on financial statements with another company. In addition, the Board's capital rules use GAAP financial consolidation except in special circumstances. See, e.g., 12 C.F.R. Part 217; Consolidated Financial Statements for Holding Companies, Federal Reserve Reporting Form FR Y-9C. This approach would also align with the definitions of "affiliate" under ISDA Master Agreements and the ISDA 2015 Universal Protocol, both of which are based on ownership of a majority of the voting power of an entity.

compliance. As such, these entities should also be exempted from compliance with the final rule.

IV. Amendments made to covered QFCs that are uncleared swaps or security-based swaps in order to comply with the QFC final rule should not, on their own, trigger the application of the Board's margin requirements for such QFCs.

Under the Proposed Rule, Covered Entities would have to conform their existing covered QFCs with counterparties in order to continue entering into new covered QFCs with such counterparties,[33] and the ISDA 2015 Universal Protocol amends all existing Covered Agreements between Adhering Parties.[34] As a result, in many cases the Proposed Rule would, in practice, apply retroactively to covered QFCs entered into prior to the effective date of the final rule. Such retroactive application raises the question of whether the required amendments to existing covered QFCs that are swaps or security-based swaps (referred to herein collectively as "swaps") could trigger regulatory requirements implemented after the date such swaps were originally executed.

Under Title VII of the Dodd-Frank Act, the generally applicable test for whether an amendment or modification to an existing swap would create a "new" swap and, therefore, trigger subsequently implemented requirements, is whether the amendment relates to a "material" term of the swap.[35] We view an amendment to a swap to comply with the Proposed Rule as not affecting the "material" terms of the swap (as defined in the Product Definitions). For example, the CFTC and SEC have identified an amendment of a swap to reflect the replacement of a "key person" of a hedge fund with a new "key person" as an amendment "not to a material term" of the swap, and they contrasted such an amendment with one that would change the reference securities underlying the swap, which they would view as material.[36] Amendments made to comply with the Proposed Rule only affect the ability of a counterparty to exercise certain termination rights; accordingly, such amendments are more akin to changes to a "key person" provision, which also creates termination rights for counterparties, than amendments that affect the economic profile of the swap for purposes of the Product Definitions.

We also believe that the foregoing analysis should be relevant for purposes of the Board's final margin rules for uncleared swaps entered into by covered swap entities ("**Margin Rules**").[37] In

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[33] Proposed Rule, § 252.83(a)(2)(ii).

[34] The Board notes with approval that a feature of the ISDA 2015 Universal Protocol is that, unlike the Proposed Rule, the ISDA 2015 Universal Protocol "amends all existing transactions of adhering party." 81 Fed. Reg. 29183.

[35] CFTC and Securities and Exchange Commission ("**SEC**"), Joint Final Rule, "Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping." 77 Fed. Reg. 48208, 48286 (Aug. 13, 2012) (the "**Product Definitions**"). The Product Definitions were adopted as a joint rule by the CFTC and the SEC, in consultation with the Board.

[36] Id., note 894.

[37] See 80 Fed. Reg. 74840 (Nov. 30, 2015). The Margin Rules were adopted by the Board and other U.S. Prudential Regulators, including the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Farm Credit Administration and the Federal Housing Finance Agency. In addition, the CFTC adopted

the context of the Margin Rules, the Board rejected requests to classify "new swap transactions as 'swaps entered into prior to the compliance date' [of the Margin Rules]" out of a concern that doing so could "create significant incentives to engage in amendments and novations for the purpose of evading the margin requirements."[38] Because amendments made to existing swaps to comply with the Proposed Rule would not affect the material economic terms of the swaps, ISDA would not view such amendments as resulting in new swap transactions that would be subject to the Margin Rules.[39] Since such amendments would be made for the purpose of complying with the Board's own regulatory requirements, such amendments do not raise the risk of evasion identified by the Board. We also would be concerned that, if the Board took a contrary view, the Proposed Rule would effectively undermine the decision of the Board and the other Prudential Regulators to implement the Margin Rules on a prospective basis over a number of years so as to reduce the near-term cost and liquidity impact of the Margin Rules.[40] We urge the Board to coordinate with its fellow regulators to ensure that amendments made to comply with the final rule would not be viewed as triggering the retroactive application of other regulatory requirements, including the Margin Rules. If the Board believes that such amendments could result in the retroactive application of the Margin Rules, our members would appreciate the opportunity to discuss these issues further with the Board.

V. ISDA seeks clarification about certain ambiguous provisions of the Proposed Rule and urges the Board to make certain clarifying changes.

ISDA believes that it would be helpful for the Board to provide the following clarifications with respect to the Proposed Rule.

A. Enforceability of covered QFCs that are not conformed to the final rule.

The Board should confirm that the obligations under a covered QFC would still be enforceable even if its terms do not comply with the requirements of the final rule. Regulators have provided similar assurances in respect of the Prudential Regulation Authority's rule regarding contractual stays in financial contracts governed by third-country law and Section 60a of the German Recovery and Resolution Act. Clarifying that such QFCs would remain enforceable would provide counterparties of Covered Entities comfort that QFCs that do not comply with the requirements of the final rule (e.g., due to oversight) nonetheless remain enforceable against the Covered Entity and provide Covered Entities comfort regarding enforceability against counterparties.

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parallel margin rules for covered swap entities that do not have a Prudential Regulator. 81 Fed. Reg. 636 (Jan. 6, 2016). The SEC proposed margin rules for uncleared security-based swaps, but those have not yet been finalized.

38 80 Fed. Reg. 74851.

39 Likewise, amendments made to comply with stay regulations in other jurisdictions, such as those adopted in the United Kingdom and Germany, should not, on their own, trigger the application of the Margin Rules.

40 See Margin Rules, § _.1(e) (staggered implementation schedule for the Margin Rules). We note that, in the cost-benefit analysis of the Margin Rules, the Prudential Regulators stated that they believe that the Margin Rules would only apply to existing swaps once they are "rolled into new swaps." 80 Fed. Reg. 74891.

B. Intended scope of section 252.83(b)(2).

The text of section 252.83(b)(2) of the Proposed Rule is currently unclear and does not appear to match the intended operation of this provision as described by the Board in the preamble to the Proposed Rule. This section of the Proposed Rule reads as follows (emphasis added):

> (2) Default rights with respect to the covered QFC that may be exercised against the covered entity are permitted to be exercised to no greater extent than the default rights could be exercised under the U.S. special resolution regimes if the covered QFC was governed by the laws of the United States or a state of the United States and the covered entity were under the U.S. special resolution regime.

From the preamble to the Proposed Rule and context, it appears that this provision is intended to operate in a manner similar to the "opt-in" provisions under Section 1 of the ISDA 2015 Universal Protocol. However, the phrasing of this section is different from that used in the ISDA 2015 Universal Protocol and would appear to produce a different result.

For example, from a plain reading, it would appear that the highlighted language requires that it be assumed at all times that the Covered Entity is subject to proceedings under a U.S. special resolution regime, even when it is not. The result of this reading would be that stays on default rights would apply even when the Covered Entity is not in resolution proceedings. By contrast, the opt-in provisions of Section 1 of the ISDA 2015 Universal Protocol clarify that if an Adhering Party becomes subject to proceedings under a Special Resolution Regime, then default rights could be exercised only as permitted under the relevant regime. We believe that this is the intended effect of this section as well. In the preamble to the Proposed Rule, the Board states that the purpose of section 252.83 is to provide certainty that all covered QFCs "would be treated the same way in the context of a receivership of a covered entity under the Dodd-Frank Act or the FDI Act."[41]

Further, it is not clear how this provision would apply to cross-default rights—those rights in a QFC with, for example, a subsidiary that are based on the resolution of an affiliate, such as a parent. Under Section 1 of the ISDA 2015 Universal Protocol, an Adhering Party opts in to the resolution regime applicable to a "Related Entity" (such as a guarantor) of its counterparty if the "Related Entity" enters resolution proceedings. By contrast, the provisions of section 252.83(b)(2) would appear to apply only with respect to parties to the particular QFC (e.g., with respect to an ISDA Master Agreement, only the direct counterparty, and, with respect to a related guarantee, the related guarantor, but, with respect to the ISDA Master Agreement, not the guarantor). Based on the Board's discussion of cross-default rights and "single-point-of-entry" resolution in the preamble, we also believe that this was not the intended operation of section 252.83.[42]

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[41] 81 Fed. Reg. 29178 (emphasis added).

[42] See, e.g., 81 Fed. Reg. 29175 (stating that the Proposed Rule would apply to subsidiaries of G-SIBs because "it is necessary to ensure that those subsidiaries or affiliates do not enter into QFCs that contain

Accordingly, we ask the Board to clarify the requirements of this provision.

C. Treatment of agency transactions.

ISDA requests that the Board revise section 252.83(a)(3) and 252.84(a)(3) to require a Covered Entity to conform agency transactions only if the default rights under the covered QFC relate to a Covered Entity as follows:

> To the extent that the covered entity is acting as agent with respect to a QFC, the requirements of this section apply to the extent the transfer of the QFC relates to the covered entity or the default rights relate to the covered entity or an affiliate of the covered entity **that is also a covered entity.**

This change would clarify that if a Covered Entity enters into a transaction as agent on behalf of a non-U.S. affiliate (that would not be a Covered Entity under the Proposed Rule), the Covered Entity would not need to conform such transaction if default rights under the QFC relate solely to the non-U.S. affiliate. Default rights related to the non-U.S. operations of non-U.S. G-SIBs are generally not the focus of the Proposed Rule and, in the scenario described, do not bear a sufficient connection to U.S. financial stability to warrant the burden and cost of compliance.

D. Prohibition on default rights based on a Covered Entity's entry into resolution proceedings.

The Board should revise section 252.84(e)(1) to clarify that default rights based on a Covered Entity or an affiliate thereof entering resolution under the FDIA or OLA are not prohibited, but instead are merely subject to the terms of such regimes.

In defining the creditor protections under section 252.84(e)(1), the Proposed Rule states that if the direct party becomes "subject to a receivership, insolvency, liquidation, resolution, or similar proceeding," the counterparty is able to exercise its default right, but excludes from the scope of such permissible default rights those that arise if the direct party enters "receivership, conservatorship, or resolution under the [FDIA], [OLA] or laws of foreign jurisdictions that are substantially similar to" the FDIA or OLA.

Such an outcome is clearly contrary to the Board's intentions articulated in the preamble and the requirements under section 252.83, which are aimed at ensuring that default rights that arise if the direct party enters proceedings under the FDIA or OLA are subject to any stays or overrides under such regimes. We therefore ask the Board to clarify that such default rights are permitted so long as they are subject to the provisions of the FDIA or OLA, as required under section 252.83.

cross-default rights that the counterparty could exercise based on the holding company's or affiliate's entry into resolution (or that any such cross-default rights are stayed when the holding company enters resolution).").

E. Clarifying ambiguous language in section 252.84(g).

The Board should clarify the lead-in language to section 252.84(g), which is ambiguous as drafted. Under the language in the Proposed Rule, the "additional creditor protections" identified in section 252.84(g) would allow a counterparty to exercise default rights that are "related, directly or indirectly, to the covered affiliate support provider." Such language, however, is not aligned with the prohibition in section 252.84, which overrides default rights that are related, directly or indirectly, to such entity becoming subject to certain proceedings.[43] It appears the intended meaning is as follows:

> Additional creditor protections for supported QFCs. Notwithstanding paragraph (b) of this section, with respect to a covered direct QFC that is supported by a covered affiliate credit enhancement, the covered direct QFC and the covered affiliate credit enhancement may permit the exercise of a default right <u>**after the stay period**</u> that is related, directly or indirectly, to the covered affiliate support provider <u>**becoming subject to a receivership, insolvency, liquidation, resolution or similar proceedings,**</u> ~~**after the stay period**~~ if...

F. Scope of the exclusion for cleared covered QFCs.

The Board should clarify that the intended scope of the exemption provided under section 252.88(a) of the Proposed Rule applies to U.S. agency-style clearing. This provision states that a Covered Entity does not need to conform a covered QFC "to which a CCP is party."

The preamble of the Proposed Rule states that the intention of this provision is to exclude "from the definition of 'covered QFC' all QFCs that are cleared through a central counterparty."[44] However, it is not clear that the language "to which a CCP is party" would capture the customer leg of an agency clearing relationship. In addition, we note that, under the principal-to-principal clearing model, a CCP would not be a "party" to the customer-facing leg of the QFC, although such leg would be subject to certain aspects of the CCP's rules.

Accordingly, we request that the Board clarify section 252.88(a) to exclude cleared QFCs from the requirements of section 252.83 and 252.84 in situations where the Covered Entity in default

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43 Members have also raised concerns that the additional creditor protections under sections 252.84(e)(3) and 252.84(g) only apply to QFCs supported by a credit enhancement provided by a "covered affiliate support provider" (an affiliate that is a Covered Entity). As a result, if an affiliate that is not a Covered Entity guarantees a QFC for the benefit of the Covered Entity's counterparty, cross-defaults to such entities are overridden without condition, similar to unsupported cross-defaults. This provision effectively creates disparate treatment between beneficiaries of credit enhancements from Covered Entities and non-Covered Entities. This approach would significantly curtail the rights of counterparties and is inconsistent with the treatment of beneficiaries of credit support in other parts of the Proposed Rule. We therefore urge the Board to create parity of treatment for all counterparties that receive credit support from an affiliate of a Covered Entity.

44 81 Fed. Reg. 29176.

(or whose affiliate is in default) acts as the clearing member, but not where the Covered Entity in default (or whose affiliate is in default) is the clearing customer.

In the context of principal-to-principal clearing, it is important to establish parity between a CCP's ability to exercise default rights against a clearing member and a customer's ability to exercise default rights against the clearing member under the related back-to-back transaction. If a CCP is able to exercise default rights due to the exclusion for covered QFCs to which a CCP is a party and the customer cannot exercise similar default rights in the customer-facing leg of the transaction, a clearing member could be left with an unbalanced book, and the customer could be left with a QFC that was intended to be cleared but is not. The ISDA 2015 Universal Protocol addresses this potential imbalance by allowing the customer to exercise default rights against a clearing member to the extent such default rights become exercisable or applicable as a result of, and substantially contemporaneous with, the exercise by the CCP of any right it may have to terminate or transfer the related cleared transaction between the clearing member and the CCP. This approach preserves parity for both legs of a cleared transaction without increasing the risk of such trades for either the clearing member or the customer. We respectfully request that the Board take a similar approach under section 252.84 of the final rule.

G. Clarify the interaction with expected OCC Stay Regulation and application to "covered banks."

The Board should clarify the interaction between the Proposed Rule and the forthcoming rule proposal from the OCC. In particular, the purpose and effect of section 252.88(b), as drafted, on the exclusion of covered bank QFCs from the Proposed Rule is unclear, and clarification of the interaction between the two rules is necessary for Covered Entities and covered banks to ensure that their QFCs are in compliance with the appropriate applicable rules. Relatedly, ISDA and its members note that it is impossible to identify any issues that may arise from the interaction of the Proposed Rule and the forthcoming OCC rule in the absence of proposal from the OCC. Following such a proposal, ISDA may have additional comments on the Proposed Rule.

VI. The Board should extend the compliance deadline and allow for phased-in compliance by counterparty type.

Under the Proposed Rule, Covered Entities would have one year to conform their covered QFCs to the rule requirements. Because the Proposed Rule applies to all QFCs entered into by Covered Entities, with limited exceptions, and because it effectively applies on a Covered Entity-group basis, compliance will require Covered Entities to amend a significant number of contracts with a significant number of counterparties. Importantly, counterparties to QFCs will inevitably vary in the degree of sophistication and knowledge about the Proposed Rule and the issues it is attempting to address. We therefore expect that compliance will require a substantial effort by the industry to educate market participants both about the substance of the Proposed Rule and the steps necessary to comply (e.g., adhering to the Proposed U.S. Jurisdictional Module to the ISDA JMP, or the ISDA 2015 Universal Protocol, as applicable).[45]

[45] If the Board does not safe harbor the Proposed U.S. Jurisdictional Module, ISDA may need to submit a Jurisdictional Module for approval by the Board, which could reduce the time that Covered Entities would have to educate counterparties and conform their QFCs.

With that in mind, we believe that a longer, phased-in approach to compliance, such as the phase-in approach taken in the United Kingdom, would be appropriate. ISDA suggests that the Board adopt the following schedule for phasing in compliance:

- Phase 1: The initial compliance date would apply to covered QFCs with banks, broker-dealers, swap dealers, security-based swap dealers, major swap participants and major security-based swap participants.

- Phase 2: The second compliance date would be six months after the initial compliance date and would apply to covered QFCs with asset managers, commodity pools, private funds and other entities that are predominantly engaged in activities that are financial in nature.

- Phase 3: The third compliance date would be one year after the initial compliance date and would apply to covered QFCs with all other counterparty types.

In addition, the Board should coordinate with the OCC to ensure consistent compliance deadlines between the two final rules.

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ISDA appreciates the opportunity to provide these comments. We hope that the Board finds our comments useful in its continuing deliberations on the implementation of contractual stays in financial contracts. Please do not hesitate to contact the undersigned if we can provide further information about the derivatives market or other information that would assist the Board in its work in relation to the Proposed Rule.

Yours sincerely,

Katherine T. Darras
ISDA General Counsel

cc: Janet L. Yellen
Chair

Stanley Fischer
Vice Chairman

Lael Brainard
Governor

Jerome H. Powell
Governor

Daniel K. Tarullo
Governor

Michael S. Gibson
Director, Division of Banking Supervision and Regulation

Mark E. Van Der Weide
Deputy Director, Division of Banking Supervision and Regulation

Scott G. Alvarez
General Counsel, Legal Division

Barbara J. Bouchard
Senior Associate Director, Division of Banking Supervision and Regulation

Keith Ligon
Adviser, Division of Banking Supervision and Regulation

Constance M. Horsley
Assistant Director, Division of Banking Supervision and Regulation

Felton Booker
Senior Supervisory Financial Analyst, Division of Banking Supervision and Regulation

Mark Savignac
Supervisory Financial Analyst, Division of Banking Supervision and Regulation

Will Giles
Counsel, Legal Division

Lucy Chang
Attorney, Legal Division