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August 5, 2016

VIA ELECTRONIC SUBMISSION

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

Re: Comments on Proposed Rule: 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 Definition of Qualifying Master Netting Agreement and Related Definitions, RIN 7100 AE–52[1]

Dear Mr. Secretary:

On behalf of the eleven Federal Home Loan Banks (the "**FHLBanks**"), we appreciate this opportunity to comment on the aforementioned proposed rule which, if adopted, would, among other things, require counterparties to contractually limit their termination and default rights with respect to certain uncleared qualified financial contracts, including over-the-counter swaps and repurchase agreements ("**QFCs**") with global systemically important banking organizations ("**GSIBs**") and their affiliates that are subject to regulation in the United States (the "**Proposed Rule**").

I. The FHLBanks

The FHLBanks are government-sponsored enterprises ("**GSEs**") of the United States, organized under the authority of the Federal Home Loan Bank Act of 1932, as amended, and structured as cooperatives. Each FHLBank is independently chartered and managed, but the FHLBanks issue consolidated debt obligations for which each FHLBank is jointly and severally liable. The FHLBanks serve the general public interest by providing liquidity to approximately 7,000 member financial institutions, including banks, thrifts, credit unions, insurance companies,

and community development financial institutions. In doing so, the FHLBanks help increase the availability of credit for residential mortgages, community investments, and other services for housing and community development. Specifically, all of the FHLBanks provide readily available, low-cost sources of funds to their member financial institutions through loans referred to as "advances." Additionally, some FHLBanks also purchase and hold residential mortgage loans from their member financial institutions and retain such mortgage loans.

The FHLBanks, as end-users, enter into swap transactions with swap dealers to facilitate their business objective of safely and soundly providing liquidity to their member financial institutions and to manage and mitigate financial risk, primarily interest rate risk. As of March 31, 2016, the aggregate notional amount of over-the-counter ("**OTC**")[2] interest rate swaps held by the FHLBanks collectively was nearly $520 billion. At present, the FHLBanks are clearing a significant and growing percentage of their interest rate swap transactions. However, a significant percentage of FHLBank swaps are not currently eligible for clearing and it is anticipated that, even as the types of swaps that can be cleared expands, the FHLBanks will, for the foreseeable future, depend on the uncleared OTC swaps market to meet their hedging needs.

II. Comments

A. *The treatment of futures and cleared swaps agreements with a futures commission merchant ("**FCM Agreements**") should be clarified.*

The FHLBanks support the Proposed Rule's exclusion of cleared transactions from the requirements of the Proposed Rule and respectfully request that FCM Agreements, pursuant to which futures and cleared swap transactions are entered into, be expressly excluded as well.

The Proposed Rule makes clear that cleared QFCs are excluded from the scope of the Proposed Rule.[3] The definition of QFC is found in Title II of the Dodd-Frank Wall Street Reform Consumer Protection Act ("**Dodd-Frank**"), which definition includes, among other things, futures and swaps transactions. The definition also includes "master agreements" for such transactions, but *only with respect to* such transactions (*i.e.*, the master agreements, in and of themselves, are not QFCs).[4] In the United States, futures and swaps that are cleared are transacted through a futures commission merchant pursuant to, and in accordance with, the terms of an FCM Agreement.

The FHLBanks are of the view that FCM Agreements are excluded from the Proposed Rule's requirements, because such agreements are only QFCs to the extent that they relate to futures and swaps and, since futures and cleared swaps are excluded, the FCM Agreements are also excluded. However, the FHLBanks respectfully request that the Proposed Rule be amended to confirm that this is the case. In the alternative, the FHLBanks request that the adopting

release for the Proposed Rule, when it is adopted, include guidance expressly excluding FCM Agreements from the scope of the Proposed Rule.

B. *The ISDA Resolution Stay Jurisdictional Modular Protocol should be recognized as a safe harbor from the requirements of the Proposed Rule.*

The FHLBanks believe that use of the ISDA Resolution Stay Jurisdictional Modular Protocol (the "**JMP**") should qualify as a safe harbor from the Proposed Rule's requirements to the same extent that the use of the ISDA 2015 Universal Resolution Stay Protocol (the "**Universal Stay Protocol**") is a safe harbor from the Proposed Rule's requirements.

Among other things, and subject to several exceptions, the Proposed Rule "would prohibit a covered entity from being party to a covered QFC that allows for the exercise of any default right that is related, directly or indirectly, to the entry into resolution of an affiliate of the covered entity. The [Proposed Rule] also would generally prohibit a covered entity from being party to a covered QFC that would prohibit the transfer of any credit enhancement applicable to the QFC (such as another entity's guarantee of the covered entity's obligations under the QFC), along with associated obligations or collateral, upon the entry into resolution of an affiliate of the covered entity."[5]

As an alternative to compliance with these prohibitions, the Proposed Rule would permit amendment of a QFC via adherence to the Universal Stay Protocol. The Universal Stay Protocol was developed by the International Swaps and Derivatives Association, Inc. ("**ISDA**") to enable "parties to amend the terms of their [contracts] to contractually recognize the cross-border application of special resolution regimes applicable to certain financial companies *until comprehensive statutory regimes are adopted* and to support the resolution of certain financial companies under the United States Bankruptcy Code."[6] According to the NOPR, a safe harbor from the aforementioned prohibitions was afforded with respect to the Universal Stay Protocol because, among other things, the Universal Stay Protocol has the same general objective as the Proposed Rule, which is to "make GSIBs more resolvable by amending their contracts to, in effect, contractually recognize the applicability of U.S. special resolution regimes and to restrict cross-default provisions to facilitate orderly resolution under the U.S. Bankruptcy Code."

Subsequent to its publication of the Universal Stay Protocol, ISDA published the JMP. The JMP is designed to afford market participants the ability to amend their existing trading documentation to comply with the special resolution regimes of specific jurisdictions via separate "Jurisdictional Modules." Specifically, a market participant can use the JMP to amend its existing trading documentation solely with respect to those jurisdictions and counterparties with which they transact and in a manner that reflects the specific rules of those jurisdictions.

The JMP "is aimed at achieving the same policy goals as the [Universal Stay Protocol] with respect to the orderly resolution of systemically important financial institutions."[7] Also, the "operative provisions of the [JMP] are aimed at achieving an outcome substantially similar to the outcome under Section 1 of the [Universal Stay Protocol], which results in counterparties to financial institutions consenting to be subject to stays on or overrides of certain termination rights under [special resolution regimes], notwithstanding the governing law of their agreements." For these reasons, the FHLBanks respectfully request that the Proposed Rule be amended so that, if ISDA publishes a Jurisdictional Module for the United States that addresses the Proposed Rule's requirements (in its final form), use of the JMP would qualify as a safe harbor to the same extent that the use of the Universal Stay Protocol is a safe harbor from the Proposed Rule's requirements.

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We appreciate the opportunity to comment. Please do not hesitate to contact me via the contact information above, Mark Sherrill at (713) 470-6106 or mark.sherrill@sutherland.com, or Ray Ramirez at (202) 383-0868 or ray.ramirez@sutherland.com, with any questions you may have.

Respectfully submitted,

James M. Cain

JMC/rar
cc: Federal Home Loan Bank Presidents and General Counsel
Mark D. Sherrill, Esq., Sutherland
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[1] 81 Fed. Reg. 29,169 (May 11, 2016) (to be codified at 12 C.F.R. parts 217, 249, and 252) (the "**NOPR**").
[2] Note that we view the term "OTC" as synonymous with the term "non-cleared" that is used in the NOPR.
[3] *See* proposed 12 C.F.R. §252.88(a) (2016).
[4] *See* §§ 210(c)(8)(D)(iii)(IX) and 210(c)(8)(D)(vi)(V) of Dodd-Frank, 12 U.S.C.§ 5390(c)(8)(D)(iii)(IX) and 5390 (c)(8)(D)(vi)(V).
[5] NOPR at 29,179.
[6] Description of the Universal Stay Protocol on the ISDA website, https://www2.isda.org/functional-areas/protocol-management/protocol/22. (Emphasis added.)
[7] Description of the JMP on the ISDA website, https://www2.isda.org/functional-areas/protocol-management/protocol/24.