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Robert de V. Frierson, Esq.
Secretary
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20th Street & Constitution Avenue, NW
Washington, D.C. 20551

Re: 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 (Docket No. R-1538; RIN 7100 AE-52)

Ladies and Gentlemen:

The Institute of International Bankers ("IIB") appreciates the opportunity to comment on the proposed rulemaking referenced above.[1] The IIB's membership is comprised of banks headquartered outside the United States which engage in a variety of banking and other financial activities in the United States. The Proposal would apply to IIB member banks that have been designated as globally systemically important banking organizations ("G-SIBs") by the Financial Stability Board ("FSB"). Currently, there are twenty-two foreign banking organizations ("FBOs") that have been designated as G-SIBs.[2] Thirteen of these twenty-two firms have recently formed Intermediate Holding Companies ("IHCs") under the Federal Reserve Board's ("FRB") Regulation YY.[3]

The IIB has co-signed with The Clearing House Association L.L.C., the Securities Industry and Financial Markets Association, the American Banker Association, the Financial

[1] 81 Fed. Reg. 29169(May 11, 2016) (the "Proposal").

[2] See Financial Stability Board, 2015 update of list of global systemically important banks (G-SIBs) (Nov. 3, 2015), available at http://www.fsb.org/wp-content/uploads/2015-update-of-list-of-global-systemically-important-banks-G-SIBs.pdf

[3] 79 Fed. Reg. 17240 (March 27, 2014).

Services Roundtable and the Financial Services Forum a separate letter on the Proposal (the "Joint Trade Associations Letter"). However, we are submitting this letter on our own behalf to focus specifically on the following two aspects of the Proposal that are uniquely relevant to FBOs:

- To facilitate cross-border resolution strategies, U.S. branches and agencies of FBOs (hereinafter referred to collectively as "branches") should be excluded from the definitions of "covered entity" and "U.S. operations" of foreign G-SIBs where the FBO G-SIB's home country's legal framework meets the objectives of the Proposal. The home jurisdiction of almost every foreign G-SIB has a legal framework in place that includes a statutory power to impose a temporary stay on early termination rights of Qualified Financial Contracts ("QFCs") and thereby give effect to foreign resolution measures. Where QFCs are not governed by home country law, contractual clauses are being added to ensure statutory stay power under the home resolution regime is enforceable globally. Requiring the adoption of additional contractual clauses under the Proposal would duplicate existing stay powers and introduce potential conflicts with group resolution strategies.

- Even if U.S. branches of FBOs are not excluded, the definition of "covered QFC" should be revised to exclude any master agreement where transactions are booked to a non-U.S. location of a non-U.S. Covered Entity. Payment or delivery made at the U.S. branch does not make the QFC sufficiently closely connected to the U.S. as to affect the financial stability of the U.S. In this way, unnecessary restrictions on QFCs requiring amendment of thousands of additional contracts that are not closely connected to the U.S. can be avoided.

I. Exclusion from the definition of a "covered entity" for U.S. branches of non-U.S. G-SIBs whose Qualified Financial Contracts are already subject to similar regulatory requirements

We support the overall objective of the Proposal in order to avoid early termination of QFCs in resolution and welcome the FRB's intention to further implement the standards set in the FSB October 2014 updated (the "Key Attributes")[4] and the November 2015 Principles for Cross-Border Effectiveness of Resolution Actions (the "Cross-Border Principles")[5]. However, we are concerned about the significant costs and limited benefits arising from the interaction of the Proposal with overseas jurisdictions' regulatory frameworks if the definition of foreign G-

[4] See Financial Stability Board, Key Attributes of Effective Resolution Regimes for Financial Institutions (Oct. 15, 2014), available at http://www.fsb.org/wp-content/uploads/r_141015.pdf.

[5] See Financial Stability Board, Principles for Cross-border Effectiveness of Resolution Actions (Nov. 3, 2015), available at http://www.fsb.org/wp-content/uploads/Principles-for-Cross-border-Effectiveness-of-Resolution-Actions.pdf.

SIBs' "U.S. operations" is not revised. We have no objection to the application of the Proposal to locally incorporated entities which may be subject to U.S. resolution, as a contingency where the group resolution strategy is unsuccessful. However, in our view, the Proposal would impose duplicative requirements on foreign G-SIBs' U.S. branches, whose QFCs are already subject to existing and substantially equivalent resolution powers, without a proportionate incremental benefit to their resolvability or reduction in risks to U.S. financial stability.

As agreed to by FSB members, all member jurisdictions should implement in domestic regimes statutory stay powers and ensure their cross-border effectiveness through regulation requiring broad adoption of contractual recognition of those stay powers. However, the FSB Cross-Border Principles are clear that this is only necessary "in the absence of an appropriate statutory framework" and to ensure enforceability of the home resolution authority's stay power.[6] Indeed, as per the FSB, statutory frameworks provide more legal certainty and should supersede contractual approaches.

At present, the home jurisdiction of almost every foreign G-SIB has a legal framework in place – as assessed by the FSB's most recent peer review – that includes a statutory power to impose a temporary stay on early termination rights of QFCs.[7] These statutory frameworks have broad effect. For example, if a European resolution authority invokes the stay powers under the EU Bank Recovery and Resolution Directive (the "BRRD") to give effect to foreign resolution measures, the stay is automatically effective for all QFCs globally, including those booked in U.S. branches. Japanese and Swiss regimes take a similar approach. Where QFCs are not governed by the home country law, there is a requirement to follow a contractual recognition approach. As per FSB commitments, almost all foreign G-SIB home jurisdictions have put in place regulations or have regulatory proposals under development to require contractual clauses in QFCs governed by foreign law (non-EU law in the case of the EU BRRD). This will ensure that the statutory stay power under the home resolution regime is enforceable globally across all QFCs in foreign branches, including in the U.S., in support of single point of entry ("SPOE") resolution strategies. The ISDA Protocol is the vehicle that most foreign G-SIBs will use to meet these regulatory requirements for contractual recognition, and the jurisdictional modules are—as far as possible—drawn up to result in consistent treatment globally.

The combination of these existing statutory stay powers and regulatory requirements for contractual clauses that recognize home country stays or resolution regimes for foreign law governed QFCs effectively meets the objectives of the Proposal, as it results in all QFCs being subject to the home resolution regime, since they are either already under the home country law or have "opted-in" to abide by it in the event of resolution. Furthermore, this facilitates cross-border SPOE resolution strategies as it allows the home authority to ensure the effectiveness of the resolution powers to the branch network globally.

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[6] Id.

[7] See Financial Stability Board, Second Thematic Review on Resolution Regimes (Mar. 18, 2016), available at http://www.fsb.org/wp-content/uploads/Second-peer-review-report-on-resolution-regimes.pdf.

Importantly, by limiting the application of the Proposal to U.S. subsidiaries (including IHCs) and exempting U.S. branches of foreign G-SIBs, the Proposal will facilitate cross-border cooperation in resolution proceedings in line with the FSB's Key Attributes and Cross-Border Principles. Under the FSB's framework, in a scenario where a foreign G-SIB enters into resolution proceedings, the home and host authority should cooperate to ensure the orderly resolution, taking supportive measures as necessary to achieve this. This applies equally in the event of a group resolution – potentially requiring the host authority to use its local resolution powers – and in the event of a subsidiary in a host jurisdiction entering resolution – in which case, the home authority could support the resolution action through application of its powers to the parent.

For example, in the event of a U.S. subsidiary of a non-U.S. G-SIB headquartered in the European Union entering into a resolution proceeding under U.S. law (under either Dodd-Frank Act Title II proceedings or Bankruptcy Code proceedings), Article 94 of the BRRD empowers the home resolution authority to apply any of the statutory resolution powers in the BRRD to the parent bank in support of the resolution of the U.S. subsidiary under U.S. law, even if the parent has not entered into resolution itself. The statutory resolution powers that can be applied include the stay power under Article 70 of the BRRD, which extends to any EU-law governed financial contract in the U.S. branch, including those originally subject to U.S. law but which have opted into EU law under the ISDA Resolution Protocol. In this way, early termination of QFCs located in the U.S. branch are already subject to the temporary stay as outlined in the Proposal and cross-default rights versus the IHC or its subsidiaries – where they exist - are not triggered.

Of course, this would require the FRB to cooperate with the respective home resolution authority in order to seek confirmation that such supportive measures would be taken in the event of a U.S. subsidiary entering resolution, but in our view this would already be the case through FRB participation in existing non-U.S. G-SIB crisis management groups. Further, this type of cooperation mechanism is already recognized in the FRB's recent TLAC proposal, where the home country resolution authority for the parent foreign banking organization of the IHC may provide certification with respect to its intentions in resolution to be eligible for differentiated treatment based on the SPOE strategy. There is no reason why this principle could not also be applied in this Proposal, with the FRB seeking reassurance that the stay power could be activated in support of resolution of the IHC, e.g., under Article 94 of the BRRD, as a contingency in case the IHC enters a U.S. resolution proceeding.

Such an approach would support cross-border cooperation in resolution. Having already entered into a QFC governed by the home country governing law, or opting into it via the relevant ISDA Resolution Protocol, it would be potentially unclear to counterparties as to which law governs in the event of resolution, thereby creating the potential for legal challenge that the Proposal and the FSB's recommendations on contractual recognition is intended to avoid. It also creates significant uncertainty in the market over who will resolve those branches, when under the SPOE resolution strategy, it should properly be the home country resolution authority. In our view, imposing a requirement which potentially conflicts with group resolution strategy to address a contingency situation where the IHC enters U.S. resolution is disproportionate and can best be dealt with instead via the cooperation mechanism outlined above, consistent with the FSB Cross-Border Principles.

To be clear, we are not asking for an exemption or a competitive advantage. Foreign G-SIBs are already undertaking considerable remediation efforts to comply with home regulatory requirements that their foreign law governed QFCs opt into their home resolution regime and become subject to statutory stay powers. Excluding foreign G-SIBs' U.S. branches from the Proposed Rule would not prevent their counterparties from being subject to temporary stays on early terminations rights in QFCs, and so there is no risk of regulatory arbitrage and activity moving away from U.S. G-SIBs as a result. However, we do believe that requiring adoption of additional contractual clauses under the Proposal would duplicate efforts currently underway, effectively imposing additional costs on foreign G-SIBs relative to U.S. G-SIBs. We are not aware of any other jurisdictions, including Germany and the United Kingdom, that would include in their scope branches of foreign banks, focusing instead on locally incorporated activities. We request a similar reciprocal treatment by the FRB as that received by U.S.G-SIBs from foreign authorities.

Specifically, we request the removal of U.S. branches from the definitions of foreign G-SIBs' "U.S. operations" and "covered entity". Alternatively, the FRB should explicitly state that the Proposal will only apply to U.S. branches of foreign G-SIBs insofar as the home resolution regime and group resolution strategy would not adequately ensure that early termination rights, including cross-default rights against the U.S. IHC or subsidiaries, will not be triggered in resolution. At the very minimum, we ask the FRB to exclude from the definition of a "covered QFC" under the final rule, QFCs with U.S. branches of foreign G-SIBs that are governed by law in its home country, if such QFCs are already subject to existing statutory power under the home country law, or opt-into such law by the counterparty through contractual means (e.g. ISDA Resolution Protocol).

II. The NPR should be amended to exclude QFCs that are not booked in a U.S. branch or agency of a non-U.S. Covered Entity

As discussed above, the IIB believes that an effective cross-border stay regime, including coordination among resolution authorities and clear delineations of regulatory authority, is an important part of any resolution system for large financial institutions. In view of this global context, the IIB strongly agrees with the Federal Reserve's intention "to avoid imposing unnecessary restrictions on QFCs that are not closely connected with the United States" by excluding certain QFCs under foreign bank multi-branch master agreements from the requirements of the NPR. As drafted, however, Section 252.86(a) of the NPR would include in the definition of "covered QFC" many QFCs under multi-branch master agreements that have little or no connection to the U.S., and would impose a significant compliance burden on FBOs without a corresponding benefit to U.S. financial stability. The IIB suggests that in the case of an FBO multi-branch master agreement, the requirements of the NPR should not apply to any master agreement where all transactions are booked to a non-U.S. location of a non-U.S. Covered Entity.

Under the NPR, an FBO must conform all QFCs under multi-branch master agreements if such QFCs are booked, or if payment or delivery may be made, at such U.S. branch or agency. However, the IIB believes that the payment or delivery location alone does not make a QFC sufficiently "closely connected to the United States" to affect U.S. financial stability. Given that it is a standard practice for global banks to have multi-branch master agreements that provide the possibility of making or receiving payment or delivery through a U.S. branch, the current proposal could apply to tens of thousands QFCs entered into by FBOs, even if both parties were based in the EU, transactions were booked in the EU and the agreement were governed by EU law. Counterparties would not expect QFCs booked outside the U.S. to be subject to U.S. resolution regimes. Also, for the vast majority of FBOs subject to the NPR, such QFCs already are or soon will be covered by the statutory stay regimes and contractual opt-in and amendment requirements in the FBOs' home jurisdictions.

In practical terms, the requirement to amend QFCs under multi-branch master agreements, even if such QFCs are not booked in the U.S., would require some FBOs to amend these thousands of additional contracts at a significant cost, and would disproportionately burden FBOs as compared to U.S. GSIBs. The NPR does not describe the improvements to financial stability that would result from the applying the proposal to QFCs under multi-branch master agreements that are not booked at a U.S. branch or agency of an FBO, and it is difficult to see how the benefits of applying the proposal to such QFCs would outweigh the costs. In addition, the FRB's proposal to exclude only certain QFCs under multi-branch master agreements may complicate the netting mechanics for such master agreements.

We appreciate your consideration of our comments. Please contact the undersigned if we can be of further assistance.

Sincerely,

Sarah A. Miller

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