INTERNATIONAL ENERGY CREDIT ASSOCIATION

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August 5, 2016

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

Email to regs.comments@federalreserve.gov

Re: Comments of the IECA on the Notice of Proposed Rulemaking of the Board of Governors of the Federal Reserve System : *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, published on May 11, 2016, in Docket No. R-1538 and RIN 7100 AE-52

Dear Mr. Frierson:

The International Energy Credit Association ("IECA") respectfully submits these comments to the Board of Governors of the Federal Reserve System (the "Board") supporting in part, questioning in part, and requesting certain clarifications and modifications with respect to the Board's notice of proposed rulemaking entitled *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* ("Proposed QFC Rule") issued in the above-captioned proceeding.

I. Introduction to the IECA

The IECA is an association of over 1,400 credit, risk management, legal and finance professionals that is dedicated to promoting the education and understanding of credit and other risk management-related issues in the energy industry. For over ninety years, IECA members have actively promoted the development of best practices that reflect the unique needs and concerns of the energy industry. Following the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("DFA" or "Dodd-Frank Act") and its amendments of the Commodity Exchange Act ("CEA"), the IECA has filed numerous comments with the Commodity Futures Trading Commission ("CFTC"), the Federal Energy Regulatory Commission ("FERC"), and, on at least one prior occasion, the IECA has filed comments with the Board.

The IECA seeks to protect the rights and advance the interests of the buyside community of commercial energy companies and other energy market participants, representatives of which make up the majority of the IECA's membership. These entities produce, sell, and/or purchase for resale substantial quantities of various physical energy commodities, including electricity, natural gas, oil and other energy-related physical commodities necessary for their commercial energy businesses. Many of these commercial energy companies and other energy market participants rely on futures contracts and swaps to help them mitigate and manage (i.e., hedge) the risks of physical energy commodity price volatility to their commercial energy businesses, which millions of Americans and the American economy rely on for safe, reliable and reasonably-priced energy supplies.

II. Regarding Compliance with the Obligations to Conform QFCs Under Sections 252.83(a) and 252.84(a), the IECA Urges the Board to Modify Section 252.85(b) to Allow Trade Associations, such as the IECA, to Submit Forms of Covered QFCs or Proposed Amendments to One or More Forms of QFCs to the Board for Approval as Compliant with the Proposed QFC Rule.

The IECA appreciates that when the Board and most commenters discuss the non-Covered Entity counterparties in the context of the Board's proposed restrictions on Qualified Financial Contracts ("QFCs")[1] between Covered Entities[2] and non-Covered Entity counterparties, those non-Covered Entity counterparties are deemed to be large asset management funds and other similar entities entering into QFCs to manage various risks, or to invest, using various futures, swaps and other financial contracts with Covered Entities, for the purposes of managing the tens of billions of dollars invested by the thousands of clients that invest in each such fund.

In the Board's deliberations on this Proposed QFC Rule, however, the IECA urges the Board not to lose sight of the many smaller entities, which also have entered into numerous QFCs with Covered Entities. The impacts of the Board's Proposed QFC Rule on these smaller counterparties to QFCs should not be ignored by the Board as it considers the public comments and develops a final rule on QFC restrictions for Covered Entities.

As set forth in the Proposed QFC Rule, the Board defines QFC by reference to the definition of "qualified financial contract" in Section 210(c)(8)(D)(i), Powers and Duties of the Corporation [Federal Deposit Insurance Corporation], of Title II, Orderly Liquidation Authority ("OLA"), of the DFA,[3] which says: "The term "qualified financial

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[1] See definition of "qualified financial contract" in proposed section 252.81 of the Proposed QFC Rule, 81 Fed. Reg. 29169 at 29190.

[2] See definition of "covered entity" in proposed section 252.82(a) of the Proposed QFC Rule, 81 Fed. Reg. at 29190.

[3] See definition of "qualified financial contract" in the Dodd-Frank Act, 12 U.S.C. 5390(c)(8)(D).

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contract" means any securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, and any similar agreement that the Corporation determines by regulation, resolution, or order to be a qualified financial contract for purposes of this paragraph." (Emphasis added.)

In addition to QFCs with Covered Entities for bilateral (not cleared) "swap agreements," many energy market participants have entered into uncleared QFCs with Covered Entities that are "forward contracts" or "commodity contracts,"[4] which QFCs have been entered into with Covered Entities by these "buyside" energy market participants in order to sell or purchase various physical energy commodities, the physical delivery of such energy commodities being necessary to the day-to-day commercial energy businesses of such "buyside" energy market participants.[5]

Depending on whether the Board elects to narrow the scope of the definition of the QFCs required to be conformed pursuant to proposed section 252.83(a) or section 252.84(a), some or all of these existing "commodity contracts, forward contracts, repurchase agreements, and swap agreements" that are QFCs will become Covered QFCs[6] if and when the "buyside" energy company or any of its affiliates enters into a new QFC with a Covered Entity or any affiliate that is a Covered Entity or a Covered Bank.[7]

Many of these QFCs that are "commodity contracts" or "forward contracts" have not been entered into pursuant to an ISDA Master Agreement, but are instead entered into

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[4] The term "commodity contracts" may include "trade options" entered into pursuant to section 32.3 of the CFTC's regulations (17 C.F.R. 32.2), which are intended by the parties thereto to be physically settled.

[5] See, for example, recent Electric Quarterly Reports (EQRs) submitted on a calendar quarter basis to FERC (which address physical sales of electricity). EQR queries entered at http://eqrreportviewer.ferc.gov/ for the first two quarters of 2016 identify contracts for physical commodity sales of electricity-related commodities to over 300 different purchasers by subsidiaries of five of the six systemically important U.S. banking organizations ("US GSIBs"). While from the perspective of the Board, these electricity contracts may only be "incidental" to financial activity (within the meaning of Board Regulation Y, 12 C.F.R. Part 225), these are subject to regulation by FERC, who among other areas of oversight, is concerned with the reliability of the bulk power system and ensuring just and reasonable rates. Indeed, the master agreements for these types of transactions typically include "Mobile-Sierra" provisions which provide that the terms of such agreements shall not be modified by application to the FERC, and that in the absence of an agreement by the parties to proposed changes, the standard of review for any contractual changes, whether proposed by a party, a non-party, or the FERC acting sua sponte, shall solely be the "public interest" application of the "just and reasonable" standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) and clarified by *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish*, 554 U.S. 527 (2008) U.S. 527 (2008)), and *NRG Power Marketing LLC v. Maine Public Utilities Commission*, 558 U.S. 165 (2010).

[6] See definition of "covered QFC" in proposed section 252.83(a)(2)

[7] Proposed section 252.81 defines "covered bank" as "a national bank, Federal savings association, federal branch or federal agency," which "covered banks" will reportedly be subject to a new rule, to be proposed by the Office of the Comptroller of the Currency ("OCC"), which will be comparable to the Board's Proposed QFC Rule, but will be applicable to "covered banks" that are subsidiaries of U.S. GSIBs and are subject to regulation by the OCC.

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under other master purchase and sale agreements, such as a North American Energy Standards Board ("NAESB") master agreement for natural gas, Edison Electric Institute ("EEI") for electricity, or some other form of physical commodity master purchase and sale agreement or a bespoke bilateral agreement with a Covered Entity.

These forms of physical commodity agreements generally do contain termination rights based on the insolvency of a counterparty and many contain transfer restrictions. In many instances, such contracts also include guarantees or other credit support provisions, which will provide cross-default termination rights with respect to an affiliated credit support provider. Accordingly, if such a QFC becomes a Covered QFC, then the Covered Entity will be obligated to conform this Covered QFC pursuant to sections 252.83(a) and 252.84(a).

Many such non-Covered Entity counterparties do not have ISDA Master Agreements with their Covered Entity counterparty with whom they have such QFCs that are forward contracts or commodity contracts. As such, such QFCs may be the only types of QFCs that are required to be conformed under sections 252.83 and 252.84. For the applicable Covered Entity, getting the non-Covered Entity counterparty to execute an ISDA 2015 Universal Resolution Stay Protocol or the ISDA Resolution Stay Jurisdictional Modular Protocol, which has yet to be drafted by ISDA for the Board's Proposed QFC Rule (collectively, the "ISDA Conformation Protocols"), will likely require a substantial educational effort.

In addition, the impacts of the restrictions on such physically-settled QFCs may present unexpected contractual hardships and may present opportunities for contractual compromises that may benefit both the Covered Entities and the non-Covered Entity counterparties. Such contractual hardships and/or contractual compromises may require substantial modification to the ISDA Conformation Protocols and render problematic the execution of either of the ISDA Conformation Protocols by such non-Covered Entity counterparties. The current version of the ISDA Resolution Stay Jurisdictional Modular Protocol ("ISDA JM Protocol") posted on ISDA's website does not allow parties to make any modifications or amendments thereto.

This could create a situation where such non-Covered Entity counterparties and their Covered Entity counterparts are compelled to negotiate separate, bilateral conforming amendments to each of their Covered QFCs. Such a process would be costly and time-consuming and present a substantial burden for all parties involved.

In certain instances, these parties might benefit from a narrowing by the Board of the scope of the QFCs required to be conformed. For purposes of section 252.84 of the Proposed QFC Rule, the Board could 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

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conformed to the requirements of section 252.84.[8] In addition, the Board could clarify that even though a QFC must be conformed to the requirements of section 252.84 because it contains default rights or relevant transfer restrictions, if that QFC is governed by U.S. law, then the QFC does not also need to be conformed to the requirements of section 252.83.[9]

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. 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. On this basis, the Board could 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.[10]

And yet, having a standardized form to allow compliance with the Board's conformation requirements that requires little or no actual modification or negotiation between the Covered Entities and such non-Covered Entity counterparties with QFCs that are physically-settled forward contracts and commodity contracts, while accurately satisfying the conformation requirements of sections 252.83 and 252.84 of the Board's Proposed QFC Rule, would provide efficiency and minimize the cost of such conformation for both the Covered Entities and such non-Covered Entity counterparties.

When various ISDA protocols were prepared to implement various provisions of the CFTC's Dodd-Frank Act regulatory requirements for registered Swap Dealers, the IECA drafted standardized forms of amendments to three separate ISDA protocols ("IECA Amendments"), which IECA Amendments were used by many commercial end-users and their registered Swap Dealer counterparties to amend and modify their underlying agreements to allow such Swap Dealers to comply accurately and fully with their regulatory requirements under the Dodd-Frank Act and the CFTC's regulations

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[8] 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.

[9] 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.

[10] 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 QFC Rule would significantly reduce the burden and cost of complying without undermining the Board's policy objectives.

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thereunder, while simultaneously meeting the contractual requirements of the commercial end-user counterparties.

Literally hundreds of such IECA Amendments were executed by some registered Swap Dealers with their commercial end-user counterparties to efficiently and relatively inexpensively meet the CFTC's regulatory compliance requirements for such Swap Dealers under Title VII of the DFA.

To enable such a regulatory compliance method to be readily available to meet the Board's conformation requirements for Covered QFCs of Covered Entities, if and when the IECA is asked by various non-Covered Entity counterparties to draft such a standardized form of conformation document, the IECA respectfully requests the following modifications to the Board's Proposed QFC Rule.

(IECA ASKS): The IECA respectfully requests that the Board modify section 252.85(b) of the Proposed QFC Rule, to allow a trade group, such as the IECA, to propose a form of conformance document for the Board's approval.

As currently proposed, section 252.85(a) provides a safe harbor for parties to satisfy the Board's conformation requirements for Covered QFCs by adhering to the ISDA 2015 Universal Resolution Stay Protocol. Similarly, many market participants anticipate (hope) that the Board will also provide a safe harbor for parties to satisfy the Board's confirmation requirements using the ISDA Resolution Stay Jurisdictional Modular Protocol.

The Board's Proposed QFC Rule includes a process in section 252.85(b), which authorizes a "Covered Entity" to request that the Board "approve as compliant with the requirements of section 252.84 proposed revisions of one or more forms of covered QFCs, or proposed amendments to one or more forms of covered QFCs, with enhanced creditor protection conditions." There is no provision in section 252.85(b), as currently worded, for ISDA, the IECA, or any other trade association, to request approval by the Board of "proposed amendments to one or more forms of covered QFCs, with enhanced creditor protection conditions."

It is not clear to the IECA that approval by the Board under section 252.85(c) is absolutely necessary to enable the IECA to prepare a form of document that can easily be used by both non-Covered Entity counterparties and Covered Entities to "conform" their Covered QFCs with sections 252.83(a) and 252.84(a). If such a form complies with the Board's conformation requirements in sections 252.83 and 252.84, then the Board's requirements would be satisfied.

However, including the ability of trade associations, such as ISDA and the IECA, to be eligible to request a safe harbor for their standardized conformation forms could afford some benefits to both Covered Entities and non-Covered Entity counterparties as

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they seek to comply with the Board's requirements for Covered QFCs. Making such an approval process available to trade groups, such as ISDA and the IECA, in addition to Covered Entities, will enhance the likelihood of efficient and timely conformance by Covered Entities with their obligations under sections 252.83(a) and 252.84(a).

Accordingly, the IECA respectfully requests that the Board modify section 252.85(b) of the Proposed QFC Rule, to allow a trade group, such as the IECA, to propose a form of conformance document for the Board's approval.

III. The IECA Supports the Comments on the Board's Proposed QFC Rule Submitted by ISDA and Urges the Board to Consider the Various Clarifications and Modifications to the Board's Proposed QFC Rule Requested by ISDA.

The IECA, through its counsel, has participated in the Resolution Stay Protocol Working Group ("RSP-Working Group") of the International Swaps and Derivatives Association, Inc. ("ISDA"). The IECA fully supports the efforts of ISDA and its RSP-Working Group to assist the Board and the regulators of other G-20 countries as they each seek to implement the G-20 directive regarding the formation of special resolution regimes ("Special Resolution Regimes" or "SRRs") under the laws of each such country.

While the IECA wishes to submit its own additional comments, as set forth in this document, the IECA also fully supports ISDA's Comments on the Board's Proposed QFC Rule, which are being submitted today to the Board. We urge the Board to consider ISDA's Comments and the various clarification and modifications to the Board's Proposed QFC Rule requested therein by ISDA.

IV. IECA Requests that the Board Accept and Consider Additional Comments on the Board's Proposed QFC Rule on or after the Date that Comments are Due to be Submitted to the U.S. Office of the Comptroller of the Currency ("OCC") on the OCC's Proposed Complementary QFC Rule, which has not yet been Published by the OCC.

The IECA appreciates that (i) the Board's Proposed QFC Rule applies to those U.S. GSIBs and their subsidiaries which are subject to the Board's regulatory jurisdiction and (ii) certain subsidiaries of U.S. GSIBs are Covered Banks, which Covered Banks are, by definition, subject to the OCC's regulatory jurisdiction. Accordingly, the Board's proposed section 252.88(b) excludes QFCs with Covered Banks from the conformation requirements of sections 252.83(a) and 252.84(a) to the extent the Covered Bank is required to conform such QFCs pursuant to the requirements of the OCC's yet-to-be-published rule on QFCs of Covered Banks that are subsidiaries of GSIBs ("Complementary QFC Rule")

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Since the OCC has not yet published its Complementary QFC Rule, it is possible that the OCC's proposed Complementary QFC Rule may define Covered Banks or QFCs that are subject to the OCC's conformation requirements, or other aspects of the OCC's proposed rule, that create various ambiguities or inconsistences with the Board's Proposed QFC Rule.

(IECA ASKS:) In order to provide an opportunity for the public to notify the Board and suggest responses to address any such ambiguities or inconsistencies, the IECA respectfully requests that the Board allow additional comments to be submitted to the Board on its Proposed QFC Rule on or after the date that comments are due to be submitted to the OCC on its Complementary QFC Rule.

V. General Comments on the Fairness of the Board's Proposed QFC Rule.

The Proposed QFC Rule proposes to require non-Covered Entity counterparties to amend their Covered QFCs to modify their existing contractual rights with the stated goal of preventing contagion, but with the unintended (perhaps) consequence of creating an entire new set of uncertainties for the energy market participants that are consumers of the targeted financial products provided under such QFCs and which rely on Covered Entities as creditworthy providers of both physical commodity supplies and financial derivatives necessary to the commercial businesses of such non-Covered Entity counterparties.

As customers of the Covered Entities, these non-Covered Entity counterparties realize that the Board is, in part, implementing the provisions of Section 204, Orderly Liquidation of Covered Financial Companies, under the OLA found in Title II of the DFA. Section 204(a) of Title II of the DFA specifies that the purpose of this OLA is providing the "necessary authority to liquidate failing financial companies that pose a significant risk to the financial stability of the United States in a manner that mitigates such risk and minimizes moral hazard."[11] Section 204(a)(1) goes on to explicitly say that this authority is to be "exercised in the manner that best fulfills such purpose, so that - - (1) creditors and shareholders will bear the losses of the financial company." (Emphasis added.)

The IECA recognizes that Congress in enacting Title II of the DFA (i.e., the OLA provisions) was primarily concerned with ensuring that U.S. taxpayers would not have to bail-out "failing financial companies that pose a significant risk to the financial stability of the United States," but instead those losses would be "bailed-in" to creditors and shareholders. The IECA submits, however, that the "manner that best fulfills such purpose" should take into consideration all impacts of the Board's Proposed QFC Rule, including the impact on customers that rely on the physical commodity supplies and financial derivatives necessary to the prudent management and operation of commercial

[11] Section 204(a) of the Dodd-Frank Act, 12 U.S.C. 5384(a).

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energy companies in the U.S., which these Covered Entities provide under many of these QFCs.

Some more worrisome elements in the Proposed QFC Rule for commercial energy companies that are non-Covered Entity counterparties to QFCs include the following troubling provisions, among others.

(i) Greater Burden of Proof on Non-Covered Entity Counterparty Than on Covered Entity. The requirement that in litigation with a Covered Entity, a non-Covered Entity has a higher burden of proof than the Covered Entity is difficult to understand.[12] This same presupposition was also included in the ISDA Conformation Protocols which were negotiated by ISDA with the Board and other G-20 regulators before the Board's Proposed QFC Rule was published and we do not know the rationale for this provision;[13]

(ii) Right of Covered Entity to Require Margin/Credit Support, When Non-Covered Entity is Prohibited. The contractual right of a defaulting Covered Entity to demand collateral from its non-Covered Entity counterparty to provide credit support (margin) for a market move, while the non-Covered Entity will have no right to require or collect such collateral from the Covered Entity under clause (1)(ii) of the definition of "Default right" in section 252.81 of the Proposed QFC Rule,[14] is troubling; and

(iii) Rights to Exercise Remedies After the "Stay Period" May Provide a Right Without a Remedy. Proposed section 252.84(g)(3), which allows a non-Covered Entity counterparty to a "supported QFC" (i.e., a Covered QFC in which a "covered affiliate support provider" provides credit support for the Covered Entity's obligations owed under a Covered QFC to a non-Covered Entity) to exercise certain default rights "after the stay period," under certain circumstances is also troubling. Section 252.84(g)(3) essentially gives the non-Covered Entity the right to exercise its contractual default rights if "the covered affiliate support provider does not remain, and a transferee does not become, obligated to the same, or substantially similar, extent as the covered affiliate support provider was obligated immediately prior to entering the receivership, insolvency, liquidation, resolution, or similar proceeding..."

As is explained in the preamble portion of the Board's Proposed QFC Rule regarding this provision:

> "Default rights could also be exercised at the end of the stay period if the original credit support provider does not remain, and no transferee becomes, obligated to the same (or substantially similar) extent as the

[12] 81 Fed. Reg. 29181 col. 2.
[13] 81 Fed. Reg. 29174 col. 2.
[14] 81 Fed. Reg. 29190 col. 1.

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> original credit support provider was obligated immediately prior to entering a resolution proceeding (including a Chapter 11 proceeding) with respect to (a) the credit enhancement applicable to the covered QFC, (b) all other credit enhancements provided by the credit support provider on any other QFCs between the same parties, and (c) all credit enhancements provided by the credit support provider between the direct party and affiliates of the direct party's QFC counterparty. Such creditor protections would be permitted in order to prevent the support provider or the transferee from "cherry picking" by assuming only those QFCs of a given counterparty that are favorable to the support provider or transferee. Title II and the FDI Act contain similar provisions to prevent cherry picking."[15]

The IECA is concerned that in this circumstance, the non-Covered Entity counterparty may now exercise contractual default rights and cross-default rights, but the "covered affiliate support provider" is no longer obligated, and no transferee is obligated, to provide such credit support. In such a circumstance, there appears to be a strong likelihood that many of the covered affiliate support provider's assets will have been transferred to a third party, which transferee has elected not to accept a transfer of any of the QFC credit support obligations owed to the non-Covered Entity, thereby leaving the non-Covered Entity with a right to terminate its QFC and sue for damages, but it would be seeking damages from an entity that could no longer have any assets other than the QFCs of the one non-Covered Entity that the transferee chose not to accept.

In other words, the "cherry picking" prohibition appears to prevent a transferee from accepting transfer of credit support obligations of a covered affiliate support provider in support of a specific non-Covered Entity ("Party A") which are favorable to the transferee, while rejecting transfer of credit support obligations of a covered affiliate support provider in support of that same Party A that are unfavorable to the transferee. However, these "cherry picking" prohibitions, do not prevent a transferee from accepting transfer of all other assets and QFC credit support obligations of a covered affiliate support provider owed to other, third-party non-Covered Entities, so long as the transferee rejects all, and not just part, of the credit support obligations owed to Party A.

The IECA is concerned that this creditor protection could leave the non-Covered Entity with a right to terminate its QFC and seek default damages from its Covered Entity counterparty and the "covered affiliated support provider," both of whom now, as a result of the transfer, have no assets from which to satisfy any bona fide damages claim. This grant of a right, without any assets remaining from which to recoup damages owed to the non-Covered Entity counterparty, is a troubling provision.

[15] See Proposed QFC Rule, 81 Fed. Reg. at 29180-29181.

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The IECA understands that energy companies doing business with big banks bear the credit risk of the banks as counterparties. The provisions of OLA and the Board in this Proposed QFC Rule propose, essentially, push onto these non-Covered Entity companies certain risks and costs by privatizing "too big to fail" regulation by placing oversight risk on those who would do business with the Covered Entities.

Unfortunately, the absence of liquidity in various swap markets and physical commodity markets actually limits the number of willing, creditworthy and sufficiently large counterparties with which to enter into the types of QFCs that are "commodity contracts" and "forward contracts," as well as "swap agreements," that are required by the non-Covered Entities that are commercial energy companies. If non-Covered Entity counterparties are unable to enter into, and rely on the performance of, such QFCs with Covered Entities, there are few remaining choices.

As a result, the relief provided to such non-Covered Entity counterparties in the form of the Board's definition of "covered QFC" in proposed section 252.83(a)(2) of the Proposed QFC Rule, while genuinely beneficial and appreciated by non-Covered Entity counterparties, may only be short-term relief and could quickly expire due to the lack of liquidity represented by the lack of creditworthy and sufficiently well-capitalized counterparties to replace these Covered Entities.[16]

Due to the above-described lack of liquidity, such non-Covered Entity counterparties and their affiliates will likely need to enter into new QFCs (i.e., new transactions under their existing master agreements), in order to continue to procure the physical energy commodity supplies needed to operate their commercial energy businesses and to procure financial derivatives (uncleared swap agreements) needed to manage and mitigate prudently (i.e., hedge) their exposure to commercial risks.

As a result, what sounds like useful relief for non-Covered Entity counterparties in the Proposed QFC Rule may be very short-lived.

Therefore the IECA questions whether the Board's Proposed QFC Rule is "**the manner which best fulfills such purpose**," as required by Section 204(a) of the DFA.

(IECA ASKS:) The IECA submits that during the course of the next several months, innovative people at one or more Covered Entities and non-Covered Entities are likely to develop a means of more equitably addressing these concerns in a manner which still allows the Covered Entities to satisfy the Board's conformation requirements under sections 252.83 and 252.84. Such innovations would likely be considered "enhanced

[16] Pursuant to the definition of "covered QFC" in section 252.83(a)(2), a non-Covered Entity counterparty may retain its current contract default rights under such Covered QFCs, so long as that non-Covered Entity counterparty and all of its affiliates refrain from entering into any new QFC with a Covered Entity or any of its affiliates that is also a Covered Entity or a Covered Bank.

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creditor protections" and require new "proposed provisions of one or more forms of Covered QFCs, or [new] proposed amendments to one or more forms of Covered QFCs with enhanced creditor protection conditions."

The IECA requests that the Board establish the flexibility in the Proposed QFC Rule to allow such innovation to be proposed to the Board for approval, by revising section 252.85(b) to allow trade associations, such as the IECA, to propose such forms of conformation documents and enhanced creditor protections to the Board for its approval as requested above in Part II of these IECA Comments.

VI. Comment on the Board's Willingness to Consider Comments of Non-Covered Entities.

Even though the Board received many comments from non-bank trade associations on its proposed Volcker Rule, in its final Volcker Rule, the Board did not cite any comments of any commenter that was not an entity regulated by the Board, other than the Electric Reliability Council of Texas ("ERCOT") and a citation to a number of form post cards that the Board had received.[17] The Board's proposed Volcker Rule had asked over 383 questions and many in industry invested significant time and effort into providing comments, and were very disappointed to see their legitimate and well-intended comments be essentially ignored in the Board's discussion of the final Volcker Rule. We accordingly hope that our effort in providing these comments on the Board's Proposed QFC Rule will be considered by the Board in its review.

VII. Responses to Specific Questions Asked by the Board in its Proposed QFC Rule.

The IECA respectfully offers the following answers to some, but not all, of the questions set forth in the Board's Proposed QFC Rule.

***Question 1**: The Board invites comment on all aspects of this section [1].*

Response: The IECA understands that only default rights based on: (i) the insolvency of a Covered Entity that is a direct counterparty to a QFC, (ii) the prohibition of a transfer by a resolution authority under OLA or FDIA of a Covered Entity's obligations under the QFC or a related credit support to a third party, or (iii) the insolvency of a Covered Entity affiliate of the Covered Entity that is a direct party to a QFC, are subject to the suspension and prohibition provisions of the Board's Proposed QFC Rule.

The ability of a non-Covered Entity counterparty to a QFC to exercise its remedies arising from any direct default, such as a failure to pay any amount when due under a

[17] Volcker Rule, 79 Fed. Reg. 5536 at 5539 (January 31, 2014).

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QFC, by a Covered Entity as a direct party to a QFC or a Covered Entity as a credit support provider is unaffected by the Board's Proposed QFC Rules.

The IECA may ultimately propose additional creditor protections to the Board with respect to QFCs that involve commodity contracts, forward contracts and swap agreements between Covered Entities and commercial energy companies and we hope the Board will be favorably inclined to approve such enhanced creditor protections.

> ***Question 2****: The Board invites comment on the proposed definition of the term "covered entity."*

Response: [Not Answered]

> ***Question 3****: The Board invites comment on alternative approaches for determining the scope of application of the proposed restrictions.*

Response: [Not Answered]

> ***Question 4****: 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?*

Response: The Board should resist the temptation to expand the scope of "Covered Entity" beyond GSIBs and their affiliates. As noted above, Section 204(a) of Title II of DFA specifies that OLA is concerned with resolution of "failed financial companies that pose a significant risk to the financial stability of the United States." As such, the IECA believes that expanding the application of this Proposed QFC Rule beyond GSIBs and their affiliates is beyond the scope of the Board's authorization under the DFA and is unnecessary.

> ***Question 5****: 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.*

Response: The proposed definition would include contracts for the purchase of commodities that the GSIB acquires for use and consumption in the ordinary course of its

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business. Collection on these contracts do not threaten the solvency of the GSIB should the non-GSIB company exercise its remedies. In the case of utility and gas energy supply contracts, these rights of a bankrupt debtor are adequately addressed in Section 366 of the Bankruptcy Code, which restricts the ability of the utility to cut off service. There is no evidence that the financial system is put at risk because a bank that does not pay its utility bill and is subject to the normal procedures of Section 366 of the Bankruptcy Code. The Board should not impair the rights of vendors to GSIBs, unique for all customers of these vendors. Ordinary course utilities should be noted as parties to QFCs, but should be specifically exempted from having to perform under this proposed rule.

> ***Question 6****: 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.*

Response: This exclusion is appropriate. There would be unbearable uncertainty if clearinghouses were required to treat GSIB counterparties differently. Other clearing members would be required to make good on the failings of the GSIB to provide collateral to margin its trades in order to maintain the solvency of the clearinghouse, causing severe financial stress on innocent parties. It would also not be fair for only GSIBs on an exchange or swap execution facility to have special rights at the expense of the other market participants.

> ***Question 7****: 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.*

Response: [Not Answered]

> ***Question 8****: 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*

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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)?

Response: It is difficult to figure out what the Board means by proposed section 252.81 Default right (1)(ii). A default right is a "right or contractual provision that alters the amount of collateral or margin that must be provided with respect to an exposure thereunder, including by altering any ... variation margin ... other than a right or operation of a contractual provision arising solely from a ... change in the amount of an economic exposure."[18] There are generally two reasons in standard trading contracts for a margin demand- either a change in credit rating reduces a party's credit threshold, which reduces the amount the downgraded party is permitted not to margin, or market prices move. Proposed section 252.81(b)(1) prohibiting a QFC from having a default right "that is related, directly or indirectly, to an affiliate of the direct party becoming subject to ... insolvency" exacerbates the confusion, since a parent insolvency would likely "indirectly" give a right to demand margin when the credit rating of the parent is cut upon its insolvency.

If the Board's goal is to provide that a party cannot enforce a provision that requires more margin because of a credit downgrade, but that margin may be demanded for market price changes, the Board should explicitly so state.

Filing a proof of claim in bankruptcy or otherwise filing a pleading in a court proceeding or the resolution proceeding of the direct QFC and the affiliate QFC should be specifically permitted, and excluded from any stay of default rights. They should not be forestalled until "the end of the stay period,"[19] because applicable bankruptcy deadlines may have passed, leaving the creditor without a remedy and unable to collect even the unsecured creditor dividend. Additionally, in a bankruptcy of a parent guarantor of a subsidiary, proofs of claim are typically filed by a creditor for the underlying debt in the subsidiary's bankruptcy and for the guaranty in the parent's bankruptcy. Both should be clearly permitted.

With respect to "the need to show cause", of particular relevance to the energy industry are contract clauses that provide relief during the occurrence of force majeure events (e.g., a damaging hurricane which causes natural gas production to be shut in making deliveries at certain locations impracticable or impossible). We would ask clarification that such force majeure provisions are excluded, and the Board may wish to consider a textual change to section (2) of the definition of "Default right" in 252.81[20] which would insert the phrase "**as a result of force majeure or**" before the text "on demand", which is shown marked in bold below:

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[18] 81 Fed. Reg. 29190 col. 1.
[19] see 81 Fed. Reg. 29180 col. 3.
[20] 81 Fed. Reg. 29190 col. 1.

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(2) With respect to section 252.84, does not include any right under a contract that allows a party to terminate the contract **as a result of force majeure or** on demand or at its option at a specified time, or from time to time, without the need to show cause.

Question 9: *The Board invites comment on all aspects of this section [II.D.] of the proposal.*

Response: [Not Answered]

Question 10: *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?*

Response: The restrictions are not clear. It is not clear how the Board is distinguishing cross-defaults from defaulted guaranties. See answers to questions 1 and 4.

Question 11: *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?*

Response: [Not Answered]

Question 12: *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)?*

Response: [Not Answered]

Question 13: *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?*

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Response: [Not Answered]

> ***Question 14****: 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?*

Response: The trading activity of the GSIB should be considered in connection with mandating a contractual stay. If the GSIB has attempted to corner the market in an essential commodity, such as wheat, oil, or natural gas, and accumulated outsized financial and physical positions, preventing the unwinding of those positions would withhold this essential supply from the market, exacerbating the corner and protecting the GSIB to the derogation of the market as a whole. There should be a mechanism within the required contract for the stay on default rights to be overridden by a determination of a regulator that liquidation of positions if not permitted would disrupt the supply of or otherwise cause or exacerbate abnormal price movements in that commodity. Then a process must be put in place so that market participants can seek a ruling that the commodity at issue has been cornered or otherwise manipulated by the GSIB in resolution so the stay on the exercise of default rights can be lifted and the market in that commodity returned to normal.

The Board seems to believe that parties can by contract change the administrative priority of a claim in bankruptcy.[21] This is not the case; Section 503(b) describes what claims may have administrative priority, and in a bankruptcy parties other than the contracting parties will have a say in a dispute.

> ***Question 15****: 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?*

Response: [Not Answered]

> ***Question 16****: 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?*

[21] 81 Fed. Reg. 29182 col. 3, fn. 119.

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Response: One of the troubling provisions in the Proposed QFC Rule is the Board's proposed asymmetrical burden of proof for the exercise of default rights: "after an affiliate of the direct party has entered a resolution proceeding, (a) the party seeking to exercise the default right [which necessarily is the non-GSIB, as it is the GSIB entity that is bankrupt] bears the burden of proof that the exercise of that right is indeed permitted by the covered QFC and (b) the party seeking to exercise the default right must meet a 'clear and convincing evidence' standard, a similar standard, or a more demanding standard."[22]

The Board is dramatically overstepping its authority by dictating to the judiciary its rules on burdens of proof in litigation before it. The Board is dramatically seeking to favor the entities for which it is responsible to oversee by providing that those entities, as parties to a lawsuit, have a lesser burden of proof than their adversaries.

The Board presents only supposition for this requirement; it does not cite any instance of a court finding a bank owed money on a QFC that the counterparty to the QFC was unable to prove was owed by the bank. The Board cites no evidence, no instance, of a court inadequately protecting the interests of a bank regulated by it, on any level, much less one that rises to the level of the threat to the financial system that is the stated need for the proposed rule, because of the burden of proof.

In litigation over a master agreement with multiple transactions, some in the money for the GSIB and some in the money for the non-GSIB, under the Board's proposal the GSIB would have a lower burden of proof than the non-GSIB for transactions under the same agreement. For master agreements, the GSIB would have a lesser burden of proof to show the money owed to it by the non-GSIB than the GSIB would have to show the money owed by the GSIB. This is fundamentally unfair.

It is also not clear what exactly the Board wants the non-GSIB to have a higher burden in proving. In a dispute over the meaning of contract terms, the Board would replace the applicable doctrines of construing against the drafter, which could be the bank, or concerning contracts of adhesion, with a thumb on the scales of justice in favor of the banks. Rather than express confidence in its ability to regulate the banks to ensure that they are safe and sound, the Board instead asks the judiciary to give these banks special protections against losing lawsuits on their debts.

The Board proposes to fundamentally change the functioning of the judicial process when a bank is a litigant, without any factual support for the proposition that this is needed or would provide any benefit to anyone other than the GSIB. The Board's proposed rule is justified by the need for protecting the financial system for the risks of a panic and contagion,[23] yet weeks or months later in a court proceeding determined by a judge the

[22] 81 Fed. Reg. 29181 col. 2.
[23] 81 Fed. Reg. 29170

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alleged panic or need of a GSIB to engage in an asset fire sale to meet current obligations will have passed. There is no need to add insult to injury by restricting the non-GSIB's default rights and then ensuring that the meaning of those default rights is interpreted against the GSIB to the maximum extent possible.

> ***Question 17****: 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.*

Response: [Not Answered]

> ***Question 18****: 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?*

Response: No, the process does not work within the context of a normal negotiating process. There is a free rider problem by which one party would bear the expense of the rest of the marketplace in determining the availability of remedies for creditors. The Board should provide that any request can be made by any person, whether or not they have a pending contract with a bank; there should be no need to be a party in contract with a bank. This way trade associations such as the IECA may pursue Board approval of certain rights.

> ***Question 19****: The Board invites comment on the proposed transition periods and the proposed treatment of preexisting QFCs.*

Response: [Not Answered]

> ***Question 20****: 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?*

Response: [Not Answered]

> ***Question 21****: The Board invites comment on all aspects of this [Section IV] evaluation of costs and benefits.*

Response: The Proposed QFC Rule and reciprocal national regimes have costs that the Board has not considered in its Proposed QFC Rule.

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First, the Board completely ignores the costs on the non-GSIB parties of negotiating and entering into the requisite documentation. The Board seems to presume that all parties doing business with the GSIBs will simply "sign here." This is not, and should not be the case; it would be imprudent for any corporation responsible to shareholders to simply "sign here" without an understanding of the risks presented to the corporate enterprise. The non-GSB counterparties will need to retain attorneys. Additionally, the Board seems to acknowledge that counterparties may try to negotiate the terms of the compliant documentation, but does not accord a cost to that negotiation.

Second, the Board does not include the cost to the economy of the economic barriers to international finance established by rules such as the Proposed QFC Rule as reciprocated by other national rules of other countries, including those cited by the Board.

Third, the requirements of and costs of the Proposed QFC Rule on non-GSIBs is insufficiently considered in light of the expected follow on of (a) similar OCC rules and (b) contractual contagion of these provisions to other financial institutions.

Fourth, the cost to non-GSIBs of the loss or impairment of the contractual rights that the Board, and the OCC, will impose upon non-GSIBs is potentially substantial. Loss of rights has a cost. For example, the GSIBs will have the option of terminating a contract based on the market price on the day they file for bankruptcy by being able to reject the agreement as of the filing date, or to wait for the non-GSIBs termination following the GSIB's nonperformance. This is a free price option- an ability of the GSIB to choose the termination price that is best for it, that is not available to the non-GSIB. The non-GSIB bears the cost of this option.

Another example is the cost to the non-GSIB of being required to post collateral to a defaulting GSIB on market movements, while the non-GSIB appears to have no ability to require the GSIB to post or return collateral to it, based on the definition of default right. The risks to non-GSIBs of being squeezed by not receiving collateral while they are posting collateral, as well as the threat to financial stability of potential non-GSIB failures and asset fire sales necessitated thereby, should be evaluated.

The Board proposes a new and untested burden of proof for the non-GSIB in bankruptcy litigation, this will most assuredly increase the cost to the non-GSIB of any litigation with the GSIB.

> ***Question 22****: 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?*

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Response: The proposed amendments to the definition of "qualifying master netting agreement" in Part 217 of the Board's rules and to the definition of "qualifying master netting agreement" Part 249 of the Board's Rules are unnecessarily complex and maintain the current state of scattered and varied definitions in U.S. prudential regulators' rules. Master netting agreement forms (or "MNA") are published by a number of trade groups, and there are also privately developed versions as well. Such MNA are readily identifiable by the definition of "master netting agreement"[24] provided for in the U.S. bankruptcy code ("Bankruptcy Code").[25] In contrast to the single definition in the Bankruptcy Code, among the rules of the Board, the OCC and the Federal Deposit Insurance Corporation ("FDIC"), there are 10 definitions for master netting agreements (and that is not including cross-product qualifying master netting agreements or master netting agreement definitions in the rules of the Federal Housing Finance Agency ("FHFA") or the Farm Credit Administration ("FCA")). The Board has 2 qualifying master netting agreement definitions[26] and an eligible master netting agreement definition.[27] The FDIC has 2 qualifying master netting agreement definitions[28] and an eligible master netting agreement definition.[29] The OCC has 2 qualifying master netting agreement definitions[30] and an eligible master netting agreement definition.[31] The other two prudential regulators, the FHFA and the FCA, also have master netting agreement definitions in their rules.

The more versions of definitions with added or changed details, the more likely there will be inconsistencies or other problems (and they are guaranteed to waste resources in respect of analysis and compliance efforts).

The new definition for "qualifying master netting agreement" proposed in the Proposed QFC Rule to update section 217.2 removes internal inconsistencies where previously reference to "receivership" and "conservatorship" appeared together in one location but "conservatorship" was left out in respect to two references to "receivership" elsewhere in the definition, which is an improvement. Reference to "bankruptcy" is replaced with "conservatorship" in two locations in the update to section 249.3. Also section 217.2 and section 249.3 will now be consistent with each other because the proposal removes two instances of "resolution" from section 249.3, so that both section 217.2 and section 249.3 now make consistent references to "receivership, conservatorship, insolvency, liquidation, or similar proceeding". While consistency is an improvement, it may not change the reality of the boilerplate text in many trading agreements, for example, if the

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[24] 11 U.S.C.§101(38A).
[25] 11 U.S.C. § 101 et seq.
[26] 12 C.F.R. §§ 217.2 and 249.3.
[27] 12 C.F.R. § 237.2.
[28] 12 C.F.R. §§ 329.3 and 324.2.
[29] 12 C.F.R. § 349.2.
[30] 12 C.F.R. §§ 3.2 and 50.3. (While the term "Qualifying master netting agreement" also appears in a definitions list in 12 C.F.R. §32.2(u), the term is defined as having "the same meaning as" the term in §3.2 of the OCC rules.)
[31] 12 C.F.R. § 45.2.

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qualifying master netting agreement is an ISDA master agreement, there is a boilerplate "Bankruptcy" default provision, which is unlikely to change much, and it makes reference to a longer litany of conditions, including bankruptcy, insolvency, winding-up, liquidation, or the appointment of an administrator, conservator, receiver, trustee, custodian, among others. The same boilerplate text is likely to be subject to the other versions of the definitions by the other prudential regulators, even if such definitions vary in some way.

There is a problem with the definition of "qualifying master netting agreement" that is not addressed by the changes proposed in the Proposed QFC Rule, however. The existing and proposed revisions for both section 217.2 and section 249.3 do not comport with section 302(a)[32] of the Business Risk Mitigation and Price Stabilization Act of 2015 ("BRMPSA"). The definitions provide that a "qualifying master netting agreement" will provide for the right of the prudentially regulated entity to "liquidate or set-off collateral". To the extent that BRMPSA does not allow regulators to impose margining on the uncleared swaps of nonfinancial end users, the requirement for collateral liquidation rights in a qualifying master netting agreement is problematic. The 1992 form of ISDA master agreement does not refer to collateral or provide any provision to achieve liquidation or setoff of collateral. The most common way such rights become included in a 1992 ISDA master agreement is by the addition of a credit support annex, which is for margining. BRMPSA protects certain entities, like nonfinancial end users, from the regulatory imposition of margining on uncleared swaps. The definitions of "qualifying master netting agreement" would exclude a 1992 form of ISDA master agreement that does not have a credit support annex, and this would not comport with BRMPSA.

It appears that parts of this Proposed QFC Rule overlook and in some cases intentionally disregard the interests of nonfinancial end users. Legislation like BRMPSA and comments from legislators and others, including from the CFTC, indicate that nonfinancial or commercial end users, typically those who are participants in the real economy, and who were not the cause of the last financial crisis, should not be disregarded—but they are being blatantly so in the Proposed QFC Rule. Remarkably, on p29172 of the Proposed QFC Rule, the Board states that "the proposal is concerned only with default rights that run against a GSIB—that is, direct default rights and cross-default rights that arise from the entry into resolution of a GSIB entity. The proposal would not affect default rights that a GSIB entity (or any other entity) may have against a counterparty that is not a GSIB entity." This rulemaking proposes taking away rights of counterparties to GSIBs to help the GSIBs give their regulator greater comfort than it is getting from other compliance efforts, such as living wills. It is remarkably unbalanced and inconsistent with legal exceptions and exemptions intended for nonfinancial end users and similarly situated counterparties.

[32] 7 U.S.C. § 6s(e)(4).

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***Question 23**: 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)?*

Response: [Not Answered]

Paperwork Reduction Act Requests for comments:
(a) Whether the collections of information are necessary for the proper performance of the Board's functions, including whether the information has practical utility;

Response: [Not Answered]

(b) The accuracy of the Board's estimates of the burden of the information collections, including the validity of the methodology and assumptions used;

Response: [Not Answered]

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

Response: [Not Answered]

(d) Ways to minimize the burden of information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Response: [Not Answered]

***Question 24**: 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.*

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Response: In the flexibility analysis of the Board's Proposed QFC Rule, it states that "Section 165(b) of the Dodd-Frank Act provides the legal authority for this proposal".[33] In light of the fact that the Proposed QFC Rule involves mandated contractual stays and prohibited contractual cross-default provisions that are not explicitly specified in the Dodd-Frank Act, we would like to know which specific provision of Section 165(b) is being referred to by this reference. Is it one of the delineated Required Standards[34] (and if so, which one), or is it one of the delineated Additional Standards[35] (and if so, which one)?

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

Response: [Not Answered]

***Question 26**: Has the Board organized the proposal in a clear way? If not, how could the proposal organized more clearly?*

Response: [Not Answered]

***Question 27**: Are the requirements of the proposed rule clearly stated? If not, how could they be stated more clearly?*

Response: See answer to question 8.

***Question 28**: Does the proposal contain unclear technical language or jargon? If so, which language requires clarification?*

Response: [Not Answered]

***Question 29**: 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?*

Response: [Not Answered]

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[33] 81 Fed. Reg. 29187 col. 2.
[34] Section 165(b)(1)(A) of the Dodd-Frank Act, 12 U.S.C. 5365(b)(1)(A).
[35] Section 165(b)(1)(B) of the Dodd-Frank Act, 12 U.S.C. 5365(b)(1)(B).

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***Question 30**: What else could the Board do to make the proposal clearer and easier to understand?*

Response: The rule is complex and technical, with definitions and references that require great familiarity with the structure and organization of large financial institutions in order to digest and understand its scope and practical implications. Many non-Covered Entity counterparties to QFCs, such as commercial energy businesses, are focused on delivering products and services to their customers. They are not, and should not be, in the business of interpreting complex rules applicable to financial companies. Yet that is precisely what a non-Covered Entity counterparty will have to do in order to evaluate the risks it faces in selecting a particular financial institution with which to do business. While the goal of reducing systemic risk is important for all market participants, that goal must be balanced against the need to protect the end-user.

The IECA believes the Board's rule (particularly Part 252.83 and 252.84 and all related definitions), which has direct impact on the hedging transactions of non-Covered Entity counterparties, should be rewritten to make it understandable to the non-Covered Entity counterparties. Alternatively, some form of Frequently Asked Questions (FAQ) or other explanatory document should be provided by the Board (or perhaps written by others and formally or informally approved by the Board) that would be understandable by non-financial companies genuinely striving, in good faith, to analyze and understand their rights and obligations under their existing QFCs and any new QFCs with Covered Entities if and to the extent conformed in accordance with the Board's Proposed QFC Rule.

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VIII. Conclusion.

The IECA appreciates the opportunity to provide these Comments and would welcome the opportunity to discuss these comments further should you require any additional information on any of the topics discussed herein.

Please direct correspondence concerning these comments to:

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Yours truly,
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