The Asset Management Industry
SERVING INDIVIDUAL INVESTORS

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May 16, 2016

Board of Governors of the Federal Reserve System Issues Proposal on Stays in Qualified Financial Contracts of Global Systemically Important Banking Organizations

[29916]

May 16, 2016

TO:

DERIVATIVES MARKETS ADVISORY COMMITTEE No. 20-16
SEC RULES COMMITTEE No. 24-16
FIXED-INCOME ADVISORY COMMITTEE No. 15-16
MONEY MARKET FUNDS ADVISORY COMMITTEE No. 13-16
ICI GLOBAL REGULATED FUNDS COMMITTEE No. 33-16

RE:

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ISSUES PROPOSAL ON STAYS IN QUALIFIED FINANCIAL CONTRACTS OF GLOBAL SYSTEMICALLY IMPORTANT BANKING ORGANIZATIONS

On May 3, the Board of Governors of the Federal Reserve System ("Board") issued a proposal ("Proposal") that would require U.S. global systemically important banking organizations ("GSIBs"), certain subsidiaries of U.S. GSIBs, and certain U.S. operations of foreign GSIBs to include certain restrictions in their qualified financial contracts ("QFCs"). [1] Those aspects of the Proposal most relevant to registered investment companies ("funds") and their advisers are summarized below. We have also have attached for your convenience, as an exhibit to this memorandum, the questions included for comment in the Proposal. The Board requests comments on the Proposal by August 5, 2016.

ICI has scheduled a member call to discuss possible comments on the Proposal on May 23, from 3-4 pm ET. If you would like to participate in the member call, please contact Jennifer

Odom at jodom@ici.org or (202) 326-5833, and she will send you the dial-in information.

Background

The Proposal is part of the Board's efforts to address the systemic implications of the failure of a major financial firm, such as the failure of Lehman Brothers in September 2008. [2] The Board and the Federal Deposit Insurance Corporation ("FDIC") have identified the exercise of certain default rights in QFCs as a potential obstacle to orderly resolution in the context of resolution plans filed by systemically important firms under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). The Board explains that the Proposal is intended to avoid systemic disruption that may be caused by the exercise of QFC default rights in the event of a GSIB's failure. [3]

The Proposal would facilitate implementation of the Universal Resolution Stay Protocol, which was developed by the International Swaps and Derivatives Association ("ISDA"), in coordination with the Financial Stability Board. The ISDA Universal Resolution Stay Protocol enables parties to amend the terms of covered agreements to recognize contractually the cross-border application of special resolution regimes applicable to certain financial companies and, under the 2015 version of the protocol ("2015 Protocol"), supports the resolution of certain financial companies under the U.S. Bankruptcy Code. The Proposal is necessary to implement the insolvency provisions of the 2015 Protocol.

The Proposal would require QFCs entered into by certain entities to contain contractual provisions that recognize the automatic stay of termination and transfer provisions applicable in resolution proceedings under the Orderly Liquidation Authority ("OLA") provisions of Title II of the Dodd-Frank Act and the Federal Deposit Insurance Act ("FDIA"). It would also generally require QFCs entered into by certain entities to prohibit the QFC counterparty from exercising default rights based on the entry into resolution of an affiliate of the covered entity (i.e., prohibit the exercise of cross-default rights) under Title II of the Dodd-Frank Act and the U.S. Bankruptcy Code.

Covered Entities and Contracts under the Proposal

Covered Entities

The Proposal would apply to "covered entities," which would be defined to include: (1) any U.S. GSIB bank holding company; (2) any subsidiary of such a bank holding company that is not a "covered bank;" and (3) the U.S. operations of any foreign GSIB with the exception of any "covered bank." [4] Whether an entity is a U.S. GSIB bank holding company would be determined pursuant to the Board's rule which establishes the criteria for identifying a GSIB and the methods that those firms must use to calculate a risk-based capital surcharge (i.e., the GSIB surcharge rule). [5] The Proposal includes all subsidiaries of U.S. GSIBs (other than covered banks) in recognition of the fact that U.S. GSIBs generally enter into QFCs through their subsidiaries rather than directly through the holding company.

Covered entities would also include all U.S. operations of foreign GSIBs that are not covered banks, including U.S. subsidiaries, U.S. branches, and U.S. agencies. The Proposal would define a "global systemically important foreign banking organization" (i.e., a foreign GSIB) to include any foreign banking organization that would be designated as a GSIB under the Board's GSIB surcharge rule or would be designated as a GSIB under the global methodology for identifying GSIBs adopted by the Basel Committee on Banking Supervision ("BCBS"). [6]

Covered Contracts

For purposes of the Proposal, "qualified financial contract" would be defined as in section 210(c)(8)(D) of Title II of the Dodd-Frank Act, which includes swaps, repo and reverse repo transactions, securities lending and borrowing transactions, commodity contracts, and forward agreements. A "covered QFC" under the Proposal would generally mean a QFC to which the covered entity enters, executes or otherwise becomes a party. The Proposal, however, would explicitly exclude from the definition of "covered QFC" a QFC to which a CCP is a party, [7] as well as QFCs subject to similar requirements of the OCC.

The definition of covered QFC would include master agreements that apply to QFCs. The Board explains that, under the Dodd-Frank Act's definition of QFC, which the Proposal would include, master agreements for QFCs, together with all supplements to the master agreement (including underlying transactions), would be considered a single QFC. The Proposal would explicitly exclude, however, QFCs that permit transactions to be entered into both at a U.S. branch or U.S. agency of the foreign bank and at a non-US. location of the foreign bank (i.e., multi-branch master agreements) if the QFC is not booked at a covered entity, and no payment or delivery may be made at a covered entity.

The Proposal generally would apply to a covered QFC regardless of whether the covered entity or the covered entity's direct counterparty is acting as a principal or as an agent. For example, a GSIB subsidiary may enter into a master securities lending arrangement with a foreign bank as agent for a U.S.-based fund client.

Proposed QFC Restrictions Relating to U.S. Special Resolution Regimes

Proposed rule § 252.83 resembles section 1 of the 2015 Protocol, and would require that a covered QFC explicitly provide both: (1) that the transfer of the QFC (and any interest or obligation in or under it and any property securing it) from the covered entity to a transferee would be effective to the same extent as it would be under the U.S. special resolution regimes ("SRRs") if the covered QFC were governed by the laws of the United States or of a state and the covered entity were under the U.S. SRRs; and (2) that default rights with respect to the covered QFC that could be exercised against a covered entity could be exercised to no greater extent than they could be exercised under the U.S. SRRs if the covered QFC were governed by the laws of the United States or of a state and the covered entity were under the U.S. SRRs.

The Proposal would define "U.S. special resolution regimes" to mean the FDIA and the OLA provisions of Title II of the Dodd-Frank Act, as well as the regulations issued under those statutes. The Proposal would define "default right" to include common default rights such as a setoff right, the right to liquidate pledged collateral, the ability to suspend or delay the non-defaulting party's performance under the contract or accelerate the obligations of the defaulting party, the right to demand payment or delivery, or the right to terminate the QFC, as well as "any similar rights." [8] It would also include a right or contractual provision that alters the amount of collateral or margin that must be provided with respect to an exposure including, for example, by changing the initial amount, threshold amount, variation margin, minimum transfer amount, or the margin value of collateral. Importantly, the proposed definition of "default right" would exclude certain business as usual payments associated with a QFC, such as same-day payment netting, as well as contractual margin requirements that arise solely from the change in the value of the collateral or margin, or the amount of an economic exposure.

The Proposal's provisions regarding U.S. SRRs are intended to provide certainty that all covered QFCs would be treated similarly if a covered entity is put into receivership under the Dodd-Frank Act or FDIA regardless of the domicile of the counterparties or the law governing the contract. These provisions are intended to help ensure that a court in a foreign jurisdiction would enforce the stay and transfer provisions of the U.S. SRRs with respect to a covered QFC of a covered entity to the same extent as if the covered QFC were directly subject to the U.S. SSRs. [9]

Proposed QFC Restrictions Relating to Insolvency Proceedings

Proposed rule § 252.84 resembles section 2 of the 2015 Protocol, and would prohibit a covered entity from being party to a covered QFC [10] that: (1) allows the exercise of any default right that is related to the entry into resolution of an affiliate of the covered entity (i.e., prohibition of cross-default rights); and (2) prohibits the transfer of a credit enhancement applicable to the QFC (a guarantee, for example) from an affiliate to a transferee upon the entry into resolution of the affiliate. These provisions would apply to defaults triggered by an affiliate of the covered entity that is a GSIB entering into resolution under Title II of the Dodd-Frank Act or the U.S. Bankruptcy Code. For purposes of these provisions, the definition of "default right" would not include contractual rights to terminate without the need to show cause, including rights to terminate on demand and rights to terminate at contractually specified intervals. [11]

The purpose of the proposed prohibitions regarding default rights and transfers is to facilitate the orderly resolution of a GSIB by preventing the failure of one entity within a group from leading to the disorderly unwind of its affiliates' QFCs and allowing the transfer of credit enhancements to a solvent entity. [12] While the OLA provisions of Title II of the Dodd-Frank Act address both direct default rights and cross-default rights in a resolution proceeding, [13] the Proposal would extent these prohibitions to any type of resolution of a covered entity, including a resolution under the U.S. Bankruptcy Code.

The Board recognizes, however, that these restrictions may limit the ability of covered entities' QFC counterparties to include certain protections in covered QFCs. Proposed rule § 252.84 would therefore include detailed creditor exceptions intended to allow creditors to exercise both direct and cross-default rights not related to an orderly resolution of a GSIB. [14]

First, under the Proposal's general creditor protections, a covered QFC and the covered affiliate credit enhancement supporting that QFC could permit the covered entity's counterparty to exercise default rights based on the covered entity's own entry into resolution (other than the covered entity's resolution under a U.S. or foreign SRR), the covered entity's failure to make a required payment or delivery, or the failure of a covered affiliate support provider [15] or a transferee to make a payment or delivery required under a credit enhancement that supports the QFC.

Second, the Proposal contains additional creditor protections for a covered QFC that is supported by a credit enhancement provided by an affiliate of the covered entity that is also a covered entity. The Proposal would provide that, after the expiration of a stay period, [16] a covered QFC and the covered affiliate credit enhancement could allow, subject to certain conditions, the exercise of a default right that is related to an affiliate support provider if: (1) the affiliate remains obligated under the credit enhancement and enters liquidation proceedings; [17] (2) the credit enhancement is transferred to a transferee, and the transferee enters liquidation proceedings; (3) the credit enhancement is transferred to a transferee, and the transferee does not become obligated to the same

extent as the affiliate with respect to the credit enhancement and certain other credit enhancements provided by the affiliate; and (4) the credit enhancement is transferred to a transferee, and all of the ownership interests held by the affiliate are not transferred to the transferee, or reasonable assurance is not provided that the assets will be transferred or sold to the transferee in a timely manner.

Finally, the Proposal includes specific creditor protections related to covered QFCs that are supported by affiliate credit enhancements, where the support provider becomes subject to FDIA proceedings. Under these provisions, a covered QFC and the covered affiliate credit enhancement could allow the exercise of a default right that is related to an affiliate support provider becoming subject to FDIA proceedings either: (1) after the expiration of the FDIA stay period, [18] if the credit enhancement is not transferred under the relevant provisions of the FDIA and regulations; or (2) during the FDIA stay period, to the extent that the default right permits the supported party to suspend performance under the covered QFC to the same extent as that party would be entitled to do if the covered QFC were with the credit support provider itself and were treated in the same manner as the credit enhancement.

Proposal's Relationship to the 2015 Protocol

The Proposal provides that, as an alternative to complying with proposed rule § 252.84 (relating to insolvency proceedings), a covered entity could instead, as a safe harbor, comply with the 2015 Protocol. [19] Significantly, the safe harbor references only the Protocol, not the ISDA jurisdictional modular protocol ("JMP"), to which the buy side is expected to adhere. [20]

The safe harbor option clearly is intended to encourage adherence to the 2015 Protocol. For example, the Board explicitly acknowledges that that the scope of the stay and transfer provisions in the 2015 Protocol are narrower than the stay and transfer provisions required under the Proposal. [21] The Board explains that the 2015 Protocol also provides a number of protections to supported parties that are additional to, or stronger versions of, the creditor protections the Proposal otherwise permits for supported parties. [22] The Protocol also contains additional creditor protections, compared to the Proposal, in situations in which credit enhancements have been transferred to another entity, [23] as well as situations in which an affiliate credit support provider remains obligated after a resolution proceeding. [24] The Board also observes that, as compared to the creditor protections provided in the Proposal, the 2015 Protocol's additional creditor protections "appear to meaningfully increase a supported party's assurance that material payment and delivery obligations under its covered QFCs will continue to be performed and should meaningfully decrease the supported party's credit risk to its direct parties." [25]

Process for Board Approval of Enhanced Creditor Protections

As an alternative to relying on the creditor protections under proposed rule § 252.84 or relying on the safe harbor, the Proposal provides for a process under which any covered entity may submit to the Board a request to approve as compliant with the rule one or more QFCs that contain creditor protections that would not otherwise be permitted under the rule's restrictions. The covered entity would be required to provide an analysis to the Board addressing specific considerations set out in the Proposal. The covered entity would also be required to submit a legal opinion stating that the requested terms would be valid and enforceable under applicable law. The Proposal provides that the Board may approve the enhanced creditor protections, subject to any conditions or commitments the Board may set. If approved, the enhanced creditor protections could be used by other covered

entities.

Transition Periods

The Proposal would take effect on the first day of the first calendar quarter that begins at least one year after the issuance of a final rule. A covered entity would be required to ensure that covered QFCs entered into on or after the effective date comply with the rule's requirements. A covered entity would be required to conform pre-existing QFCs (those entered into prior to the effective date) to the rule's requirements no later than the first date on or after the effective date on which the covered entity or an affiliate (that is also a covered entity or covered bank) enters into a new covered QFC with the counterparty to the preexisting covered QFC or an affiliate of the counterparty. [26] An entity that becomes a covered entity after the final rule is issued would be required to comply with the rule by the first day of the first calendar quarter that begins at least one year after the entity becomes a covered entity.

Revisions to Certain Definitions

The Board also proposes to amend several definitions in its capital and liquidity rules to help ensure that the Proposal would not have unintended effects for the treatment of covered entities' netting sets. The key definition for registered funds appears to be the definition of "qualifying master netting agreement," which currently provides that default rights may be stayed if an entity is in resolution under the Dodd-Frank Act, the FDIA, a substantially similar law applicable to government-sponsored enterprises, a substantially similar foreign law, or where the agreement is subject by its terms to any of those laws. The Proposal would amend this definition to recognize the restrictions the Proposal would place on the QFCs of covered entities. This aspect of the Proposal is intended to maintain the existing capital and liquidity treatment of master netting agreements for QFCs of covered entities. [27]

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Associate General Counsel

Appendix

Question 1 (p. 29175): The Board invites comment on all aspects of this section.

Question 2 (p. 29176): The Board invites comment on the proposed definition of the term "covered entity."

Question 3 (p. 29176): The Board invites comment on alternative approaches for determining the scope of application of the proposed restrictions.

Question 4 (p. 29176): The Board invites comment on whether the proposal should be expanded to cover banking organizations that are not GSIBs but that engage in especially high levels of QFC activity. If so, what specific metrics should be used to identify such banking organizations?

Question 5 (p. 29176): The Board invites comment on the proposed definitions of "QFC"

and “covered QFC.” Are there financial transactions that could pose a similar risk to U.S. financial stability if a GSIB were to fail but that would not be included within the proposed definitions of QFC and covered QFC? Are there transactions that would be included within the proposed definitions but that would not present risks justifying the application of this proposal? Please explain.

Question 6 (p. 29176): The Board invites comment on the proposed exclusion of cleared QFCs, including the potential effects on the financial stability of the United States of excluding cleared QFCs as well as the potential effects on U.S. financial stability of subjecting covered entities’ relationships with central counterparties to restrictions analogous to this proposal’s restrictions on covered entities’ non-cleared QFCs.

Question 7 (p. 29177): The Board invites comment on the proposed exclusion, including the potential benefits and detriments to U.S. financial stability of eliminating the proposed exclusion, the reduction in compliance burden that would be produced by the proposed exclusion, and the proposed exclusion’s effect on netting under multi-branch master agreements.

Question 8 (p. 29177): The Board invites comment on all aspects of the proposed definition of “default right.” In particular, are the proposed exclusions appropriate in light of the objectives of the proposal? To what extent does the exclusion of rights that allow a party to terminate the contract “on demand or at its option at a specified time, or from time to time, without the need to show cause” create an incentive for firms to include these rights in future contracts to evade the proposed restrictions? To what extent should other regulatory requirements (e.g., liquidity coverage ratio or the short-term wholesale funding components of the GSIB surcharge rule) be revised to create a counterincentive? Would additional exclusions be appropriate? To what extent should it be clarified that the “need to show cause” includes the need to negotiate alternative terms with the other party prior to termination or similar requirements (e.g., Master Securities Loan Agreement, Annex III - Term Loans)?

Question 9 (p. 29178): The Board invites comment on all aspects of this section of the proposal.

Question 10 (p. 29183): The Board invites comment on the proposed restrictions on cross-default rights in covered entities’ QFCs. Is the proposal sufficiently clear, such that parties to a conforming QFC will understand what default rights are and are not exercisable in the context of a GSIB resolution? How could the proposed restrictions be made clearer?

Question 11 (p. 29183): Are the proposed restrictions on cross-default rights under-inclusive, such that the proposed restrictions would permit default rights that would have the same or similar potential to undermine an orderly GSIB resolution and should therefore be subjected to similar restrictions?

Question 12 (p. 29183): In particular, would it be appropriate for the prohibition to explicitly cover default rights that are based on or related to the “financial condition” of an affiliate of the direct party (for example, rights based on an affiliate’s credit rating, stock price, or regulatory capital level)?

Question 13 (p. 29183): The Board invites comment on whether the proposed restrictions should be expanded to cover contractual rights that a QFC counterparty may have to terminate the QFC at will or without cause, including rights that arise on a periodic basis.

Could such rights be used to circumvent the proposed restrictions on cross-default rights? If so, how, if at all, should the proposed rule regulate such contractual rights?

Question 14 (p. 29183): The Board invites comment on the proposed provisions permitting specific creditor protections in covered entities' QFCs. Does the proposal draw an appropriate balance between protecting financial stability from risks associated with QFC unwinds and maintaining important creditor protections? Should the proposed set of permitted creditor protections be expanded to allow for other creditor protections that would fall within the proposed restrictions? Is the proposed set of permitted creditor protections sufficiently clear?

Question 15 (p. 29183): The Board invites comment on its proposal to treat as compliant with section 252.84 of the proposal any covered QFC that has been amended by the Protocol. Does adherence to the Protocol suffice to meet the goals of this proposal and appropriately safeguard U.S. financial stability?

Question 16 (p. 29183): The Board invites comment on the proposed requirement for burden-of-proof provisions in covered QFCs. Is the proposed requirement drafted appropriately to advance the goals of this proposal? Would those goals be better advanced by alternative or complementary provisions?

Question 17 (p. 29183): The Board invites comment on all aspects of the proposed treatment of agency transactions, including whether creditor protections should apply to QFCs where the direct party is acting as agent under the QFC.

Question 18 (p. 29184): The Board invites comment on all aspects of the proposed process for approval of enhanced creditor protections. Are the proposed considerations the appropriate factors for the Board to take into account in deciding whether to grant a request for approval? What other considerations are potentially relevant to such a decision?

Question 19 (p. 29184): The Board invites comment on the proposed transition periods and the proposed treatment of preexisting QFCs.

Question 20 (p. 29184): Would it be appropriate to impose different compliance deadlines with respect to different classes of QFCs? If so, how should those classes be distinguished, and which should be required to be brought into compliance first?

Question 21 (p. 29185): The Board invites comment on all aspects of this evaluation of costs and benefits.

Question 22 (p. 29186): The Board invites comment on all aspects of the proposed amendments to the definitions of "qualifying master netting agreement," "collateral agreement," "eligible margin loan," and "repo-style transaction." Would the proposed amendments have the intended effect?

Question 23 (p. 29186): Would it be appropriate to incorporate state law resolution regimes into these definitions (for example, state insurance law that provides similar stays of QFC default rights)?

Question 24 (p. 29187): The Board welcomes written comments regarding this initial regulatory flexibility analysis, and requests that commenters describe the nature of any impact on small entities and provide empirical data to illustrate and support the extent of the impact. A final regulatory flexibility analysis will be conducted after consideration of

comment received during the public comment period.

Question 25 (p. 29187): The Board invites comment on this section, including any additional comments that will inform the Board's consideration of the requirements of RCDRIA.

Question 26 (p. 29188): Has the Board organized the proposal in a clear way? If not, how could the proposal organized more clearly?

Question 27 (p. 29188): Are the requirements of the proposed rule clearly stated? If not, how could they be stated more clearly?

Question 28 (p. 29188): Does the proposal contain unclear technical language or jargon? If so, which language requires clarification?

Question 29 (p. 29188): Would a different format (such as a different grouping and ordering of sections, a different use of section headings, or a different organization of paragraphs) make the regulation easier to understand? If so, what changes would make the proposal clearer?

Question 30 (p. 29188): What else could the Board do to make the proposal clearer and easier to understand?

endnotes

[1] 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, 81 Fed. Reg. 29169 available at https://www.gpo.gov/fdsys/pkg/FR-2016-05-11/pdf/2016-11209.pdf ("Proposing Release").

[2] Id. at 29171.

[3] Id. at 29170.

[4] "Covered bank" would be defined under the Proposal as a national bank, a Federal savings association, federal branch, or federal agency. These banks are supervised by the Office of the Comptroller of the Currency ("OCC"). The OCC is expected to issue a proposed rule that would subject covered banks that are GSIB subsidiaries to requirements substantively identical to those included in the Proposal.

[5] See 12 CFR 217.402. Under the methodology of this rule, there currently are eight U.S. GSIBs: Bank of America Corporation, The Bank of New York Mellon Corporation, Citigroup Inc., Goldman Sachs Group, Inc., JPMorgan Chase & Co., Morgan Stanley Inc., State Street Corporation, and Wells Fargo & Company. The Board notes that this list may change in the future in light of changes to the relevant attributes of the current U.S. GSIBs and of other large U.S. bank holding companies.

[6] In November 2015, the FSB and the BCBS published an updated list of banking organizations that are GSIBs under the global methodology. The list includes the eight U.S. GSIBs and the following 22 foreign banking organizations: Agricultural Bank of China, Bank of China, Barclays, BNP Paribas, China Construction Bank, Credit Suisse, Deutsche Bank, Groupe BPCE, Groupe Crédit Agricole, Industrial and Commercial Bank of China Limited, HSBC, ING Bank, Mitsubishi UFJ FG, Mizuho FG, Nordea, Royal Bank of Scotland, Santander,

Société Générale, Standard Chartered, Sumitomo Mitsui FG, UBS, and Unicredit Group.

[7] Customer-facing transactions of a clearing member, however, may be subject to the Proposal's requirements.

[8] The Proposal includes all such default rights regardless of source, including rights existing under contract, statute, or common law.

[9] The Board explains that the proposed requirements are not intended to imply that a given covered QFC is not governed by the laws of the United States or of a state, or that the statutory stay-and-transfer provisions would not in fact apply to a given covered QFC, but to provide certainty regarding the treatment of covered QFCs in receivership.

[10] The Board notes that, under the proposed definition of QFC, credit enhancements on QFCs would themselves be QFCs.

[11] The Board explains that excluding these types of rights is consistent with the Proposal's objective to restrict 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.

[12] The Board explains that these provisions are consistent with the "single point of entry" resolution strategy, under which some of a failed entity's affiliates may continue to meet their obligations and do not enter resolution. The Board notes that these provisions are also consistent with the "multiple point of entry" resolution approach under which some of a failed entity's affiliates continue to meet their obligations and do not enter resolution.

[13] This proposed provision is modeled on section 210(c)(16) of the Dodd-Frank Act.

[14] In the event of a legal dispute regarding a party's right to exercise a default right under a covered QFC, the Proposal would establish a standard under which a QFC counterparty would bear the burden to demonstrate, by clear and convincing evidence or a similar or higher burden of proof, that the exercise is permitted under the covered QFC.

[15] A "covered affiliate support provider" would be defined, with respect to a covered affiliate credit enhancement, as the affiliate of the direct party that is obligated under the covered affiliate credit enhancement and is not a transferee. A "covered affiliate credit enhancement" would be defined as an affiliate credit enhancement in which a covered entity, or covered bank referenced in the Proposal, in the obligor of the credit enhancement. See Proposed rule § 252.84(f).

[16] The proposed stay period, with respect to a receivership, insolvency, liquidation, resolution, or similar proceeding, would be the period of time beginning on the commencement of the proceeding and ending at the later of 5:00 p.m. (eastern time) on the business day following the date of the commencement of the proceeding and 48 hours after the commencement of the proceeding. This stay period is similar to the stay periods that that would be imposed in a resolution under the OLA provisions of Title II of the Dodd-Frank Act or the FDIA, although it could run longer than those stay periods under some circumstances. It is also similar to the stay period under the 2015 Protocol (the longer of one business day or 48 hours following the commencement of insolvency proceedings).

[17] Other than a Chapter 11 proceeding.

[18] Under the FDIA, the relevant stay period runs until 5:00 p.m. (eastern time) on the business day following the appointment of the FDIC as receiver. 12 U.S.C. 1821(e)(10)(B)(I).

[19] The Board clarifies that this includes the Securities Financing Transaction Annex and the Other Agreements Annex, as well as subsequent, immaterial amendments to the 2015 Protocol.

[20] The JMP is intended to achieve the same policy goals as the 2015 Protocol with respect to the orderly resolution of GSIBs, but was developed to facilitate compliance with the stay regulations in different jurisdictions. It is expected that the buyside would adhere to the JMP rather than the 2015 Protocol. See ISDA Resolution Stay Jurisdictional Modular Protocol, available at https://www2.isda.org/functional-areas/protocol-management/protocol/24. In the Proposing Release, the Board recognizes that "ISDA is expected to supplement the [2015 Protocol] with ISDA Resolution Stay Jurisdictional Modular Protocols for the United States and other jurisdictions." It goes on to note that "[a] jurisdictional module for the United States that is substantively identical to the [2015 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." The current draft version of the U.S. JMP would not appear to satisfy this standard, although it is possible that such a module could be developed.

[21] The Board notes, for example, that the Protocol only stays default rights arising from proceedings under Chapters 7 and 11 of the Bankruptcy Code, the FDIA, and the Securities Investor Protection Act. It explains that the stay under proposed rule § 252.84 is broader; it requires a stay to apply under any receivership, insolvency, liquidation, resolution, or similar proceeding, and therefore includes applicable state and foreign insolvency proceedings. Proposing Release, supra note 1, at n. 110.

[22] For example, the Protocol requires that an affiliate support provider or transferee must remain obligated to the "same extent" for its stay to remain effective, and that the covered entity remain registered and licensed by relevant regulatory bodies. The Proposal, however, would not permit a covered QFC to exempt the non-defaulting party from the stay and transfer requirements of proposed rule § 252.84 if the affiliate support provider or transferee remains obligated to the same or substantially similar extent as the affiliate support provider was immediately prior to entering the resolution proceeding. Proposing Release, supra note 1, at n.113.

[23] Examples under the Protocol include the transferee satisfying all material payment and delivery obligations to each of its creditors during the stay period; the transferee continuing to satisfy all financial covenants and other terms applicable to the credit enhancement provider under the agreement after the stay period; and the transferee continuing to satisfy all provisions and covenants regarding the attachment, enforceability, perfection, or priority of property securing the obligations of the credit enhancement after the stay period. See id. at nn. 116-118 and accompanying text.

[24] For example, under the 2015 Protocol, when the bankruptcy court issues an order by the end of the stay period providing supported parties with increased creditor priority in bankruptcy. See id. at n. 119.

[25] Id. at 29182.

[26] Therefore, the Proposal would not require that a covered entity conform a preexisting QFC to the rule's restrictions if that covered entity and its affiliates do not enter into any new QFCs with the same counterparty or its affiliates on or after the effective date.

[27] The Board recognizes that it and the other prudential regulators, in the context of final rules on margin for uncleared swaps, recently adopted a definition of "eligible master netting agreement" that is similar to the existing definition of "qualifying master netting agreement" and that definition may similarly need to be amended. See Margin and Capital Requirements for Covered Swap Entities; Final Rule, 80 Fed. Reg. 74840 (Nov. 30, 2015). The Board states that it will consult with the other prudential regulators before amending that definition. Proposing Release, supra note 1, at text accompanying n.137. The final rules issued by the Commodity Futures Trading Commission on margin for uncleared swaps contain a similar definition of "eligible master netting agreement" and may also need to be amended. See Margin Requirements for Uncleared Swaps for Swap Dealers and Major Swap Participants; Final Rule, 81 Fed. Reg. 636 (Jan. 6, 2016).
