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Robert deV. Frierson, Secretary
Board of Governors of the Federal Reserve System
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Re: Comments on Proposed Rulemaking of the Board of Governors of the Federal Reserve System (the "Fed"): *Restrictions on Qualified Financial Contracts of Systemically Important U.S. Banking Organizations ...*, 81 Fed. Reg. 29169, RIN 7100 AE-52, published on May 11, 2016 ("Proposed Rule")

Dear Mr. Frierson:

I submit these comments in my personal capacity as a United States citizen.

The Proposed Rule requires "Global Systemically Important Banking organizations", or "GSIBs" to require all with whom they do business to agree to some extraordinary contract terms that benefit the GSIB. Some terms, like delays in exercising some remedies, may make sense. Others, such as **requiring Main Street companies, public pension plans, and state agencies to agree to substantially higher burdens of proof in litigation than the banks**,[1] are unsupported and rather shocking. Also disturbing is the Fed's finding that the Proposed Rule's requirements are met by what a registered industry lobbying group, the International Swaps and Derivatives Association, wrote many months before the Proposed Rule was even published.[2]

I am depressed by the Fed's surrender on governing the entities it regulates sufficiently to prevent them from engaging in activities too risky for their balance sheets. The Fed instead proposes to privatize "too big to fail" regulation by placing oversight risk on those who do business with GSIBs. The Fed says banks are so weak that, alone of all other market participants, they must get special contract rights. They cannot be regulated successfully to be strong and avoid undue risk; the Fed's message is: avoid them, we can't control them. The Fed even states: "Counterparties are also able to prudently manage risk through other means, including entering into [contracts] with entities that are not GSIB entities and therefore would not be subject to the proposed rule."[3]

Even more depressing is the traditional futility of a citizen submitting comments

[1] "[C]overed entities would be permitted to comply by adhering to the ISDA 2015 Resolution Stay Protocol. fn. 40: See proposed rule §252.85(a). The Board views the ISDA 2015 Resolution Stay Protocol as consistent with the requirements of the proposed rule." 81 Fed. Reg. 29181 col. 2.
[2] 81 Fed. Reg. 29174 col. 2.
[3] Proposed Rule, 81 Fed. Reg. 29185 col. 1.

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to the Fed on post-financial crisis rulemakings. Even though the Fed received many comments from non-bank trade associations and private individuals on the so-called Volcker Rule,[4] in its final rule the Fed did not cite any commenter that was not an entity regulated under the rule, other than ERCOT. The proposed rule asked more than a thousand questions; the initial comment period allowed only forty-five business minutes per question for response. Many in industry invested significant time and effort, and all were very disappointed to see their comments ignored.

The Fed proposes asymmetrical burdens of proof: "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 counterparty, as the GSIB is bankrupt] bears the burden of proof that the exercise of that right is indeed permitted by the [contract] 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."[5]

The Fed seeks to protect the entities for which it is responsible not by ensuring their safety and soundness, but rather by mandating a Judge's thumb on the scale. The Fed's claim, or cloak, of accomplishing this through a supposed "freedom of contract" is disingenuous. On the same grounds advanced here, the Fed could further require that all banks obtain from their Main Street company, public pension plan, and state agency counterparties waivers of jury trial, waivers of default interest, or waivers of prevailing party attorneys fees in litigation.

The Fed does not cite any instance of a court awarding money that the counterparty did not "clearly and convincingly" prove was owed, or of a court inadequately protecting the interests of a bank on any level, much less one that allegedly threatens the global financial system, because of the burden of proof in litigation.

The Fed justifies the Proposed Rule by the need to protect the financial system from panic and contagion,[6] yet weeks or months later in a court proceeding determined by a Judge, there is no panic. For example, parent guaranties from GSIBs are subject to these Proposed Rules. A guaranty gives the right to demand money and then, if the money is not paid, file a lawsuit demanding that money. The defendant guarantor then has 30 days or so to answer the complaint, and this is followed by a year or two of litigation before any money is actually due from the guarantor. In bankruptcy, it is simple verification of a claim that can be initiated years after the filing. There is no threat to the financial system, or risk of requiring asset fire sales, by enforcing guaranties. The Fed's statement that counterparties who have no leverage, but do have a legitimate expectation that banks will be regulated to be safe and sound in the transactions in which

[4] Final Rule, *Prohibitions and Restrictions on Proprietary Trading ...*, 79 Fed. Reg. 5536 (Jan. 21, 2014): "The Agencies received over 18,000 comments ... More than 600 comment letters were unique comment letters, including from members of Congress, ... consumer and public interest groups, and individuals." 79 Fed. Reg. 5539, col. 2.

[5] 81 Fed. Reg. 29181 col. 2.

[6] 81 Fed. Reg. 29170

they engage, are free to go elsewhere to negotiate a level playing field, appears to defeat the purpose of bank regulation.

The Fed also seems to believe that parties can by contract change the administrative priority of a claim in bankruptcy.[7] This is not the case; Section 503(b) of the Bankruptcy Code describes what claims may have administrative priority, and in a bankruptcy parties other than the contracting parties will have a say in a dispute.

In its cost-benefit analyses, the Fed ignores the cost of impairment of contract rights on the Main Street company, public pension plan, and state agency counterparties. Loss of rights has a cost. For example, the counterparty must post collateral to a defaulting GSIB bank on market movements, while the GSIB bank has no obligation to post or return collateral to the counterparty, since exercising a remedy for the failure of the GSIB to post the collateral would be an impaired default right. The Fed should include the costs of the risks to Main Street company, public pension plans, and state agency counterparties of being squeezed by not receiving collateral while they are posting collateral, and having to fire sell their own assets to do so. the Fed should include the increased cost of litigation imposed by the proposed new burden of proof.

I hope you will consider my comments, as well as the comments of other individuals and non-banks, in your rulemaking.

Yours truly,

Jeremy D. Weinstein

cc: The Honorable Mark DeSaulnier, United States House of Representatives
The Honorable Diane Feinstein, United States Senate
The Honorable Barbara Boxer, United States Senate

[7] 81 Fed. Reg. 29182 col. 3, fn. 119.