ISDA® Safe, Efficient Markets

December 12, 2016

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

By email: regs.comments@federalreserve.gov

Legislative and Regulatory Activities Division
Office of the Comptroller of the Currency
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By email: regs.comments@occ.treas.gov

Robert E. Feldman, Executive Secretary
Attention: Comments/Legal ESS
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

By email: comments@FDIC.gov

Re: Notices of Proposed Rulemaking regarding Terms of Qualified Financial Contracts (FRB RIN No. 7100 AE-52; FRB Docket No. R-1538) (OCC RIN 1557-AE05; Docket ID OCC-2016-0009)

Ladies and Gentlemen:

The International Swaps and Derivatives Association, Inc. ("**ISDA**")[1] is submitting this supplemental comment letter to the Board of Governors of the Federal Reserve System (the "**Board**"), the Office of the Comptroller of the Currency (the "**OCC**") and the Federal Deposit Insurance Company (the "**FDIC**") in response to the Board's and the OCC's notices of proposed rulemaking (together, the "**Proposed Rules**") regarding mandatory contractual stay requirements

[1] Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 850 member institutions from 66 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association's website: www.isda.org.

for qualified financial contracts ("**QFCs**") for global systemically important banking groups ("**GSIBs**").[2]

ISDA submitted a comment letter to the Board on August 5, 2016 (the "**ISDA Board Comment Letter**") in response to the Board Proposed Rule and a comment letter to the OCC on October 18, 2016 (the "**ISDA OCC Comment Letter**") in response to the OCC Proposed Rule, each of which included suggestions and recommendations with respect to the Proposed Rules.[3] This comment letter supplements those submissions with a recommendation for the Board and the OCC to modify their treatment of multi-branch master agreements in their final rules. Unlike the Board Proposed Rule and the OCC Proposed Rule, the FDIC Proposed Rule does not specifically address multi-branch netting arrangements because "covered FSIs" do not include federal or state-licensed branches of foreign banking organizations. Therefore, this comment letter focuses specifically on the requirements of the Board Proposed Rule and the OCC Proposed Rule.

Under the Board Proposed Rule and the OCC Proposed Rule, counterparties could have different default rights for individual transactions entered into under a single multi-branch master agreement. As discussed in greater detail below, this approach would be inconsistent with market standard documentation, which is designed to allow counterparties to exercise default rights with respect to all transactions and close-out on a net basis. By allowing compliance with requirements to amend default rights on a transaction-by-transaction basis, the Proposed Rules could impair the ability to apply close-out netting and lead parties to break up netting sets. We do not believe this is a policy goal of the Proposed Rules. In addition, the Board's and OCC's proposed approach could require ISDA to develop a Jurisdictional Module to the ISDA Resolution Stay Jurisdictional Modular Protocol ("ISDA JMP") that either varies from the scope of the final rules to preserve close-out netting or introduces uncertainty under standard documentation. In either case, the result would be a more complicated compliance solution that market participants may be less inclined to adhere to.

We believe these complications are unnecessary and that the Board's and OCC's approach would not benefit resolvability. Instead, ISDA urges the Board and the OCC, in coordination with the FDIC, to modify their final rules to treat multi-branch netting agreements as a single QFC rather than applying different requirements to different transactions thereunder. This change would align the requirements of the rules with current industry-standard documentation of multi-branch master agreements and avoid implementation hurdles for ISDA and covered entities. We believe this change furthers the goals of the regulators by expanding the scope of QFCs subject to the requirements of the Proposed Rules.

This suggestion is intended to supplement our recommendations with respect to multi-branch master agreements included in Section III.D of the ISDA Board Comment Letter (which letter was attached to the ISDA OCC Comment Letter and which recommendations apply with respect to the OCC Proposed Rule). In that section, we urge the Board and OCC to eliminate the condition that a transaction under a multi-branch master agreement would be a "covered QFC" if

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[2] See 81 Fed. Reg. 29169 (May 11, 2016) (the "**Board Proposed Rule**"); 81 Fed. Reg. 55381 (Aug. 19, 2016) (the "**OCC Proposed Rule**"); 81 Fed. Reg. 74326 (October 26, 2016) (the "**FDIC Proposed Rule**").

[3] ISDA intends to submit a comment letter to the FDIC in response to the FDIC Proposed Rule that will be generally consistent with the ISDA Board Comment Letter and the ISDA OCC Comment Letter.

it provides for delivery or payment to be made at a U.S. branch or agency, but was not booked at a U.S. branch or agency. We reiterate this request. Such QFCs are not closely connected to the United States and therefore should not be subject to the requirements of the Proposed Rules. In practical terms, the requirement to include new contractual terms in QFCs where the only connection to the United States is payment or delivery in a U.S. branch or agency would require non-U.S. institutions to amend tens of thousands of additional QFCs booked abroad, many of which must also be amended to comply with contractual stay requirements of such non-U.S. institutions' home-country regulatory regimes. This would impose a significant burden on non-U.S. covered entities with no benefit to U.S. financial stability.

I. The Board and the OCC should modify their final rules to provide that, if a QFC is booked to a U.S. branch of a non-U.S. GSIB, the entire multi-branch master agreement and all transactions thereunder would be a single "covered QFC"

ISDA urges the Board and the OCC to treat a multi-branch master agreement, including all underlying transactions, as a single covered QFC for purposes of the final rules. The Proposed Rules provide that, with respect to multi-branch master agreements of U.S. branches or agencies of non-U.S. GSIBs, "covered QFCs" include only those agreements or transactions "booked at such U.S. branches and U.S. agencies or for which a payment or delivery may be made at such U.S. branches or U.S. agencies."[4] As a result, the Proposed Rules contemplate that different transactions under a single multi-branch master agreement could be subject to different terms with respect to default rights.

This treatment of multi-branch master agreements under the Proposed Rules is not consistent with existing practices for documenting master agreements. Industry-standard master agreements do not generally provide mechanics for terminating individual transactions or groups of transactions based on payment or insolvency defaults. For example, under the ISDA Master Agreement (whether or not multi-branch), the mechanics providing for termination, netting and application of collateral based upon the occurrence of such defaults apply to all "Transactions" regardless of where they are booked.[5] In the preambles to the Proposed Rules, the Board and the OCC note that the treatment of multi-branch master agreements under the Proposed Rules is different than the purpose of master agreements, which "contain general terms that the parties wish to apply to multiple transactions."[6]

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[4] See Board Proposed Rule, section 252.86(a); OCC Proposed Rule, section 47.8(a). In the ISDA Board Comment Letter and the ISDA OCC Comment Letter, we recommend that the treatment of multi-branch master agreements be narrowed so that a transaction would not need to be conformed solely because payment or delivery may be made at a U.S. branch or agency with respect to such transaction. As discussed further below, we reiterate this request and ask the regulators to define a multi-branch master agreement as a "covered QFC" solely if transactions are booked to a U.S. branch or agency.

[5] See, e.g., ISDA 2002 Master Agreement, section 6(a) ("Right to Terminate Following Event of Default. If at any time an Event of Default with respect to a party (the "Defaulting Party") has occurred and is then continuing, the other party (the "Non-defaulting Party") may, by not more than 20 days notice to the Defaulting Party specifying the relevant Event of Default, designate a day not earlier than the day such notice is effective as an Early Termination Date in respect of all outstanding Transactions.") (emphasis added).

[6] See 81 Fed. Reg. 29177; 81 Fed. Reg. 55388. The Board and OCC also recognize that the definition of QFC treats a master agreement, together with all supplements and underlying transactions, "as a single QFC." Id.

Final rules that diverge from the approach taken under industry-standard documentation could impose unnecessary burdens on the market. First, changes made to comply strictly with such rules could lead to parties breaking netting sets by applying different default rights on a transaction-by-transaction basis. This result is inconsistent with a key purpose of multi-branch master agreements and would require significant amendments to existing agreements. In addition, such an approach would increase the complexity of an already complex regulatory regime, and run contrary to market expectations. This would increase the burden of complying with the final rules by increasing the burden of educating counterparties about the effects of compliance.

Further, such a divergence risks reducing the use of an ISDA protocol for market-wide compliance. As discussed in the ISDA Board Comment Letter and the ISDA OCC Comment Letter, ISDA expects to publish a U.S. Jurisdictional Module for the ISDA JMP, which we urge the regulators to safe harbor as a means of complying with final rules. In Section I.A of the ISDA Board Comment Letter, we explain that the scope of "Covered Agreements" under such a U.S. Jurisdictional Module is expected to refer to the definition of "covered QFC" in the final rules. Were this approach to be taken, the amendments made to comply with the Proposed Rules would apply only to those transactions under a multi-branch agreement (rather than to the entire multi-branch agreement), because only such transactions would fall within the definition of "covered QFC." This approach of linking the scope of "Covered Agreement" to "covered QFCs" is aimed, in part, at facilitating asset managers and other buyside counterparties of entities subject to the final rules complying with applicable fiduciary duties. A Jurisdictional Module that applies to contracts not covered by relevant regulations makes it more difficult to determine that adhering to the Jurisdictional Module is consistent with such duties.

We believe these obstacles can be avoided if the regulators treated a multi-branch master agreement as a single "covered QFC." Such an approach would not be contrary to the regulators' resolvability and systemic stability objectives, but would ease the burden of compliance, including by providing greater clarity regarding the scope and effect of the final rules. Accordingly, we recommend that a multi-branch master agreement, including all transactions thereunder, be a "covered QFC" if a transaction is booked to a U.S. branch or agency.

Under our proposal, if a QFC transaction is booked to a U.S. branch or agency of the non-U.S. GSIB after the compliance date of the rules, the entire master agreement would be a "covered QFC" that must be conformed to the rule requirements.[7] As with other covered QFCs under the Proposed Rules, even if a non-U.S. GSIB has legacy QFC transactions booked to a U.S. branch or agency, the multi-branch master agreement would only be a "covered QFC" if new QFCs are booked to the U.S. branch or agency after the compliance date (or if QFC transactions are entered into with affiliates also subject to the contractual stay requirements). Multi-branch master agreements under which payment or delivery may be made at a U.S. branch or agency, but under which no transactions are booked to the U.S. branch or agency, would not be "covered QFCs." We believe that this scope better reflects the nature of multi-branch master agreements

[7] If new QFC transactions under a multi-branch master agreement are only booked to non-U.S. branches, such master agreement would not be a "covered QFC."

and correctly balances the policy objectives of resolvability with the compliance burden placed on covered entities under the Proposed Rules.

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ISDA appreciates the opportunity to provide these comments. We hope that the Board, the OCC and the FDIC find our comments useful in their continuing deliberations on the implementation of contractual stays in financial contracts. Please do not hesitate to contact Samantha Riley (sriley@isda.org) or the undersigned if we can provide further information about the derivatives market or other information that would assist the Board, the OCC and the FDIC in their work in relation to the Proposed Rules.

Yours sincerely,

Katherine T. Darras, General Counsel

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