QFC USER'S GUIDE TO IECA'S QFC STAY RULE COMPLIANCE DOCUMENTS: (1) IECA BILATERAL AMENDMENT TO AMEND EXISTING QFCS ON A BILATERAL, RATHER THAN UNIVERSAL, BASIS; (2) PART [8] TO ADD QFC PROVISIONS INTO A NEW ISDA SCHEDULE; (3) SECTION 15.[13] TO ADD QFC PROVISIONS INTO A NEW NAESB BASE CONTRACT; (4) ARTICLE ELEVEN TO ADD QFC PROVISIONS INTO A NEW EEI MASTER AGREEMENT; AND (5) IECA'S POST-PROTOCOL-ADHERENCE BILATERAL AMENDMENT[1]

Energy companies that are parties to one or more existing Qualified Financial Contracts ("**QFCs**"), such as an ISDA Master Agreement, a NAESB Base Contract, an EEI Master Agreement (each a "**Master Agreement**"), and various other types of contracts that are also QFCs, with one or more global systemically important banking organizations ("**GSIBs**"), are receiving requests, or will soon receive requests, from those GSIBs asking that the non-GSIB parties to such existing QFCs enter into one of several documents that will amend their existing QFCs to conform those existing QFCs to the QFC Stay Rules issued by the U.S. Bank Regulators by no later than January 1, 2020.

In addition, companies that wish to enter into a new Master Agreement, or various other types of contracts that are also QFCs with a GSIB, including companies that have already amended all their existing QFCs with that GSIB or companies that did not have any existing QFCs with the GSIB and are entering into a QFC for the first time with that GSIB, will find that each such GSIB will be proposing QFC Stay Rule compliance provisions for inclusion in all such new QFCs.

[1] Document #5, IECA's QFC Post-Protocol-Adherence Bilateral Amendment is [UNDER DEVELOPMENT]. We will post this document #5 on the IECA's website (www.ieca.net) as soon as it is completed.

To assist energy companies in responding to those requests from GSIBs, the drafting team of the International Energy Credit Association ("**IECA**") has prepared the following documents ("**IECA QFC Stay Rule Compliance Documents**"):

(1) A proposed form of IECA Customized Version of the ISDA® Bilateral Amendment ("**IECA Bilateral Amendment**"), which may be used to amend one or more existing QFCs between a GSIB (referred to therein and in this QFC User's Guide as a "**Covered Entity"**) and a non-GSIB (referred to therein and in this QFC User's Guide as a "**Counterparty Entity**"), available in four separate templates: 1 – For use between a U.S. GSIB Group and a Corporate Counterparty Entity; 2 – For use between a U.S. GSIB Group and a Corporate Counterparty Group; 3 – For use between a Non-U.S. GSIB Group and a Corporate Counterparty Entity; and 4 – For use between a Non-U.S. GSIB Group and a Corporate Counterparty Group.

(2) A proposed form of Part [8] to an ISDA Schedule, which may be used to add QFC Stay Rule compliance provisions into a new QFC that is an ISDA Master Agreement between a Covered Entity (i.e., a GSIB) and a Counterparty Entity;

(3) A proposed form of Section 15.[13] to a NAESB Base Contract, which may be used to add QFC Stay Rule compliance provisions into a new QFC that is a NAESB Base Contract between a Covered Entity (i.e., a GSIB) and a Counterparty Entity;

(4) A proposed form of Article Eleven to an EEI Master Power Purchase and Sales Agreement, which may be used to add QFC Stay Rule compliance provisions into a new QFC that is an EEI Master Agreement between a Covered Entity (i.e., a GSIB) and a Counterparty Entity;

(5) A proposed form of QFC Post-Protocol-Adherence Bilateral Amendment, which may be used to add into Protocol-Covered Agreements (i.e., QFCs between Adherents to the ISDA Protocol) provisions intended to increase the certainty that a non-GSIB will be able to satisfy the required Burden of Proof and become eligible to exercise Default Rights arising from the occurrence of certain "Creditor Protection Provision" Events of Default under the QFC Stay Rules –[UNDER DEVELOPMENT]; and

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INTRODUCTION. The International Energy Credit Association ("**IECA**") offers this QFC User's Guide to assist companies using, or considering using, one of the following documents prepared by the IECA's drafting team to satisfy the U.S. Bank Regulators' QFC Stay Rule (as defined below) compliance requirements:

(1) the IECA's Customized Version of the ISDA Bilateral Amendment ("**IECA Bilateral Amendment**"), which may be used to amend a non-GSIB company's ("**Counterparty**" or "**Counterparty Entity**") existing Qualified Financial Contracts ("**QFCs**") with one or more global systemically important banking organizations ("**GSIBs**" or "**Covered Entities**");

(2) the IECA's proposed form of a Part [8] to an ISDA Schedule, which may be used to insert QFC Stay Rule compliance provisions into a new QFC that is an ISDA Master Agreement between a Counterparty and a Covered Entity;

(3) the IECA's proposed form of a Section 15.[13] to a NAESB Base Contract, which may be used to insert QFC Stay Rule compliance provisions into a new QFC that is a NAESB Base Contract between a Counterparty and a Covered Entity;

(4) the IECA's proposed form of Article Eleven to an EEI Master Power Purchase and Sales Agreement ("**EEI Master Agreement**"), which may be used to add QFC Stay Rule compliance provisions into a new QFC that is an EEI Master Agreement between a Counterparty and a Covered Entity;

(5) the IECA's proposed form of QFC Post-Protocol Bilateral Amendment, which may be used to add into Protocol-Covered Agreements (i.e., QFCs between Adherents to the ISDA Protocol) provisions intended to increase the certainty that a non-GSIB will be able to satisfy the Burden of Proof required to exercise Default Rights arising from the occurrence of certain "Creditor Protection Provision" Events of Default under the QFC Stay Rules – [UNDER DEVELOPMENT]; and

(6) [Other QFC Stay Rule Compliance Document forms that the IECA Drafting Team may draft from time to time].

Note that these forms can be readily adapted to accomplish the same objectives with respect to other types of QFCs and therefore are not limited solely to application to ISDA Master Agreements, NAESB Base Contracts, and EEI Master Agreements, but could also be used with various other types of QFCs related or unrelated to energy commodities. The IECA drafting team may draft QFC Stay Rule compliance provisions for additional types of QFCs, which will then be added into this QFC User's Guide.

I. BRIEF SUMMARY OF COMPLIANCE CHOICES FOR NON-GSIBS, QFC STAY RULES COMPLIANCE OBLIGATIONS, AND HIGH-LEVEL OVERVIEW OF QFC STAY RULES

This section of the QFC User's Guide provides a brief summary of the QFC Stay Rule compliance obligations, the choices available to each non-GSIB energy company as a Counterparty to a QFC with a Covered Entity, and a high-level overview of the QFC Stay Rules. This section will explain, in brief, why GSIBs are seeking to amend their existing QFCs with non-GSIB energy companies as Counterparties to such existing QFCs with a GSIB, and why GSIBs are inserting QFC Stay Rule compliance provisions into all new QFCs entered into with non-GSIB energy companies as Counterparties to such new QFCs with a GSIB.

A. Compliance Dates and Compliance Obligation Choices. Under the QFC Stay Rules, if a GSIB has not amended its existing "in-scope" QFCs with a particular Counterparty by the specified compliance date — January 1, 2020, for non-financial Counterparties (in contrast with January 1, 2019, the compliance date for QFCs between two GSIBs, and July 1, 2019, the compliance date for QFCs between a GSIB and a non-GSIB Swap Dealer or a non-GSIB Major Swap Participant) — then on and after that compliance date the GSIB may not enter into any new QFCs, or enter into any new transactions under an existing QFC, with that Counterparty.

For a Counterparty with one or more existing QFCs with only one GSIB, this means that on and after 1/1/2020, the Counterparty has two choices with respect to its existing QFCs with that single GSIB. The Counterparty may:

(1) leave its existing QFCs with that GSIB in effect as they are and simply not enter into any new QFCs or any new transactions (i.e., no new trades) under an existing QFC with that GSIB on and after 1/1/2020. Under this choice, on and after 1/1/2020, the Counterparty will have to look to other GSIBs (and comply with the QFC Stay Rules) and other non-GSIBs to enter into new Master Agreements and various other types of QFCs. All new transactions (i.e., all new trades) entered into on and after 1/1/2020 will then have to be entered into under these new QFCs. In other words, the Counterparty may choose to not amend its existing QFCs with its current GSIB trading partner, but, if it so chooses, the Counterparty will be prohibited on and after 1/1/2020 from entering into any new trades or any new QFCs with its current GSIB trading partner; or

(2) amend all its existing QFCs with its current GSIB trading partner by no later than 1/1/2020, or the first date thereafter that the Counterparty needs to enter into any new trade or new QFC with that GSIB.

For a Counterparty with one or more existing QFCs with more than one GSIB, this means that on and after 1/1/2020, the Counterparty has three choices with respect to its multiple existing QFCs with multiple GSIBs. The Counterparty may:

(1) leave its existing QFCs with all such GSIBs as they are and simply not enter into any new QFCs or any new transactions (i.e., no new trades) under an existing QFC with any of those GSIBs on and after 1/1/2020. Under this choice, the Counterparty will have to look to other GSIBs (and comply with the QFC Stay Rules) and other non-GSIBs to enter into new Master Agreements and various other types of QFCs. All new transactions (i.e., all new trades) entered

into on and after 1/1/2020 will then have to be entered into under these new QFCs. In other words, the Counterparty may choose to not amend its existing QFCs with its current GSIB trading partners, but, if it so chooses, it will be prohibited on and after 1/1/2020 from entering into any new trades with all its current GSIB trading partners; or

(2) amend all its existing QFCs with all its GSIB trading partners by no later than 1/1/2020, or the first date thereafter that the Counterparty needs to enter into any new trade or any new QFC with any of its current GSIB trading partners; or

(3) amend its existing QFCs with one or more of its current GSIB trading partners by no later than 1/1/2020 or the first date thereafter that the Counterparty needs to enter into any new trade(s) or new QFC(s), and leave its existing QFCs with all other GSIB trading partners in effect and unchanged. Under this choice, the Counterparty will be able to enter into new trades on and after 1/1/2020 under its existing Master Agreements and other forms of QFCs with the first group of GSIBs (i.e., those GSIBs with whom its existing QFCs have been amended to comply with the QFC Stay Rules), but the Counterparty will be prohibited from entering into any new trades under its existing QFCs (nor will it be able to enter into any new QFCs) on and after 1/1/2020 with this second group of QFCs ((i.e., those GSIBs with whom its existing QFCs have not been amended to comply with the QFC Stay Rules).

In each instance, the benefits, if any, to a Counterparty of not amending an existing QFC with a particular GSIB to comply with the QFC Stay Rules will depend on a review and analysis by the Counterparty of the specific facts and circumstances arising under each such existing QFC with a GSIB.

Keep in mind that the QFC Stay Rules are not applicable to a Counterparty's Master Agreements or other types of QFCs with a non-GSIB. So, for example, a Counterparty may have an ISDA Master Agreement with a smaller bank that is not a GSIB or it may have an ISDA Master Agreement with a swap dealer that is not a bank and in each instance the QFC Stay Rules would not apply to those QFCs. For a more-detailed discussion of the definition of QFCs and the types of QFCs that are subject to the QFC Stay Rules, see Section VII.B, Defining Qualified Financial Contracts or QFCs, of this User's Guide.

<u>A due diligence review of a Counterparty's portfolio of QFCs with one or more GSIBs is recommended prior to making any of the above choices.</u>

B. Methods of Amending a Counterparty's Existing QFCs with GSIBs. As discussed above, if a GSIB has not amended its existing in-scope QFCs with a Counterparty by 1/1/2020, the GSIB may not enter into any new QFC, or enter into any new transactions (i.e., trades) under an existing QFC, with that Counterparty. So, if a Counterparty has existing QFCs with a GSIB and if the Counterparty wants the ability to (i) enter into new trades under an existing QFC with that GSIB or (ii) enter into one or more new QFCs with that GSIB, the Counterparty must amend its existing QFCs with that GSIB on or before 1/1/2020 or the first date thereafter that the Counterparty intends to enter into a new trade (or a new QFC) with such GSIB.

There are essentially three methods available to a Counterparty to amend its existing in-scope QFCs with a GSIB, including amending its existing ISDA Master Agreements, NAESB Base

Contracts, EEI Master Agreements, various other physical forward contracts, and certain other financial contracts that are QFCs. Such amendments may be accomplished by utilizing one or more of the following:

ISDA® Protocol – adherence, on a "universal" basis, to the ISDA 2018 U.S. Resolution Stay Protocol, published by ISDA on July 31, 2018 ("**ISDA® Protocol**"), which automatically amends all existing QFCs between a Counterparty Entity and all GSIBs with whom that Counterparty Entity has entered into any existing QFC(s);

ISDA Bilateral Amendment - bilateral execution, on an individual GSIB basis, by a Covered Entity (i.e., GSIB) and its BHCA Affiliates[2] ("**Covered Entity Group**") and a Counterparty Entity and its Consolidated Affiliates[3] ("**Counterparty Group**") of the ISDA Bilateral Amendment published by ISDA on November 2, 2018 ("**ISDA Bilateral Amendment**"), thereby amending all QFCs entered into by and between the various members of the Covered Entity Group and any member of the Counterparty Entity Group; or

IECA Bilateral Amendment - bilateral execution, on an individual GSIB basis, by (i) a Covered Entity or a Covered Entity Group and (ii) the Counterparty Entity or a Counterparty Group of the IECA's Customized Version of the ISDA Bilateral Amendment ("**IECA Bilateral Amendment**"), thereby amending only those QFCs expressly designated in such IECA Bilateral Amendment.

C. Insertion of QFC Stay Rule Compliance Provisions into a New QFC. Under the QFC Stay Rules, if a GSIB enters into a new QFC with a Counterparty on or after 1/1/2020, which Counterparty either has no existing QFCs in effect with that GSIB or has already amended any existing QFCs in effect with that GSIB, any such new QFC must include certain mandatory QFC Stay Rule compliance provisions.

Conforming a new QFC with the QFC Stay Rules can be accomplished by one of two methods:

(A) incorporating by reference into a new QFC between a Counterparty and a GSIB, the QFC Stay Rule compliance provisions from the document used by the Counterparty to amend its existing QFCs with that GSIB; or

(B) the QFC Stay Rules compliance provisions can be inserted in their entirety into the new QFC to be entered into between the Counterparty and the GSIB.

In the IECA's model form of Part [8] to an ISDA Schedule of a new ISDA Master Agreement and in the IECA's model form of Section 15.[13] of a new NAESB Base Contract, that can be inserted into a new QFC that is, respectively, a new ISDA Master Agreement or a new NAESB Base Contract, we have included provisions addressing both of the methods described in clause

[2] "BHCA Affiliate" has the same meaning as the term "affiliate" as defined in, and shall be interpreted in accordance with, Section 1841(k) of the Bank Holding Company Act, 12 U.S.C. 1841(k).
[3] "Consolidated Affiliate" has the same meaning specified in, and shall be interpreted in accordance with, 12 C.F.R. 252.81, 12 C.F.R. 382.1 and 12 C.F.R. 47.2 of the QFC Stay Rules.

(A) and clause (B) of the immediately preceding paragraph, so that the parties to such new QFC may choose whichever method they prefer.

Note, however, that regardless of which method (A) or (B) the parties may choose to insert QFC Stay Rule compliance provisions into a new QFC, the "Creditor Protection Provisions" Events of Default provisions shown in the IECA's form of Part [8](4) to an ISDA Schedule and the IECA's form of Section 15.[13].4 to a NAESB Base Contract should also be inserted into the new QFC, as is more fully explained in Section II of this QFC User's Guide.

As explained in Section II of this QFC User's Guide, these same "Creditor Protection Provisions" Events of Default are also included in Exhibit B to the IECA Bilateral Amendment.

D. Due Diligence Review of QFCs and Related Credit Arrangements; "Enhanced" Creditor Protections; and Subsequent Adherence to the ISDA® Protocol. Generally, a Counterparty may elect to amend one or more of its existing "in-scope" QFCs by entering into the ISDA Bilateral Amendment or the IECA Bilateral Amendment, on a GSIB by GSIB basis, with each of its current GSIB trading partners (Covered Entities) or only those Covered Entities with whom the Counterparty wishes to trade, and then, subsequently, such Counterparty may elect to adhere to the ISDA® Protocol.

Generally, the ISDA Bilateral Amendment, the IECA Bilateral Amendment, the IECA's form of Part [8] to an ISDA Schedule, and the IECA's form of Section 15.[13] to a NAESB Base Contract have all been written to accommodate such a subsequent adherence by a Counterparty to the ISDA® Protocol.

When a Counterparty adheres to the ISDA® Protocol, the Counterparty immediately and automatically amends all of that Counterparty's QFCs with any and all GSIBs, which is referred to as adherence on a "universal" basis.

As is more fully described in Section III of this QFC User's Guide, the ISDA® Protocol and the ISDA Bilateral Amendment include certain representations by a Counterparty that (i) it has obtained all third party consents required to be obtained, if any, prior to amending its QFCs, and (ii) amending its QFCs will not adversely affect any of the credit arrangements supporting its QFC obligations. Determining whether a Counterparty can make those representations or whether a Counterparty will be in breach of any such representation will require the Counterparty to perform a due diligence review of each of its QFCs and any and all related credit support arrangements prior to adhering to the ISDA® Protocol or executing the ISDA Bilateral Amendment.

As explained in Section III of this QFC User's Guide, the IECA Bilateral Amendment includes provisions that mitigate and manage the risks of violating such representations.

However, as a precaution, prior to adhering to the ISDA® Protocol or executing an ISDA Bilateral Amendment, a Counterparty should first take an inventory of its QFCs with any and all of its GSIB trading partners and then perform a due diligence review of its Direct QFCs (such as ISDA Master Agreements, NAESB Base Contracts, EEI Master Agreements, and other types of QFCs), as well as a due diligence review of all credit support arrangements and any credit, loan,

security or indenture agreements related to its Direct QFCs, which could be adversely affected by any amendments made to its Direct QFCs.

This review will allow the Counterparty to ascertain whether amending any of its Direct QFCs will require the consent of any lender, guarantor, credit support provider or other third party and will inform the Counterparty whether any such amendment could adversely affect its other contractual and financial obligations. Note too that if a Counterparty is required by one or more related agreements to obtain a third-party's consent prior to agreeing to any amendment to a Direct QFC, the Counterparty will need to address issues related to any such consent prior to addressing its QFC Stay Rule compliance obligations.

Depending on the size of its portfolio of Direct QFCs and related financial arrangements, that due diligence review may take a significant amount of time. If the applicable compliance date of January 1, 2020, is approaching and a Counterparty needs to amend its Direct QFCs with at least one or more GSIBs in order to enter into new trades on and after 1/1/2020, then such Counterparty may choose to amend its Direct QFCs on a bilateral basis with just one or two of its GSIB trading partners by entering into an ISDA Bilateral Amendment or an IECA Bilateral Amendment with that one or two GSIBs.

Then, subsequently, after the Counterparty has completed its due diligence review of its QFCs and all related credit support arrangements, the Counterparty could subsequently and knowingly (i.e., aware of its consequences) adhere to the ISDA® Protocol if such Counterparty desires to adhere to the ISDA® Protocol.

Enhanced Creditor Protections. Generally, the Creditor Protection Provisions contained in the U.S. Bank Regulators' QFC Stay Rules are applicable to the ISDA Bilateral Amendment and the IECA Bilateral Amendment and such provisions also apply to the ISDA® Protocol. In addition to such "general" Creditor Protection Provisions, the ISDA® Protocol also provides for certain "enhanced" creditor protection provisions, which the U.S. Bank Regulators will only allow a party to obtain by adhering to the ISDA® Protocol.

Under the terms of the QFC Stay Rules, during the up to 48 hour QFC Stay Period which begins when any BHCA Affiliate[4] of a GSIB becomes subject to an Insolvency Proceeding, a Counterparty's ability to exercise Default Rights based on that BHCA Affiliate becoming subject to an Insolvency Proceeding may not be exercised until the end of that QFC Stay Period. If during that QFC Stay Period the GSIB has managed to transfer its obligations to a financially-healthy bank or a Bankruptcy Bridge Company (as a Transferee), then the Counterparty will continue to be unable to exercise any Default Right, provided that the Transferee makes all payments when due.

In addition to transferring obligations under the QFC or an affiliated credit support arrangement to the Transferee, a GSIB under an ISDA® Protocol has an additional tool available to it that will also cause the Counterparty to continue to be unable to exercise any Default Rights. The GSIB may file a DIP Motion[5] with the Bankruptcy Court and, if the court agrees to elevate the

[4] "**BHCA Affiliate**" has the same meaning as the term "affiliate" as defined in, and shall be interpreted in accordance with, 12 U.S.C. 1841(k) (i.e., the Bank Holding Company Act).
[5] "**DIP Motion**" is defined in Section 6, Definitions, of the Attachment to the ISDA® Protocol.

Counterparty's claims for amounts owed to it under the QFC or affiliated credit support by awarding an "administrative preference" to the amounts owed to the Counterparty, then the Counterparty will continue to be unable to exercise its Default Rights.

This process of elevating amounts owed to a Counterparty to an "administrative preference" in the Insolvency Proceeding, which will depend entirely on the Bankruptcy Court granting the GSIB's DIP Motion, is referred to by ISDA and the U.S. Bank Regulators as the "enhanced" creditor protection, which is available only to Counterparties that adhere to the ISDA® Protocol.

If a Counterparty determines that the likelihood of such "enhanced" creditor protection being awarded by a Bankruptcy Court is good, then a Counterparty may wish to adhere to the ISDA® Protocol in order to be in the queue for this "enhanced" creditor protection.

Subsequent Adherence to the ISDA® Protocol. As previously noted, the ISDA Bilateral Amendment and each of the IECA's QFC Stay Rule Compliance Documents specify that if the Counterparty subsequently adheres to the ISDA® Protocol, then the QFC Stay Rule compliance provisions of the ISDA® Protocol shall supersede and replace the QFC Stay Rule compliance provisions of the, as applicable, ISDA Bilateral Amendment, the IECA Bilateral Amendment, the IECA's form of Part [8] to an ISDA Schedule, and the IECA's form of Section 15.[13] to a NASEB Base Contract.

Significantly, please note that the IECA Bilateral Amendment, the IECA form of Part [8] to an ISDA Schedule, and the IECA form of Section 15.[13] to a NAESB Base Contract also stipulate that the provisions addressing "Creditor Protection Provisions" Events of Default (referred to therein and herein as "**CPP Events of Default**"), which are included in each such document, are not replaced or superseded by the provisions of the ISDA® Protocol and, instead, such CPP Events of Default provisions remain in effect after any such subsequent adherence to the ISDA® Protocol.

As explained more fully in Section II of this QFC User's Guide, the continued effectiveness of these provisions regarding CPP Events of Default could be critically important to ensuring that a Counterparty has been contractually given (i.e., contractually permitted) the right to exercise Default Rights upon the occurrence of certain of the CPP Events of Default enumerated in the "general" and "additional" Creditor Protection Provisions of the QFC Stay Rules.

E. High-Level Discussion of the QFC Stay Rules The Dodd Frank Wall Street Reform and Consumer Protection Act ("**Dodd Frank Act**") was enacted on July 21, 2010 (Pub. L. 111–203). According to its preamble, the Dodd-Frank Act is intended "[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail', [and] to protect the American taxpayer by ending bailouts." (Emphasis added.)

In order to facilitate the orderly resolution of a failed GSIB under Title II, the Orderly Liquidation Authority ("**OLA**"), of the Dodd-Frank Act and the Federal Deposit Insurance Act

("**FDIA**," referred to collectively with OLA as the two "**U.S. Special Resolution Regimes**"), the U.S. Bank Regulators[6] issued the QFC Stay Rules.[7]

Subject to limited exceptions, the QFC Stay Rules require QFCs to expressly recognize (i) the stay-and-transfer powers of the FDIC under FDIA and OLA, and (ii) the override of: (a) default rights directly or indirectly related to a GSIB or its BHCA Affiliate entering into a receivership, insolvency, liquidation, resolution or similar proceeding ("**Insolvency Proceeding**"), and (b) restrictions on the transfer of a Covered Direct QFC or any Covered Affiliate Credit Enhancements to a Transferee.

As background, the QFC Stay Rules were implemented by the U.S. Bank Regulators as a further step in their implementation of the Dodd Frank Act. These QFC Stay Rules are intended to protect the U.S. economy from severe destabilization if a GSIB becomes significantly distressed or insolvent – i.e., if a GSIB "fails." The QFC Stay Rules seek to facilitate the orderly resolution of a failed GSIB by (i) limiting the ability of the non-GSIB counterparties to QFCs with a GSIB to terminate such QFCs immediately upon entry of the GSIB or one of its BHCA Affiliates into an Insolvency Proceeding, and (ii) limiting the ability of the non-GSIB counterparties to QFCs with a GSIB to prohibit the transfer to a third party of a QFC or a credit support enhancement of a QFC provided by a GSIB's affiliate.

Essentially, the QFC Stay Rules provide the following:

> "First, a covered entity generally is required to ensure that QFCs to which it is a party provide that any default rights and restrictions on the transfer of the QFCs are limited to the same extent as they would be under the Dodd-Frank Act and the Federal Deposit Insurance Act. Second, a covered entity generally is prohibited from being party to QFCs that would allow a QFC counterparty to exercise default rights against the covered entity, directly or indirectly, based on the entry into a resolution proceeding under the Dodd-Frank Act or Federal Deposit Insurance Act, or any other resolution proceeding, of an affiliate of the covered entity."[8]

The Regulators explained that "[g]iven the large volume of QFCs to which covered entities are a party, the exercise of default rights en masse as a result of the failure or significant distress of a covered entity could lead to failure and a disorderly resolution if the failed [GSIB] were forced to

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[6] Collectively, the U.S. Bank Regulators are the Federal Reserve Board ("**FRB**"), the Federal Deposit Insurance Corporation ("**FDIC**"), and the Office of the Comptroller of the Currency ("**OCC**").

[7] "**QFC Stay Rules**" means the regulations codified at 12 C.F.R. 252.2, 252.81–8 (FRB Rules), 12 C.F.R. 382.1-7 (FDIC Rules) and 12 C.F.R. 47.1-8 (OCC Rules). Collectively, the QFC Stay Rules issued by the U.S. Bank Regulators comprise: (i) with respect to a Covered Entity described in 12 C.F.R. 252.82(b) (i.e., a Covered Entity that is subject to regulation by the FRB), the regulations that are codified at 12 C.F.R. 252.2, 252.81 – 252.88 (the "**FRB Rules**"); (ii) with respect to a Covered Entity described in 12 C.F.R. 382.2(b) (i.e., a Covered Entity that is subject to regulation by the FDIC), the regulations that are codified at 12 C.F.R. 382.1 - 382.7 (the "**FDIC Rules**"); and (iii) with respect to a Covered Entity described in 12 C.F.R 47.3(b) (i.e., a Covered Entity that is subject to regulation by the OCC), the regulations that are codified at 12 C.F.R. 47.1 - 47.8 (the "**OCC Rules**").

[8] *See, e.g., "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,"* Final Rule of the Board of Governors of the Federal Reserve System ("**FRB QFC Order**"), 82 Fed. Reg. 42,882 at 42,882 (Sept. 12, 2017).

sell off assets, which could spread contagion by increasing volatility and lowering the value of similar assets held by other firms, or to withdraw liquidity that it had provided to other firms."[9]

Under the U.S. Special Resolution Regimes and the QFC Stay Rules, the U.S. Bank Regulators have been given a brief period of time ("**QFC Stay Period**") to transfer a financially-troubled GSIB's assets to a financially-healthy entity or to a bridge-financed entity created and financed by the U.S. Bank Regulators (each a "**Transferee**"), which Transferee will continue to meet the transferred obligations of the failed GSIB.

This QFC Stay Period begins on the commencement of the Insolvency Proceeding affecting a GSIB or any of its affiliates and ends at the later of 5:00 p.m. (Eastern Time) on the first day on which commercial banks in the jurisdiction of the Insolvency Proceeding are open for general business (including dealings in foreign exchange and foreign currency deposits) following the date of the commencement of such proceeding and 48 hours after the commencement of such Insolvency Proceeding.

Under the U.S. Special Resolution Regimes, each GSIB is required to submit a so-called "living will" to the applicable banking regulatory authorities for their review. This "living will" is intended to provide a procedure under which such GSIB's assets and operations can be successfully transferred to a Transferee during this QFC Stay Period, so that the GSIB's various operating subsidiaries can continue meeting all their obligations without creating a major disruption to the overall U.S. economy.

Providing for such an "orderly" resolution of a financially-troubled GSIB, without taxpayer bailouts, is the primary objective of the U.S. Special Resolution Regimes. We note too, as expressed in its Report to the Congress on Secured Creditor Haircuts, dated July 18, 2011, in response to the requirements of Section 215 of Title II, OLA, of the Dodd-Frank Act, the Financial Stability Oversight Council ("Council") said:

> "While section 215 contemplates evaluating secured creditor haircuts in the utilization of the orderly liquidation authority ("Orderly Liquidation Authority" or "OLA") authorized by Title II of the Dodd-Frank Act, OLA provides no authority to impose secured creditor haircuts."

Thus, while the OLA provisions of the Dodd-Frank Act list protecting taxpayers from the obligation to bail-out a failing GSIB, the Council has concluded that the provisions of the OLA "provide no authority to impose secured creditor haircuts."

See Section VII of this User's Guide for a more-detailed analysis and discussion of the QFC Stay Rules and the applicable provisions of the Dodd-Frank Act, including Title II-OLA, and FDIA.

F. Creditor Protection Provisions of the QFC Stay Rules and the "Clear and Convincing Evidence" Burden of Proof to be Provided by Counterparties Seeking to Exercise Default Rights after a GSIB Affiliate Becomes Subject to an Insolvency

[9] *See, e.g., FRB QFC Order* at 42,883.

Proceeding. The QFC Stay Rules set forth a general prohibition on the rights of a Counterparty to an "in-scope" QFC to exercise Default Rights upon the occurrence of certain events that might otherwise be events of default by the GSIB under that QFC, including, for example, a BHCA Affiliate of such GSIB becoming subject to an Insolvency Proceeding. However, the QFC Stay Rules also include, among other things, certain specific exceptions to the otherwise applicable general prohibition on the rights of a Counterparty to a QFC to exercise Default Rights, which exceptions are set forth as a list of enumerated events in certain provisions of the QFC Stay Rules, which we are calling the "**Creditor Protection Provisions**" of the QFC Stay Rules.[10]

These Creditor Protection Provisions are found in Sections 252.84(d), (f) and (h) of the FRB Rules, Sections 382.4(d), (f), and (h) of the FDIC Rules, and Sections 47.5(d), (f), and (h) of the OCC Rules. An excerpt from the FRB Rules containing a complete copy of the Creditor Protection Provisions from the FRB's version of the QFC Stay Rules is included in Section VII.E of this QFC User's Guide.

CPP Events of Default. As discussed more fully in Section II of this QFC User's Guide, the U.S. Bank Regulators have included certain exceptions to the general prohibition in the QFC Stay Rules that otherwise override a Counterparty's contractual rights to exercise Default Rights under a QFC with a Covered Entity. These exceptions consist of a list of certain enumerated events set forth in the Creditor Protection Provisions of the QFC Stay Rules, which we are calling the "**Creditor Protection Provision Events of Default**" or "**CPP Events of Default**."

Upon the occurrence of any one or more of these CPP Events of Default, a Counterparty to a QFC will be allowed to exercise certain "**Default Rights**"[11] under that QFC, but, importantly, a Counterparty will only be able to exercise these Default Rights under a QFC if, and to the extent that, either (i) applicable law grants such Default Rights to the Counterparty, or (ii) the parties to that QFC have contractually agreed explicitly in the QFC to permit (i.e., grant or authorize) the Counterparty to exercise such Default Rights upon the occurrence of the factual circumstances underlying the applicable CPP Event of Default.

In general, under any QFC that is an ISDA Master Agreement, a NAESB Base Contract, or an EEI Master Agreement, a Counterparty to such a QFC may only exercise Default Rights upon the occurrence of an event that is defined in that QFC as an "Event of Default." For example, the Events of Default that "permit" a Counterparty to a QFC that is an ISDA Master Agreement to exercise Default Rights are the Events of Default described in Section 5(a) of the ISDA Master Agreement, which the GSIB and the Counterparty have specified as "applicable" in the ISDA Schedule to that ISDA Master Agreement.

Accordingly, in the absence of a statute or regulation granting a Counterparty the right to exercise Default Rights under a QFC upon the occurrence of any of the CPP Events of Default, whenever one of the CPP Events of Default enumerated in the Creditor Protection Provisions has actually occurred, for a Counterparty to be authorized to exercise Default Rights under a QFC that is an ISDA Master Agreement, that CPP Event of Default listed in the Creditor Protection Provisions must also be listed as one of the Events of Default in effect under Section 5(a) of the

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[10]

[11] *See* Section 252.81 of the FRB Rules, Section 382.1 of the FDIC Rules, and Section 47.2 of the OCC Rules, enumerating the "**Default Rights**."

ISDA Master Agreement, the ISDA Schedule must also list that specific Event of Default as applicable, and the ISDA Schedule and any applicable Transaction Confirmation must not remove that Event of Default from the applicable provisions under the ISDA Master Agreement between the Counterparty and the GSIB.

Burden of Proof. Equally important, the same sections of the QFC Stay Rules that contain the Creditor Protection Provisions also contain provisions that impose a high burden of proof on any Counterparty seeking to exercise Default Rights under a QFC after an affiliate of the GSIB that is the Covered Entity under such QFC has become subject to an Insolvency Proceeding.

Moreover, these "burden of proof" provisions of the QFC Stay Rules explicitly state that a "covered QFC must require" such a high burden of proof to be met by a Counterparty seeking to exercise Default Rights after a BHCA Affiliate of the Covered Direct Party (i.e., a BHCA Affiliate of the GSIB that is a party to such covered QFC) has become subject to an Insolvency Proceeding. That provision of the QFC Stay Rules states:

> "A covered QFC must require, after an affiliate of the direct party [i.e., a BHCA Affiliate of the GSIB that is a party to such covered QFC] has become subject to a receivership, insolvency, liquidation, resolution or similar proceeding [i.e., an Insolvency Proceeding]: (1) The party [i.e., the non-GSIB Counterparty] seeking to exercise a [D]efault [R]ight to bear the burden of proof that the exercise is permitted under the covered QFC; and (2) Clear and convincing evidence or a similar or higher burden of proof to exercise a [D]efault [R]ight." (Emphasis and bracketed clarifications added.)[12]

Accordingly, the various documents used to amend any Covered QFC to comply with the QFC Stay Rules (i.e., the ISDA® Protocol, the ISDA Bilateral Amendment, the IECA Bilateral Amendment, and any other document purporting to comply with the QFC Stay Rules) will necessarily have to ensure that the Covered QFC includes a provision satisfying the U.S. Bank Regulators' requirement that each Covered QFC "**must require**" that this higher burden of proof is met by any "party" seeking to exercise Default Rights after a BHCA Affiliate of a Covered Entity has become subject to an Insolvency Proceeding.

The imposition on a non-GSIB Counterparty Entity of this obligation to provide "clear and convincing evidence or a similar or higher burden of proof" ("**Clear and Convincing Evidence**") in support of its efforts to exercise Default Rights upon the occurrence of one or more of the CPP Events of Default enumerated in the Creditor Protection Provisions, which attempted exercise of Default Rights has occurred after a BHCA Affiliate of the Covered Entity has become subject to an Insolvency Proceeding, imposes a high evidentiary standard on the non-GSIB Counterparty Entity.

Based upon our review of the factual circumstances underlying each CPP Event of Default, it seems highly likely that most instances in which a Counterparty Entity would seek to exercise Default Rights arising due to a CPP Event of Default will occur after a BHCA Affiliate of the Covered Entity has become subject to an Insolvency Proceeding.

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[12] *See* Sections 252.84(i) of the FRB Rules, Section 382.4(i) of the FDIC Rules, and Section 47.5(i) of the OCC Rules.

As a result, this higher burden of proof is likely to be applicable to most efforts by a Counterparty Entity to exercise Default Rights arising due to a CPP Event of Default. Therefore, any failure of a Counterparty to satisfy that high evidentiary standard of Clear and Convincing Evidence could adversely affect a Counterparty's ability to exercise Default Rights arising upon the occurrence of any of the CPP Events of Default.

In their orders issuing the QFC Stay Rules, the U.S. Bank Regulators explained that the Creditor Protection Provisions were included in the QFC Stay Rules to "permit a covered entity's QFC counterparty to protect themselves [sic] from imminent financial loss"[13] upon the actual occurrence of any of the CPP Events of Default enumerated in the Creditor Protection Provisions.

However, there are differences between (i) the words used to define "Events of Default" in Section 5(a) of the ISDA Master Agreement (or the words used to define "events of default" or other comparable term as used in any QFC that is not an ISDA Master Agreement) which give rise to a non-GSIB Counterparty's rights under a QFC to exercise Default Rights, and (ii) the words used in the Creditor Protection Provisions of the QFC Stay Rules to define/describe the various CPP Events of Default enumerated in those Creditor Protection Provisions that will allow a non-GSIB Counterparty to exercise Default Rights.

Under Creditor Protection Provisions of the QFC Stay Rules, Section 2 of the ISDA Bilateral Amendment, Section 2 of the IECA Bilateral Amendment, and Section 2 of the Attachment to the ISDA® Protocol (based upon the definition of "Default Right" and the language of Section 2 of the Attachment to the ISDA® Protocol), a Counterparty is only authorized under all of the foregoing to exercise Default Rights in response to the occurrence of any of the CPP Events of Default enumerated in the Creditor Protection Provisions, if the underlying QFC, or a statute or regulation, "permits" the exercise of Default Rights upon the occurrence of the factual circumstances enumerated in each such CPP Event of Default.

We are unaware of any statute or regulation granting authorization to a Counterparty Entity to exercise Default Rights under a Covered QFC upon the occurrence of any particular CPP Event of Default. We also recognize that the words of the Creditor Protection Provisions of the QFC Stay Rules do not explicitly validate a Counterparty claim of Default Rights comparable to but not literally duplicating the corresponding CPP Events of Default. Accordingly, we are concerned that the Creditor Protection Provisions of the QFC Stay Rules appear to only allow the exercise of Default Rights arising upon the occurrence of the CPP Events of Default, if such Default Rights otherwise exist.

Moreover, those same Creditor Protection Provisions of the QFC Stay Rules require each Covered QFC to be amended to "require" a Counterparty Entity to provide Clear and Convincing Evidence demonstrating that it has been granted Default Rights arising upon the occurrence of the events underlying any of the CPP Events of Default, in order for such a Counterparty Entity to be able to exercise such Default Rights upon the occurrence of such CPP Event of Default.

II. EXPLANATION FOR ADDING "CREDITOR PROTECTION PROVISIONS" EVENTS OF DEFAULT TO THE FOLLOWING FORMS: IECA BILATERAL AMENDMENT (EXHIBIT B), PART

[13] "As explained in the proposal, the exceptions in the final rule for the creditor protections described above are intended to help ensure that the final rule permits a covered entity's QFC counterparty to protect themselves from imminent financial loss…" *See, e.g., FRB QFC Order*, 82 Fed. Reg. 42882, at 42904-42905.

[8](4) TO ISDA SCHEDULE, AND SECTION 15.[13].4 TO NAESB BASE CONTRACT

The foregoing discussion of the CPP Events of Default and the applicable Burden of Proof in Section I.F. of this QFC User's Guide shows that a Counterparty will be required to present Clear and Convincing Evidence that its Covered Direct QFC grants the Counterparty the right to exercise Default Rights upon the occurrence of any particular CPP Event of Default, if the Counterparty seeks to exercise Default Rights based on that CPP Event of Default at any time after a BHCA Affiliate of the Covered Entity that is the Covered Direct Party to the Covered Direct QFC with such Counterparty has become subject to an Insolvency Proceeding.

However, as shown in the preceding Section of this QFC User's Guide, the differences between the words used to describe the Events of Default, in effect under the provisions of any Covered Direct QFC to be modified by the IECA's QFC Stay Rule Compliance Documents, and the words used to describe the factual circumstances underlying each of the CPP Events of Default, as set forth in the Creditor Protection Provisions of the QFC Stay Rules, could make it difficult for a Counterparty to provide Clear and Convincing Evidence proving that its Covered Direct QFC permits it to exercise Default Rights upon the occurrence of any of the CPP Events of Default enumerated in the Creditor Protection Provisions of the QFC Stay Rules.

To address the risk presented by this difference in the words used to define Events of Default under the Covered Direct QFC and the words used to define the CPP Events of Default enumerated in the Creditor Protection Provisions, we have added CPP Events of Default provisions into each of the IECA's QFC Stay Rule Compliance Documents to clarify a Counterparty Entity's right to exercise Default Rights when the Covered Entity and the Counterparty Entity have bargained for and included in their Covered QFC various Corresponding Events of Default, and in certain instances additional Commercial Provisions, that collectively are substantially the same or similar to one or more of the CPP Events of Default.

As discussed below, we have incorporated these provisions into each of the IECA's QFC Stay Rule Compliance Documents in order to clarify, and provide certainty to, the impacts and requirements of the Burden of Proof provisions of the QFC Stay Rules as applicable to the CPP Events of Default and each of the Covered QFCs affected by these IECA QFC Stay Rule Compliance Documents.

The purpose of these provisions is providing greater certainty that a Counterparty Entity is authorized to exercise Default Rights under its Covered Direct QFCs and Covered Affiliate Credit Enhancements upon the occurrence of any CPP Events of Default that are mapped to certain Corresponding Events of Default and additional Commercial Provisions that are in effect under such Counterparty Entity's Covered Direct QFCs and/or Covered Affiliate Credit Enhancements.

A. CPP Events of Default. Each of Sections 252.84(d), (f) and (h) of the FRB Rules, Sections 382.4(d), (f), and (h) of the FDIC Rules, and Sections 47.5(d), (f), and (h) of the OCC Rules (the "**Creditor Protection Provisions**"), which are part of the QFC Stay Rules of these

U.S. Bank Regulators, explicitly state that "the [C]overed [D]irect QFC and the [C]overed [A]ffiliate [C]redit [E]nhancement may permit the exercise of a [D]efault [R]ight" upon the occurrence of certain enumerated events, which we are calling "**CPP Events of Default**." These CPP Events of Default are explicitly enumerated in Subsections (d), (f) and (h) of each of the U.S. Bank Regulators' respective versions of the Creditor Protection Provisions of the QFC Stay Rules.

Note that these Creditor Protection Provisions do not say that a Counterparty Entity, as the non-GSIB party to a Covered Agreement, may exercise a Default Right upon the occurrence of a CPP Event of Default. Instead, these Creditor Protection Provisions say that a Covered Direct QFC and the Covered Affiliate Credit Enhancement "may permit" the exercise of a Default Right upon the occurrence of certain CPP Events of Default.

As such, the Creditor Protection Provisions of the QFC Stay Rules do not authorize a Counterparty Entity to exercise a Default Right upon the occurrence of any CPP Event of Default. Instead, the Creditor Protection Provisions of the QFC Stay Rules will allow a Counterparty Entity to exercise Default Rights upon the occurrence of one or more of the CPP Events of Default, but only if and to the extent that its Covered Direct QFC or its Covered Affiliate Credit Enhancement "permits" (i.e., grants) the Counterparty Entity the legal right to exercise Default Rights upon the occurrence of any such CPP Event of Default.

Accordingly, if a Counterparty Entity can point to a provision in its Covered Direct QFC or its Covered Affiliate Credit Enhancement that authorizes it to exercise a Default Right upon the occurrence of the factual circumstances described in a particular CPP Event of Default, then the Creditor Protection Provisions of the QFC Stay Rules will allow the Counterparty Entity to exercise that Default Right.

We have not included a copy of all three versions of the QFC Stay Rules issued by the three U.S. Bank Regulators in this QFC User's Guide, but we have included a copy of the FRB Rules in Exhibit A to this QFC User's Guide. We note that the FRB's version of the QFC Stay Rules is essentially identical to the FDIC Rules and the OCC Rules, but there are some wording differences particularly with respect to the words each such regulator uses to describe the different types of banking organizations it regulates. Nevertheless, you can read the Creditor Protection Provisions of the FRB's version of the QFC Stay Rules on pages [63 - 72] of this QFC User's Guide, including the CPP Events of Default enumerated in Sections 252.84(d), (f) and (h) of the FRB Rules, which are shown on pages [68 - 69] of this QFC User's Guide.

B. Burden of Proof. As discussed in Section I.F. of this QFC User's Guide, under Section 252.84(i) of the FRB Rules, Section 382.4(i) of the FDIC Rules, and Section 47.5(i) of the OCC Rules, the QFC Stay Rules stipulate that a Covered QFC "must require" a Counterparty Entity, that seeks to exercise Default Rights under its Covered Direct QFC or its Covered Affiliate Credit Enhancement after a BHCA Affiliate of the Covered Entity has become subject to an Insolvency Proceeding, to bear the burden of providing "clear and convincing evidence or a similar or higher burden of proof" ("**Clear and Convincing Evidence**") that its Covered Direct QFC or its Covered Affiliate Credit Enhancement authorizes the Counterparty Entity to exercise Default Rights upon the occurrence of any CPP Event of Default alleged to have occurred.

Based on our reading of the various CPP Events of Default, many of the factual circumstances described in each CPP Event of Default are most likely to occur "after an affiliate of the Covered Entity has become subject to an Insolvency Proceeding." We suspect that in most (perhaps all) instances in which a Counterparty Entity may seek to exercise Default Rights arising upon the occurrence of the factual circumstances underlying one or more of the CPP Events of Default, the Counterparty Entity will have to meet this Clear and Convincing Evidence burden of proof when it attempts to demonstrate that: (i) the factual circumstances underlying a CPP Event of Default have actually occurred and (ii) its Covered Direct QFC or its Covered Affiliate Credit Enhancement permit (i.e., authorize) the Counterparty Entity to exercise Default Rights upon the occurrence of the factual circumstances underlying such CPP Event of Default.

In those circumstances, if one or more of the CPP Events of Default enumerated in the Creditor Protection Provisions of the QFC Stay Rules occurs and the Counterparty Entity seeks to exercise Default Rights under its Covered Direct QFC, then the Counterparty Entity will be required to provide Clear and Convincing Evidence that its Covered Direct QFC permits (i.e., grants or authorizes) the Counterparty Entity the right to exercise Default Rights upon the occurrence of such CPP Event of Default. We interpret this to mean that the Counterparty Entity must provide Clear and Convincing Evidence (i) that the CPP Event of Default enumerated in the Creditor Protection Provisions is an Event of Default under Section 5(a) of the ISDA Master Agreement (or the comparable definition of "event of default" or such other comparable term under any Covered Direct QFC between them that is not an ISDA Master Agreement) between the Counterparty Entity and the Covered Entity, and (ii) that the factual circumstances comprising such CPP Event of Default have actually occurred.

The IECA's drafting team is not particularly concerned by a Counterparty Entity's ability to meet the evidentiary requirements of clause (ii) in the preceding paragraph, either the alleged event has occurred or it has not.

On the other hand, the IECA's drafting team is concerned with a Counterparty Entity's ability to meet the evidentiary requirements of clause (i). As explained in the following paragraphs, a Counterparty Entity may have difficulty providing Clear and Convincing Evidence that its Covered Direct QFC permits the Counterparty Entity to exercise Default Rights upon the occurrence of several of the CPP Events of Default enumerated in the Creditor Protection Provisions of the QFC Stay Rules.

Due to the differences in the words used to describe the CPP Events of Default enumerated in the Creditor Protection Provisions and the words used to describe the Events of Default under Section 5(a) of the ISDA Master Agreement (or the comparable definition of "event of default" or such other comparable term under any Covered Direct QFC between them that is not an ISDA Master Agreement), there is a risk that a Counterparty Entity may not be able to provide Clear and Convincing Evidence that its Covered Direct QFC affords the Counterparty Entity the right to exercise Default Rights even though the Counterparty Entity may be able to provide Clear and Convincing Evidence that one or more of the CPP Events of Default enumerated in the Creditor Protection Provisions has actually occurred.

To address this risk, Exhibit B – "Creditor Protection Provisions" Events of Default – has been added to the IECA Bilateral Amendment and similar provisions have been inserted in Sub-Part [8](4) of the IECA form of Part [8] to an ISDA Schedule for a new QFC that is an ISDA Master Agreement and in Section 15.[13].4 of the NAESB Base Contract for a new QFC that is a NAESB Base Contract.

Note that adding this language in Exhibit B, in Part [8](4) and in Section 15.[13].4 is not intended to expand or increase the Default Rights that a Counterparty Entity and a Covered Entity have negotiated and bargained for under each Covered Direct QFC and each Covered Affiliate Credit Enhancement.

Instead, we have listed each of the CPP Events of Default from the QFC Stay Rules separately in each of the IECA's QFC Stay Rule Compliance Documents. For each CPP Event of Default, we have then designated a Corresponding Event of Default, and in certain instances additional Commercial Provisions, that collectively are comparable to each of such CPP Events of Default.

Our objective in doing so is to reinforce and bring certainty to a Counterparty Entity's right to exercise Default Rights when the Covered Entity and the Counterparty Entity have bargained for and included in their Covered QFC various Corresponding Events of Default, and in certain instances additional Commercial Provisions, that collectively are comparable to one or more of the CPP Events of Default.

As discussed below, we have incorporated these provisions into each of the IECA's QFC Stay Rule Compliance Documents in order to clarify the impacts and requirements of the Burden of Proof provisions of the QFC Stay Rules as applicable to the CPP Events of Default and each of the Covered QFCs affected by these IECA QFC Stay Rule Compliance Documents. These provisions are intended to ensure that a Counterparty Entity is authorized to exercise Default Rights under its Covered Direct QFCs and Covered Affiliate Credit Enhancements upon the occurrence of any CPP Events of Default that are mapped to certain Corresponding Events of Default and additional Commercial Provisions that are in effect under such Counterparty Entity's Covered Direct QFCs and/or Covered Affiliate Credit Enhancements.

C. Corresponding Events of Default and Commercial Provisions. Each of the CPP Events of Default enumerated in the Creditor Protection Provisions of the QFC Stay Rules is listed in Paragraphs (A)(1), (2), (3) and (4), (B)(1), (2), (3), (4), (5) and (6), and (C)(1) and (2) of Exhibit B to each IECA Bilateral Amendment, subpart [8](4) to each Part [8] of a new ISDA Schedule, and subsection 15.[13].4 to each Section 15.[13] of a new NAESB Base Contract.

Designated for each such CPP Event of Default is an "event of default" that is potentially in effect under (a) each of the Covered Direct QFCs amended by such IECA Bilateral Amendment, (b) the new ISDA Master Agreement into which Part [8] is included in the applicable new ISDA Schedule, or (c) the new NAESB Base Contract into which Section 15.[13] is included in the applicable new NAESB GTCs[14] (i.e., an Event of Default under Section 5(a) of the ISDA Master Agreement for each Covered Direct QFC that is an ISDA Master Agreement, or an "Event of Default" as the term "Event of Default" or such comparable term is used and defined in each

[14] The term "NAESB GTCs" is defined in Section V of this QFC User's Guide.

such Covered Direct QFC that is not an ISDA Master Agreement, such as Section 10.2 of the NAESB GTCs of a NAESB Base Contract), which corresponds to such CPP Event of Default (each a "**Corresponding Event of Default**").

In addition to designating a specific Event of Default that is required to be in effect under a Covered Direct QFC, each Corresponding Event of Default also lists additional commercial provisions ("**Commercial Provisions**") that will be required to be in effect under a Covered Direct QFC for some, but not all, of the CPP Events of Default to which each Corresponding Event of Default applies.

Accordingly, each Corresponding Event of Default comprises (i) a specified Event of Default potentially in effect under a Covered Direct QFC and (ii) with respect to some but not all of such Corresponding Events of Default, certain additional Commercial Provisions that are required to be in effect under such Covered Direct QFC.

<u>If the specified Event of Default is in effect under the Covered Direct QFC or the Covered Affiliate Credit Enhancement, together with the additional Commercial Provisions specified for a Corresponding Event of Default, then this fact demonstrates that the parties had bargained for the Counterparty Entity to have the right under such Covered Direct QFC or Covered Affiliate Credit Enhancement to exercise Default Rights upon the occurrence of the CPP Event of Default for which such Corresponding Event of Default, including these Commercial Provisions, has been designated in each of these IECA QFC Stay Rule Compliance Documents</u>.

To effectuate the foregoing intent, each IECA QFC Stay Rule Compliance Document then includes a provision that says:

> "Each Covered Entity and the Counterparty Entity acknowledge and agree that with respect to each Covered Agreement that is a Covered Direct QFC, with respect to any Covered Affiliate Credit Enhancement and any Covered Affiliate Support Provider that supports a Covered Direct QFC, and with respect to any Transferee:
>
> (i) if a CPP Event of Default occurs with respect to a Covered Entity, as the Direct Party under a Covered Direct QFC, or the applicable Covered Affiliate Support Provider or Transferee, as applicable under such CPP Event of Default; and
>
> (ii) if the Corresponding Event of Default designated herein with respect to such CPP Event of Default is in effect under such Covered Direct QFC, and has not been otherwise contractually removed by a written agreement of the parties to such Covered Direct QFC; then
>
> (iii) such CPP Event of Default will be an event of default under such Covered Direct QFC with respect to the Covered Entity, as the Direct Party under such Covered Direct QFC, and the Counterparty Entity may exercise Default Rights in accordance with applicable law and in accordance with the notice and grace periods, if any, specified in the applicable Corresponding Event of Default provisions of the applicable Covered Direct QFC."

Each of the IECA QFC Stay Rule Compliance Documents clarifies that any requisite notice or grace period applicable to an exercise of Default Rights arising upon the occurrence of a Corresponding Event of Default, as provided in the provisions of the Covered Direct QFC or Covered Affiliate Credit Enhancement applicable to such Corresponding Event of Default, shall also be applicable to any exercise of Default Rights arising upon the occurrence of the CPP Event of Default to which such Corresponding Event of Default is designated.

Each of the IECA QFC Stay Rule Compliance Documents includes a provision comparable to the following, which is excerpted from the IECA Bilateral Amendment, which says:

> After a BHCA Affiliate of a Covered Entity, that is a party to a Covered Direct QFC with the Counterparty Entity, has become subject to an Insolvency Proceeding, if the Counterparty Entity then seeks to exercise any Default Right with respect to such Covered Direct QFC or any Covered Affiliate Credit Enhancement supporting such Covered Direct QFC, arising upon the occurrence of a CPP Event of Default, then the Counterparty Entity will be obligated to satisfy the "Burden of Proof" requirements of Section 2.6 of this Bilateral Amendment, which the parties agree will require the Counterparty to provide "clear and convincing evidence or a similar or higher burden of proof" demonstrating that:
>
> > (i) the factual circumstances comprising the applicable CPP Event of Default have occurred; and
> >
> > (ii) the Event of Default and any required Commercial Provisions comprising the Corresponding Event of Default designated for such CPP Event of Default are in effect under such Covered Direct QFC and have not been otherwise contractually removed by written agreement of the parties to such Covered Direct QFC.

If one of the applicable Corresponding Events of Default is in effect under a Covered Direct QFC and is not otherwise contractually removed by the parties to such Covered Direct QFC, then the CPP Event(s) of Default, to which such Corresponding Event of Default is designated in the applicable Exhibit B, subpart [8](4) or subsection 15.[13].4, shall be an event of default under such Covered Direct QFC.

By designating such CPP Event(s) of Default as an event of default under such Covered Direct QFC, the parties to such Covered Direct QFC will have acknowledged and agreed that such Covered Direct QFC permits the Counterparty Entity the right to exercise Default Rights under such Covered Direct QFC, pursuant to the terms of the Corresponding Event of Default, upon the occurrence of such CPP Event of Default.

Note that not all of the CPP Events of Default enumerated in the Creditor Protection Provisions of the QFC Stay Rules will be incorporated into every Covered Direct QFC. Only those CPP Events of Default for which the applicable Corresponding Events of Default, including any

specified additional Commercial Provisions, have been negotiated and agreed to by the parties in a Covered Direct QFC will be events of default under such Covered Direct QFC.

Accordingly, by incorporating, as applicable, Exhibit B, subpart [8](4), or subsection 15.[13].4 into each Covered Direct QFC, the Covered Entity and the Counterparty Entity to each such Covered Direct QFC thereby acknowledge and agree that the definition of "Events of Default" under Section 5(a) of the ISDA Master Agreement (or the comparable definition of "event of default" or such other comparable term under any Covered Direct QFC between them that is not an ISDA Master Agreement) authorizes the exercise of Default Rights upon the Counterparty Entity's provision of "clear and convincing evidence or a similar or higher burden of proof" that any of the CPP Events of Default enumerated in the Creditor Protection Provisions, for which the Corresponding Event of Default is in effect under the Covered Direct QFC, has actually occurred.

D. Why This Matters. Some market participants have suggested addressing the foregoing concerns by merely adding a brief paragraph to the existing provisions of the ISDA Protocol, the ISDA Bilateral Amendment, or the IECA Bilateral Amendment. The IECA Drafting Team is concerned that such paragraphs, which generally continue to rely on statements like: "to the extent provided for under the Covered Direct QFC or Covered Affiliate Credit Enhancement," will still require the Counterparty Entity to provide Clear and Convincing Evidence to prove to a judge that "the exercise of Default Rights arising upon the occurrence of any of the events enumerated in the Creditor Protection Provisions is **provided for under the Covered Direct QFC or Covered Affiliate Credit Enhancement**."

As a result, use of such text continues to leave the Counterparty Entity at risk of not being able to meet the requisite burden of proof and, therefore, unable to exercise Default Rights under its Covered Direct QFC or Covered Affiliate Credit Enhancement when, in fact, one of the CPP Events of Default enumerated in the Creditor Protection Provisions has actually occurred and which is comparable to one of the Events of Default, plus applicable Commercial Provisions, that the Covered Entity and the Counterparty Entity had negotiated and agreed would be part of the bargain between them and in effect under their Covered Direct QFC or Covered Affiliate Credit Enhancement.

Requiring a Counterparty Entity to meet the Clear and Convincing Evidence burden of proof requirement, without including the provisions of Exhibit B, Part [8](4) and Section 15.[13].4 presents an increased risk to a Counterparty Entity that it may be denied the right to exercise the Default Rights expressly allowed by the U.S. Bank Regulators in the Creditor Protection Provisions of the QFC Stay Rules when, in fact, both the Covered Entity and the Counterparty Entity had bargained for rights in their Covered Direct QFCs and Covered Affiliate Credit Enhancements that were intended to give the Counterparty Entity the right to exercise Default Rights in situations comparable to the circumstances underlying one or more of the CPP Events of Default.

E. Application to ISDA® Protocol and Drafting of QFC Post-Protocol Bilateral Amendment. We believe the last paragraph of Section II.D of this QFC User's Guide is also true with respect to the ISDA® Protocol:

Requiring a Counterparty Entity that has adhered to the ISDA® Protocol to meet the Clear and Convincing Evidence burden of proof requirement, without including provisions regarding the CPP Events of Default comparable to Section 2.8 and Exhibit B of the IECA Bilateral Amendment in the ISDA® Protocol, presents an increased risk to that Counterparty Entity that it may be denied the right to exercise the Default Rights expressly allowed by the U.S. Bank Regulators in the Creditor Protection Provisions of the QFC Stay Rules when, in fact, both the Covered Entity and the Counterparty Entity had bargained for rights in their Covered Direct QFCs and Covered Affiliate Credit Enhancements that were intended to give the Counterparty Entity the right to exercise Default Rights in situations comparable to the circumstances underlying one or more of the CPP Events of Default.

We have proposed two means of addressing and mitigating this risk:

(1) With respect to each Counterparty Entity that complies with the QFC Stay Rules utilizing any of the IECA QFC Stay Rule Compliance Documents, and subsequently adheres to the ISDA® Protocol, each of the IECA QFC Stay Rule Compliance Documents accommodates any such subsequent adherence to the ISDA® Protocol by allowing the ISDA® Protocol to control, with the exception that the CPP Events of Default provisions under each such IECA QFC Stay Rule Compliance Document will remain in effect, thereby ensuring that even after a Counterparty Entity has subsequently adhered to the ISDA® Protocol, its ability to exercise Default Rights upon the occurrence of one or more of the CPP Events of Default will continue to be protected and ensured with the same level of certainty provided by the CPP Events of Default provisions of the applicable IECA QFC Stay Rule Compliance Document; and

(2) With respect to each Counterparty Entity that has already modified its Covered Direct QFCs and Covered Affiliate Credit Enhancements to comply with the QFC Stay Rules by previously adhering to the ISDA® Protocol, we are developing the <u>QFC Post-Protocol Bilateral Amendment</u>, which will allow a Counterparty Entity and a Covered Entity, on a bilateral basis, to amend one or more <u>Protocol-Covered Agreements (i.e., Covered Direct QFCs and/or Covered Affiliate Credit Enhancements</u>) between the two Adherents to the ISDA Protocol, which will add CPP Events of Default provisions comparable to Section 2.8 and Exhibit B of the IECA Bilateral Amendment thereby increasing the certainty that the Counterparty Entity will be able to satisfy the Burden of Proof required to exercise Default Rights arising from the occurrence of one or more CPP Events of Default.

Please note that these CPP Events of Default provisions are intended to enhance the "creditor protection" rights of a Counterparty Entity without having any impact on the so-called "<u>enhanced</u> creditor protection" rights that the U.S. Bank Regulators allow a Counterparty Entity to receive only if it adheres to the ISDA® Protocol. However, see Section III.(C) of this QFC User's Guide for additional discussion of the "enhanced" creditor protections that are only available under the ISDA® Protocol.

The "creditor protection" rights discussed in this Section II of the QFC User's Guide address only the "general" creditor protection rights and the "additional" creditor protection rights contained in Paragraphs (d), (f), and (h)[15] of the Creditor Protection Provisions of the U.S. Bank Regulators' QFC Stay Rules.

F. Conclusion. For all of the above reasons, Exhibit B, Part [8](4) and Section 15.[13].4 have been added to, respectively, the IECA Bilateral Amendment, the form of Part [8] to an ISDA Schedule to a new ISDA Master Agreement, and the form of Section 15.[13] of a new NAESB Base Contract, in order to mitigate the risk that a Counterparty Entity will be unable to provide Clear and Convincing Evidence that its Covered Direct QFC or Covered Affiliate Credit Enhancement does permit it to exercise Default Rights upon the occurrence of one or more of the CPP Events of Default enumerated in the Creditor Protection Provisions of the QFC Stay Rules.

Similarly, we are drafting the QFC Post-Protocol Bilateral Amendment in order to allow a Counterparty Entity and a Covered Entity to bilaterally amend one or more Protocol-Covered Agreements to include CPP Events of Default comparable to Section 2.8 and Exhibit B of the IECA Bilateral Amendment after such Counterparty Entity and such Covered Entity have adhered to the ISDA® Protocol.

Providing certainty that a Counterparty Entity is permitted to exercise Default Rights under its Covered Direct QFC or Covered Affiliate Credit Enhancement upon the occurrence of one or more of the CPP Events of Default, and removing any uncertainty introduced by the Burden of Proof requirements of the QFC Stay Rules, will ensure that (i) a Counterparty Entity will be fully authorized to exercise Default Rights upon the occurrence of one or more of the CPP Events of Default and (ii) a Counterparty Entity can rely on those Default Rights as part of the creditor protections it bargained for when it negotiated and agreed to the Covered Direct QFC, any applicable Covered Affiliate Credit Enhancement, and these IECA QFC Stay Rule Compliance Documents.

III. EXPLANATION FOR OTHER CUSTOMIZED CHANGES TO THE ISDA BILATERAL AMENDMENT CONTAINED IN THE IECA'S CUSTOMIZED VERSION OF THE ISDA BILATERAL AMENDMENT

The IECA Bilateral Amendment is intended for use as a template by market participants seeking to amend, on a bilateral basis, those agreements by and between such market participants and various global systemically important banking organizations ("**GSIBs**") meeting the U.S. bank regulators' definition of Qualified Financial Contracts ("**QFCs**"). The IECA's drafting team prepared this IECA Bilateral Amendment template as a customized version of the Agreement to Amend Certain Qualified Financial Contracts, ("**ISDA® Bilateral Amendment**"), which was prepared by a group of lawyers from various GSIBs working together to draft such a template and then published by the International Swaps and Derivatives Association, Inc. ("**ISDA®**") on November 2, 2018.

[15] See Sections 252.84(d), (f) and (h) of the FRB Rules, Sections 382.4(d), (f), and (h) of the FDIC Rules, and Sections 47.5(d), (f), and (h) of the OCC Rules.

Capitalized terms used in this QFC User's Guide which are not otherwise defined in this QFC User's Guide have the meaning given to those terms in the IECA Bilateral Amendment.

A. Brief Summary of IECA's Customized Revisions to the ISDA® Bilateral Amendment as set forth in the IECA Bilateral Amendment. Section 3.1(d) of the ISDA Bilateral Amendment contains a representation by the non-GSIB party (the "**Counterparty**" or "**Counterparty Entity**") that it has obtained all consents needed to amend all of its QFCs that are amended by this ISDA Bilateral Amendment. Paragraph 2(a)(iv) of the ISDA® 2018 U.S. Resolution Stay Protocol ("**ISDA® Protocol**") contains this same representation by the Counterparty - that it has obtained all consents needed to amend all of its QFCs that are amended by the ISDA® Protocol.

Section 3.1(f) of the ISDA Bilateral Amendment contains a representation by the Counterparty that amending all of its QFCs that are amended by the ISDA Bilateral Amendment will not adversely affect any of the credit support arrangements underlying those QFCs. Paragraph 2(a)(vi) of the ISDA® Protocol contains this same representation by the Counterparty - that amending all of its QFCs that are amended by the ISDA® Protocol will not adversely affect any of the credit support arrangements underlying those QFCs.

Both the ISDA Bilateral Amendment and the ISDA® Protocol incorporate those two representations into each amended QFC that contains the right to declare a default if a representation is breached. As a result, a breach of either representation will now be a breach of the underlying amended QFCs.

For this reason, prior to signing any ISDA Bilateral Amendment, and prior to adhering to the ISDA® Protocol, every Counterparty needs to review all its QFCs (and all underlying credit support) with any GSIB that will be amended by the ISDA Bilateral Amendment or the ISDA® Protocol to determine (i) whether any consent of a third party must be obtained prior to amending each such QFC and (ii) whether amending any QFC will adversely affect the credit support securing the Counterparty's obligations thereunder to each of the GSIBs that are parties to those QFCs.

We recognize that a GSIB that is a party to any QFC with a Counterparty might never exercise its default rights under an amended QFC based on a breach of either of these two representations. A trustee in a GSIB's bankruptcy, however, may have a fiduciary obligation to exercise such default rights. Therefore, since both the ISDA Bilateral Amendment and the ISDA® Protocol are being entered into in order to address a potential insolvency of one or more GSIBs, we recommend (i) performing this due diligence review and (ii) taking steps to minimize the risk of any breach of these two representations.

To address this risk in the IECA Bilateral Amendment, the IECA's drafting team has modified Section 3.5 of the original ISDA® Bilateral Amendment in order to minimize further the risk of any breach of the two representations described above in Sections 3.1(d) and 3.1(f) with respect to an amendment of a Counterparty's existing QFCs. With this revision of Section 3.5, as more fully described below in this QFC User's Guide, the relief provided for any existing in-scope QFC sought to be amended by the IECA Bilateral Amendment will provide slightly more

complete relief than is available under the ISDA® Bilateral Amendment, and substantially more relief than is provided under the ISDA® Protocol.

As we have discovered, the ISDA® Protocol provides no protection from such a breach with respect to its amendment of any existing in-scope QFC, that is not a Credit Enhancement, if such in-scope QFC was entered into prior to the pertinent Implementation Date of the ISDA® Protocol. That finding, plus our concerns with the "Creditor Protection Provisions" Events of Default in Exhibit B to the IECA Bilateral Amendment (as is explained in the next section of this QFC User's Guide) primarily account for our recommendations in the section of this QFC User's Guide regarding "Recommended Use" of the IECA Bilateral Amendment.

B. Optional Schedule Included on which Parties May List Existing QFCs Intended to be Amended by the IECA Bilateral Amendment. One of the uncertainties the IECA's drafting team has discussed is the uncertainty of knowing which contracts between a Counterparty and a GSIB are, in fact, QFCs. In various bankruptcy proceedings over the years, parties to numerous contracts have included representations in their contracts that a party was a "forward contract merchant" or a "financial institution," or representations that a contract was or was not eligible for "safe harbor" treatment under the Bankruptcy Code, or provisions allowing netting or triangular set-off of amounts owed under a particular contract. Then, when those contracts were reviewed in an actual bankruptcy proceeding, the judge in the Bankruptcy Court ruled that the statements made by the parties were not binding on the Bankruptcy Court and the court then ruled that a contract was not what the parties to that contract had said it was.

With that as precedent, if the ISDA® Protocol or the ISDA Bilateral Amendment simply says that the parties thereto have agreed to amend "all QFCs between them," how will the parties know, with any certainty, which of their contracts have actually been amended? Will those parties have to wait until after a Bankruptcy Court has reviewed all the contracts between them and issued its determination that some of the contracts between them are QFCs and were amended, while other contracts between them are not QFCs and were not amended? And, if there are contractual and/or regulatory consequences to having amended one or more of those contracts that arise in the future, will one or both parties find themselves arguing in one or more legal proceedings that contract X between them was not a QFC and was never amended, while contract Y between them was a QFC and was amended?

To address this uncertainty, and as a convenience, the IECA Bilateral Amendment includes an optional Schedule on which the parties may list each of the specific existing in-scope QFCs that the parties are amending under their IECA Bilateral Amendment. The ISDA® Protocol and the ISDA Bilateral Amendment simply specify that all QFCs between the Counterparty Entity and one or more GSIBs (i.e., one or more Covered Entities) are amended, but neither document actually identifies any of the specific contracts actually being amended. This feature of the IECA Bilateral Amendment, all by itself, may be the deciding factor that causes some Counterparty Entities to elect to amend their existing QFCs using the IECA Bilateral Amendment.

C. Potential Uses of the IECA Bilateral Amendment. We appreciate that some Counterparties may choose to adhere to the ISDA® Protocol in order to have a chance at capturing the "enhanced" creditor protection benefits arising from an "administrative expense preference" that may be granted to a Counterparty under the ISDA® Protocol in a GSIB bankruptcy, which benefit can only be obtained by Counterparties that amend their existing QFCs by adhering to the ISDA® Protocol.

Under the ISDA® Protocol, a financially-troubled GSIB that becomes subject to an Insolvency Proceeding is committed to filing a "DIP Motion" asking that an administrative expense preference be granted with respect to all amounts owed by such GSIB under its QFCs that have been amended by the ISDA® Protocol and if that DIP Motion is granted and the Counterparties are allowed to recover amounts owed to them by the GSIB as an administrative preference, then the term of the QFC Stay Period applicable to such QFCs will be extended.

However, as analyzed and discussed in a recent article entitled "Unmasked" written by Jeremy Weinstein and published in the Futures & Derivatives Law Report (Volume 39, Issue 6, June 2019), available at this link: http://bit.ly/UnmaskedArticle ("**Unmasked**"), there is a significant risk that the "enhanced" creditor protection benefit contained in the ISDA® Protocol will prove to be an illusory "castle in the air" based on the author's review of recent Bankruptcy Court decisions, as more fully set forth in that *Unmasked* article.

Nevertheless, some Counterparties may wish to take a chance that such "enhanced" creditor protection benefits may give the Counterparty some type of preference in recovering any amounts owed by the GSIB to that Counterparty in any future Insolvency Proceeding involving that GSIB.

Other Counterparties may elect to enter into the IECA Bilateral Amendment in order to address the concerns raised by the IECA drafting team in its review of the ISDA® Protocol and the ISDA Bilateral Amendment, which concerns caused the IECA drafting team to customize the ISDA Bilateral Amendment to address those concerns and produce the IECA Bilateral Amendment.

In addition, a Counterparty may need to comply with the QFC Stay Rules by a specific date with respect to a specific G-SIB, in order to continue entering into new trades with that G-SIB on and after such date. In some instances, that Counterparty may not have time to complete the recommended due diligence review of all its QFCs and all underlying credit support arrangements in order to ascertain if there are any adverse impacts to amending those QFCs prior to that specific date.

As a result, such a Counterparty cannot make the representations set forth in the ISDA® Protocol and, therefore, rather than risk breaching its representations in the ISDA® Protocol, which representations are incorporated into the underlying QFCs, thereby causing the Counterparty to be in breach of its various QFCs, such a Counterparty should consider, first, entering into the ISDA Bilateral Amendment or the IECA Bilateral Amendment with the specific GSIB with whom the Counterparty needs to enter into new trades by the applicable specified date. Then, after executing the ISDA Bilateral Amendment or the IECA Bilateral Amendment to amend only

its QFCs with the one specific GSIB with which it needs to enter into new trades, that Counterparty could perform and complete the requisite due diligence review of its QFCs and all related credit support arrangements with all other GSIBs with whom it has QFCs in effect. Finally, after completing that due diligence review, the Counterparty could much more safely adhere to the ISDA® Protocol on an informed basis aware of the impacts of the covenants and representations in the ISDA® Protocol.

Note also that each of the ISDA Bilateral Amendment and the IECA Bilateral Amendment contain provisions that address what happens if a Counterparty adheres to the ISDA® Protocol after that Counterparty has entered into the ISDA Bilateral Amendment or the IECA Bilateral Amendment to amend its Covered QFCs with a specific GSIB.

Other Counterparties may simply prefer to comply with the U.S. Bank Regulators' QFC Stay Rules via a Bilateral Amendment on a GSIB by GSIB basis, instead of adhering to the ISDA® Protocol, which will automatically amend all of that Counterparty's QFCs with any and all GSIBs on a "universal" basis. Such Counterparties should consider entering into the IECA Bilateral Amendment with one or more specific GSIBs in lieu of using the ISDA® Bilateral Amendment, due to the benefits of the revisions to Section 3.5, the addition of the "Creditor Protection Provision" Events of Default under Exhibit B as described in this QFC User's Guide, and the other beneficial features of the IECA Bilateral Amendment as described in this QFC User's Guide.

D. Additional Arrangements may need to be negotiated between a Counterparty Entity and a Covered Entity (i.e., a GSIB) with respect to any in-scope QFCs that may be excluded from the amendments intended to be accomplished under the ISDA® Protocol, the ISDA® Bilateral Amendment, or the IECA Bilateral Amendment. For the reasons discussed in this QFC User's Guide, prior to entering into the IECA Bilateral Amendment or the ISDA® Bilateral Amendment, and prior to adhering to the ISDA® Protocol, each Counterparty Entity is urged to perform a due diligence review of any and all Covered Agreements that will be amended, and any Credit Enhancement or Third Party Credit Enhancement that supports the Counterparty Entity's obligations to the Covered Entity under such amended Covered Agreement(s).

If, as a result of such due diligence, a Counterparty Entity concludes that its amendment of any Covered Agreement may require the prior consent of a Third Party, which has not been obtained, or may otherwise adversely affect the continued effectiveness of any Credit Enhancement or Third Party Credit Enhancement, then any such existing Covered Agreement should be excluded (and therefore will not be amended), by the terms of the relief-providing text discussed above, from the amendments intended to be effected under the U.S. Bank Regulators' QFC Stay Rules.

This exclusion from any such amendments may occur pursuant to the relief-providing text of the IECA Bilateral Amendment, or, to a lesser extent, by the relief-providing text of the ISDA® Bilateral Amendment, or, to an even lesser extent, under the relief-providing text of the ISDA® Protocol. Nevertheless, such amendments are required to be addressed in some fashion in order

to allow the applicable Covered Entity (GSIB) to comply with its U.S. Bank Regulators' QFC Stay Rules.

As a result of any such exclusion, each applicable Counterparty Entity will likely be required to negotiate one or more additional accommodations with the applicable Covered Entity (or Covered Entities), which additional accommodations will ensure that: (i) all the Counterparty Entity's in-scope QFCs are amended in order to allow the applicable Covered Entity(s) to comply with the U.S. Bank Regulators' QFC Stay Rules, (ii) the Counterparty Entity obtains all consents of any Third Party(s) required to effect the amendment of all such in-scope QFCs, (iii) the enforceability, effectiveness or validity of any obligations owed under any Credit Enhancement or Third Party Credit Enhancement are not adversely affected by such amendments, and (iv) the Counterparty Entity has not breached, or the Covered Entity has waived, the representations under Sections 3.1(d) and 3.1(f) of the ISDA Bilateral Amendment and the undertaking under Section 3.5 of the ISDA Bilateral Amendment.

E. Deletion of Bracketed Sentence in Section 4.5(c) May be Desirable for Certain Counterparties. As we note in the footnote to Section 4.5(c) of the IECA Bilateral Amendment, various regulatory requirements applicable to some regulated utilities under the State or Federal regulatory compliance laws applicable to such utility, may prohibit such a utility, as a Counterparty Entity under the IECA Bilateral Amendment (or the ISDA Bilateral Amendment), from complying with the obligation imposed on such entity by Section 4.5(c) of the ISDA Bilateral Amendment. This prohibition may arise due to limitations on its interactions with its non-utility affiliates.

If so, such a Counterparty Entity may want to delete the bracketed sentence in Section 4.5(c) of the IECA Bilateral Amendment in order to reduce the risk of its failure to comply with its applicable utility regulatory requirements.

IV. EXPLANATION FOR QFC STAY RULE COMPLIANCE PROVISIONS CONTAINED IN PART [8] OF ISDA SCHEDULE FOR NEW QFC THAT IS AN ISDA MASTER AGREEMENT.

The IECA drafting team has also prepared a form of Part [8] – U.S. QFC Stay Rule Compliance Provisions for market participants to consider using to modify the ISDA Schedule to any new ISDA Master Agreement[16] with an entity that is part of a global systemically important banking organization ("**GSIB**" or "**Covered Entity**"). Use of this form of Part [8] in an ISDA Schedule is intended to allow the parties to conform a new ISDA Master Agreement with the mandatory compliance requirements for Qualified Financial Contracts ("**QFCs**") [17] under the U.S. Bank Regulators' QFC Stay Rules.[18]

[16] An ISDA Master Agreement and the Schedule thereto are published by the International Swaps and Derivatives Association, Inc. ("**ISDA**").

[17] "**Qualified Financial Contract**" or "**QFC**" has the meaning set forth in section 210(c)(8)(D) of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5390(c)(8)(D)).

[18] "**QFC Stay Rules**" means the regulations codified at 12 C.F.R. 252.2, 252.81–8, 12 C.F.R. 382.1-7 and 12 C.F.R. 47.1-8, which, subject to limited exceptions, require an express recognition of the stay-and-transfer powers of the FDIC under the Federal Deposit Insurance Act and the Orderly Liquidation Authority under Title II of the Dodd

Under the QFC Stay Rules, if a Covered Entity and a non-GSIB party ("**Counterparty Entity**") to an existing "in-scope" QFC wish to enter into any new QFC, or enter into any new transactions under an existing QFC, after one of the three compliance dates (1/1/2019, 7/1/2019 or 1/1/2020) applicable to different types of Counterparty Entities under the QFC Stay Rules, then those parties are required to amend all existing Covered Direct QFCs between them. The term "existing Covered Direct QFCs" includes existing ISDA Master Agreements, existing NAESB Base Contracts, existing EEI Master Agreements, and other existing "in-scope" QFCs between that Covered Entity, or any of its Bank Holding Company Act ("**BHCA**") affiliates,[19] and that Counterparty Entity.

A. Mandatory QFC Provisions for New QFCs. In addition to the obligation to amend existing "in-scope" QFCs, the QFC Stay Rules also obligate a Covered Entity to include certain mandatory QFC Stay Rule compliance provisions in any new QFC entered into between a Covered Entity and a Counterparty Entity after the applicable compliance date under the QFC Stay Rules, including the following (each a "**New QFC**"):

(i) any new QFC entered into by a Covered Entity and a Counterparty Entity after such parties have amended their existing "in-scope" QFCs; and

(ii) any new QFC entered into by a Covered Entity with a Counterparty Entity, with which the Covered Entity does not have any existing QFCs and, therefore ,was not subject to any amendment obligation.

This form of Part [8] U.S. QFC Stay Rule Compliance Provisions has been drafted as a hypothetical "Part [8]" of an ISDA Schedule for use in any New QFC that will be an ISDA Master Agreement between a Covered Entity and a Counterparty Entity. (If an ISDA Schedule already has Parts 1 through 8, then make this Part 9.) These provisions can also be readily adapted for use with a new NAESB Base Contract, a new EEI Master Agreement, or other new QFCs.

B. Incorporation by Reference of QFC Compliance Provisions from Document Used to Amend Existing QFCs. We note that if a Counterparty Entity and a Covered Entity are entering into a new ISDA Master Agreement after having amended one or more existing QFCs between

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Frank Wall Street Reform and Consumer Protection Act and the override of default rights related directly or indirectly to the entry of an affiliate into certain insolvency proceedings and any restrictions on the transfer of any covered affiliate credit enhancements. Collectively, the QFC Stay Rules issued by the U.S. Bank Regulators comprise: (i) with respect to a Covered Entity described in 12 C.F.R. 252.82(b) (i.e., a Covered Entity that is subject to regulation by the FRB), the regulations that are codified at 12 C.F.R. 252.2, 252.81 – 252.88 (the "**FRB Rules**"); (ii) with respect to a Covered Entity described in 12 C.F.R. 382.2(b) (i.e., a Covered Entity that is subject to regulation by the FDIC), the regulations that are codified at 12 C.F.R. 382.1 - 382.7 (the "**FDIC Rules**"); and (iii) with respect to a Covered Entity described in 12 C.F.R 47.3(b) (i.e., a Covered Entity that is subject to regulation by the OCC), the regulations that are codified at 12 C.F.R. 47.1 - 47.8 (the "**OCC Rules**"). "**U.S. Bank Regulators**" refers to the Federal Deposit Insurance Corporation ("**FDIC**"), the Office of the Comptroller of the Currency ("**OCC**"), and the Board of Governors of the Federal Reserve System ("**FRB**")

[19] The term "**affiliate**" is defined in Section 2(k) of the BHCA (12 U.S.C. 1841(k)) as: "For purposes of this chapter, the term "affiliate" means any company that controls, is controlled by, or is under common control with another company."

them using any of the three methods shown below, then such a Counterparty Entity and such Covered Entity may include the mandatory QFC Stay Rule compliance provisions in their new QFCs by either (a) using the provisions discussed above in Section IV(A) of this QFC User's Guide or (b) incorporating by reference into any new ISDA Master Agreement between them the QFC compliance provisions set forth in their chosen means of amending their existing QFCs.

In order to comply with the QFC Stay Rules requirement for amendments of existing QFCs between a Covered Entity and a Counterparty Entity, such QFC amendments may be accomplished by any of the following three methods:

(i) universal adherence to the ISDA 2018 U.S. Resolution Stay Protocol, published by ISDA on July 31, 2018 ("**ISDA® Protocol**"), which automatically amends all existing QFCs between a Counterparty Entity and all GSIBs with whom that Counterparty Entity has entered into any existing QFC(s);

(ii) bilateral execution by a Covered Entity and its BHCA affiliates ("**Covered Entity Group**") and a Counterparty Entity and its affiliates ("**Counterparty Group**") of the ISDA Bilateral Amendment published by ISDA on November 2, 2018 ("**ISDA Bilateral Amendment**"), thereby amending all QFCs entered into by and between the various members of the two groups; or

(iii) bilateral execution by (A) a Covered Entity or a Covered Entity Group and (B) a Counterparty Entity or a Counterparty Group of the IECA's Customized Version of the ISDA Bilateral Amendment ("**IECA Bilateral Amendment**"), thereby <u>amending only those QFCs designated therein as being amended</u> by such IECA Bilateral Amendment.

Accordingly, in any new QFC between parties that have already amended their existing QFCs, those parties may conform that new QFC with the U.S. QFC Stay Rule by incorporating by reference: (i) the QFC compliance terms of the ISDA® Protocol, (ii) the QFC compliance terms of the ISDA Bilateral Amendment, or (iii) the QFC compliance terms of the IECA Bilateral Amendment.

Keep in mind that the QFC Stay Rules prohibit a Covered Entity and a Counterparty Entity from incorporating the provisions of the ISDA® Protocol by reference into any QFC if the parties have not already adhered to the ISDA® Protocol to amend their existing QFCs.

Keep in mind also that a company may amend its existing QFCs using the ISDA Bilateral Amendment or the IECA Bilateral Amendment and then subsequently elect to adhere to the ISDA® Protocol. For that reason, the ISDA Bilateral Amendment, the IECA Bilateral Amendment, and the IECA's form of Part [8] U.S. QFC Stay Rule Compliance Provisions include provisions substituting the QFC Stay Rule compliance provisions of the ISDA® Protocol for the QFC Stay Rule compliance provisions of the ISDA Bilateral Amendment, the IECA Bilateral Amendment, or this Part [8].

<u>It is also important to note, as explained further below and in Section II of this QFC User's Guide, that under the IECA Bilateral Amendment and Part [8], some, but not all, of the</u>

provisions of the IECA Bilateral Amendment and Part [8] are replaced with the QFC Stay Rule compliance provisions of the ISDA® Protocol. Under the IECA Bilateral Amendment and Part [8], the explicit provisions identifying and addressing CPP Events of Default continue in effect if and when the Counterparty Entity adheres to the ISDA® Protocol after entering into the IECA Bilateral Amendment or Part [8].[20]

We note further that if a Counterparty Entity and a Covered Entity elect to incorporate the QFC compliance provisions from their ISDA® Protocol or their ISDA Bilateral Amendment by reference into a Part [8] of the ISDA Schedule to their new ISDA Master Agreement, those referenced QFC provisions should take the place of Part [8](1), Part [8](2) and, at least for QFC terms incorporated by reference to an ISDA® Protocol, Part [8](3) of the IECA form of Part [8] U.S. QFC Stay Rule Compliance Provisions.

As explained in the next section, while parties may replace the compliance provisions of Parts [8](1), (2) and (3) by incorporating those provisions by reference from the document used to amend their existing QFCs, such parties should nevertheless insert into Part [8] of the ISDA Schedule of their new ISDA Master Agreement the "Creditor Protection Provisions" Events of Default from Part [8](4) discussed immediately below.

C. Inclusion of Part [8](4) – "Creditor Protection Provisions" Events of Default. We have included "creditor protection provisions" events of default in Part [8](4) of the QFC Stay Rule compliance provisions for a new ISDA Master Agreement that are essentially the same as the "creditor protection provisions" that we included in Section 2.8 and Exhibit B to the IECA Bilateral Amendment and in the IECA's form of a Section 15.[13].4 of a new NAESB Base Contract. These provisions are intended to address the various CPP Events of Default that the U.S. Bank Regulators explicitly included in the "Creditor Protection Provisions" of the QFC Stay Rules. See Section II of this QFC User's Guide for a more detailed discussion of these issues.

V. EXPLANATION FOR QFC STAY RULE COMPLIANCE PROVISIONS CONTAINED IN SECTION 15.[13] OF NEW QFC THAT IS A NAESB BASE CONTRACT.

The IECA's drafting team has prepared a form of QFC Stay Rule compliance provisions for a Counterparty to consider using to modify a new QFC that is a Base Contract for Sale and Purchase of Natural Gas ("**NAESB Base Contract**"), published by the North American Energy Standards Board ("**NAESB**"). These model provisions are drafted as a hypothetical form of "Section 15.[13]" to the "General Terms and Conditions [for a] Base Contract for Sale and Purchase of Natural Gas" ("**NAESB GTCs**") to be added to the "Special Provisions" in any new

[20] We note that all GSIB entities have already adhered to the ISDA® Protocol or one of ISDA's two predecessor Protocols that were drafted for GSIBs to comply with the U.S. Special Resolution Regimes and the special resolution regimes of other G-20 countries. Since these QFC Stay Rules only require conformance of QFCs in which at least one party is a GSIB, these provisions only have to address what happens if the non-GSIB subsequently adheres to the ISDA® Protocol.

NAESB Base Contract[21] for sales/purchases of natural gas to be entered into between an entity that is part of a global systemically important banking organization ("**GSIB**" or "**Covered Entity**"), and a non-GSIB party ("**Counterparty Entity**").

These suggested QFC Stay Rule Compliance Provisions for a hypothetical Section 15.[13] of a new NAESB Base Contract have been drafted to be consistent with our suggested QFC Stay Rule Compliance Provisions for a hypothetical Part [8] of a new ISDA Schedule. These provisions can also be adapted for use with a new EEI Master Agreement or other Qualified Financial Contracts ("**QFCs**").[22]

A. Mandatory QFC Provisions for New QFCs. As an initial matter, all GSIBs are required by the QFC Stay Rules to include certain mandatory QFC Stay Rule compliance provisions in any in-scope QFCs. The IECA's drafting team has prepared these model "QFC Stay Rule Compliance Provisions" for market participants to use in their efforts to meet the demands of GSIBs that their non-GSIB counterparties agree to conform their existing and new QFCs to ensure compliance with the U.S. Bank Regulators' QFC Stay Rules.

The compliance obligation for the QFC Stay Rules rests on the GSIBs, not on the Counterparty Entities, however, if a Counterparty Entity wishes to enter into a new QFC, or any new transaction under an existing QFC, with a Covered Entity after the QFC Stay Rule compliance date (1/1/2019, 7/1/2019 or 1/1/2020) applicable to such Counterparty Entity, then that Counterparty Entity must agree to amend its existing QFCs and any new QFC with such Covered Entity and its affiliates to conform such QFC to the U.S. Bank Regulators' QFC Stay Rules on or before the date of such new QFC or the date of such new transaction under an existing QFC.

B. Incorporation by Reference of QFC Compliance Provisions from Document Used to Amend Existing QFCs. We note that if a Counterparty Entity and a Covered Entity are entering into a new NAESB Base Contract after having amended one or more existing QFCs between them using any of the three methods shown below, then such a Counterparty Entity and such Covered Entity may include the mandatory QFC Stay Rule compliance provisions in their new QFCs by either (a) using the provisions discussed above in Section V(A) of this QFC User's Guide or (II) incorporating by reference into any new NAESB Base Contract between them the QFC compliance provisions set forth in their chosen means of amending their existing QFCs.

In order to comply with the QFC Stay Rules requirement for amendments of existing QFCs between a Covered Entity and a Counterparty Entity, such QFC amendments may be accomplished by any of the following three methods:

(i) universal adherence to the ISDA 2018 U.S. Resolution Stay Protocol, published by ISDA on July 31, 2018 ("**ISDA® Protocol**"), which automatically amends all existing QFCs between a Counterparty Entity and all GSIBs with whom that Counterparty Entity has entered into any existing QFC(s);

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[21] See the copyright stamp on the current version of the NAESB Base Contract, NAESB Standard 6.3.1, dated September 5, 2006, which indicates that it was published by NAESB in 2006.

[22] "**Qualified Financial Contract" or "QFC"** has the meaning set forth in section 210(c)(8)(D) of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5390(c)(8)(D)).

(ii) bilateral execution by a Covered Entity and its BHCA affiliates ("**Covered Entity Group**") and a Counterparty Entity and its affiliates ("**Counterparty Group**") of the ISDA Bilateral Amendment published by ISDA on November 2, 2018 ("**ISDA Bilateral Amendment**"), thereby amending all QFCs entered into by and between the various members of the two groups; or

(iii) bilateral execution by a Covered Entity or a Covered Entity Group and a Counterparty Entity or a Counterparty Group of the IECA's Customized Version of the ISDA Bilateral Amendment ("**IECA Bilateral Amendment**"), thereby amending only those QFCs designated therein as being amended by such IECA Bilateral Amendment.

Accordingly, in any new QFC between parties that have already amended their existing QFCs, those parties may conform that new QFC with the U.S. QFC Stay Rule by incorporating by reference: (i) the QFC compliance terms of the ISDA® Protocol, (ii) the QFC compliance terms of the ISDA Bilateral Amendment, or (iii) the QFC compliance terms of the IECA Bilateral Amendment.

Keep in mind that the QFC Stay Rules prohibit a Covered Entity and a Counterparty Entity from incorporating the provisions of the ISDA® Protocol by reference into any QFC if the parties have not adhered to the ISDA® Protocol to amend their existing QFCs.

Keep in mind also that a company may amend its existing QFCs using the ISDA Bilateral Amendment or the IECA Bilateral Amendment and then subsequently elect to adhere to the ISDA® Protocol. For that reason, the ISDA Bilateral Amendment, the IECA Bilateral Amendment, and the IECA's form of Section 15.[13] U.S. QFC Stay Rule Compliance Provisions include provisions substituting the QFC Stay Rule compliance provisions of the ISDA® Protocol for the QFC Stay Rule compliance provisions of the ISDA Bilateral Amendment, the IECA Bilateral Amendment, or this Section 15.[13].

It is also important to note, as explained further below and in Section II of this QFC User's Guide, that under the IECA Bilateral Amendment and Section 15.[13], some, but not all, of the provisions of the IECA Bilateral Amendment and Section 15.[13] are replaced with the QFC Stay Rule compliance provisions of the ISDA® Protocol. Under the IECA Bilateral Amendment and Section 15.[13], the explicit provisions identifying and addressing CPP Events of Default continue in effect if and when the Counterparty Entity adheres to the ISDA® Protocol after entering into the IECA Bilateral Amendment or Section 15.[13].[23]

We note further that if a Counterparty Entity and a Covered Entity elect to incorporate the QFC compliance provisions from their ISDA® Protocol or their ISDA Bilateral Amendment by reference into a Section 15.[13] of the "Special Provisions" to their new NAESB Base Contract,

[23] We note that all GSIB entities have already adhered to the ISDA® Protocol or one of ISDA's two predecessor Protocols that were drafted for GSIBs to comply with the U.S. Special Resolution Regimes and the special resolution regimes of other G-20 countries. Since these QFC Stay Rules only require conformance of QFCs in which at least one party is a GSIB, these provisions only have to address what happens if the non-GSIB subsequently adheres to the ISDA® Protocol.

those referenced QFC provisions should take the place of Section 15.[13].1, 15.[13].2, and, at least for QFC terms incorporated by reference to an ISDA® Protocol, Section 15.[13].3 of the IECA form of Section 15.[13] U.S. QFC Stay Rule Compliance Provisions.

As explained in the next section, while parties may replace the compliance provisions of Section 15.[13].1, 15.[13].2 and 15.[13].3 by incorporating those provisions by reference from the document used to amend their existing QFCs, such parties should nevertheless insert into Section 15.[13] of the Special Provisions of their new NAESB Base Contract the "Creditor Protection Provisions" Events of Default from Section 15.[13].4 discussed immediately below.

C. Inclusion of Section 15.[13].4 – "Creditor Protection Provisions" Events of Default. We have included "creditor protection provisions" events of default in Section 15.[13].4 of the QFC Stay Rule compliance provisions for a new NAESB Base Contract that are essentially the same as the "creditor protection provisions" that we included in Section 2.8 and Exhibit B to the IECA Bilateral Amendment and in the IECA's form of a Part [8](4) of an ISDA Schedule to a new ISDA Master Agreement. These are intended to address the various CPP Events of Default that the U.S. Bank Regulators explicitly included in the "Creditor Protection Provisions" of the QFC Stay Rules. See Section II of this QFC User's Guide for a more detailed discussion of these issues.

VI. EXPLANATION FOR QFC STAY RULE COMPLIANCE PROVISIONS CONTAINED IN ARTICLE ELEVEN OF NEW QFC THAT IS AN EEI MASTER AGREEMENT.

The IECA's drafting team has prepared a form of QFC Stay Rule compliance provisions for a Counterparty to consider using to modify a new QFC that is an EEI Master Power Purchase and Sales Agreement ("**EEI Master Agreement**"), published by the Edison Electric Institute ("**EEI**"). These model provisions are drafted as a hypothetical form of "Article Eleven" to the "General Terms and Conditions," which are incorporated into an EEI Master Agreement pursuant to the provisions of a "Cover Sheet" to each EEI Master Agreement, which Article Eleven may be added to such General Terms and Conditions through the "Other Changes" provision in the Cover Sheet to any new EEI Master Agreement[24] for sales/purchases of electricity to be entered into between an entity that is part of a global systemically important banking organization ("**GSIB**" or "**Covered Entity**"), and a non-GSIB party ("**Counterparty Entity**").

These suggested QFC Stay Rule Compliance Provisions for a hypothetical Article Eleven of a new EEI Master Agreement have been drafted to be consistent with our suggested QFC Stay Rule Compliance Provisions for a hypothetical Part [8] of a new ISDA Schedule and our suggested QFC Stay Rule Compliance Provisions for a hypothetical Section 15.[13] of a new

[24] See the copyright stamp on the current version of the EEI Master Power Purchase and Sale Agreement, Version 2.1 (modified 4/25/00); Copyright 2000 by the Edison Electric Institute and National Energy Marketers Association, which indicates that it was published by EEI in 2000.

NAESB Base Contract. These provisions can also be adapted for use with other Qualified Financial Contracts ("**QFCs**").[25]

VII. REFERENCE RESOURCES FOR QFC STAY RULES

A. Brief Narrative on Origin of the QFC Stay Rules. On July 21, 2010, in response to the financial crisis of 2008-2009 (which was triggered, in part, by the Lehman Brothers investment bank's bankruptcy filing on September 15, 2008), and after spending hundreds of billions of dollars of taxpayer funds (i.e., the **Troubled Asset Relief Program** or "**TARP"** funds) to "bail-out" troubled financial entities and other major U.S. businesses,[26] President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("**Dodd-Frank Act"** or "**DFA"**).

Recognizing the severe damage to the U.S. financial system caused by the failure of a large, interconnected financial company, like Lehman Brothers, the U.S. Congress established a special resolution regime, as an alternative to resolution by a court under the U.S. Bankruptcy Code or other applicable laws, which is found in Title II of the Dodd-Frank Act (the "**Orderly Liquidation Authority"** or "**OLA"**). By its terms, this OLA could be used to resolve a "covered financial company," that is "in default or in danger of default" and whose resolution under otherwise applicable Federal or State law "would have serious adverse effects on financial stability" in the U.S.

The Financial Stability Board ("**FSB**") annually publishes an updated list of large financial institutions, whose failure could have serious adverse effects on the stability of global financial systems ("**Global Systemically Important Banks**" or "**GSIBs**").[27]

Under the OLA, a U.S. GSIB, or a U.S. branch, U.S. subsidiary or U.S. agency of a foreign GSIB, that is in danger of default could be resolved by the Federal Deposit Insurance Corporation ("**FDIC**") by transferring the troubled GSIB's assets to a financially healthy bank or a transition "**bridge financial company**" funded by the FDIC for purposes of achieving an "orderly" resolution of a troubled financial company. Under the OLA, the costs of resolution of a troubled financial company were expressly not to require a "bail-out" by U.S. taxpayers, but would require a "bail-in" so that the "creditors and shareholders will bear the losses of the financial company."

In addition to establishing the OLA, Title II of the Dodd-Frank Act also defines a "qualified financial contract" ("**QFC**"), which definition is discussed later in this QFC User's Guide.

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[25] "**Qualified Financial Contract" or "QFC"** has the meaning set forth in section 210(c)(8)(D) of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5390(c)(8)(D)).

[26] According to the U.S. Department of the Treasury, $439.6 billion of TARP funds were disbursed to U.S. businesses and, as of October 2018, the government has received total cash back in the amount of $442.6 billion, with $6.8 billion remaining to be repaid. See https://www.treasury.gov/initiatives/financial-stability/reports/Pages/TARP-Tracker.aspx.

[27] The Financial Stability Board (FSB) publishes an updated list of G-SIB organizations each November, the latest of which lists may be viewed at http://www.fsb.org/2018/11/2018-list-of-global-systemically-important-banks-g-sibs/.

Special resolution regimes similar to the OLA were enacted under the laws of many other countries that were members of the G-20 group of nations. Many U.S. companies, that have ISDA Master Agreements with GSIB banks organized in other G-20 countries in which similar special resolution regimes have been enacted, have been required by those non-U.S. GSIBs to amend their financial contracts to agree to be bound by a stay, plus the terms of any resolution of that non-U.S. GSIB, imposed by the governmental bank regulator administering that country's special resolution regime. Agreeing to such amendments was necessary for that non-U.S. GSIB to be able to enter into new transactions with counterparties located in countries other than the country in which that non-U.S. GSIB is organized. For example, many U.S. companies have agreed to UK Bail-In and Stay Provision Amendments to their ISDA Master Agreements with UK banks.

Under the U.S. special resolution regime, the U.S. Bank Regulators (Federal Reserve Board-**FRB**, Office of the Comptroller of the Currency-**OCC**, and FDIC) have issued rules restricting certain QFCs ("**Covered QFCs**") that have been entered into by (i) a U.S. bank holding company that is a GSIB, or any of its subsidiaries, or (ii) any U.S. branch, U.S. subsidiary or U.S. agency of a foreign GSIB. These U.S. GSIBs, their subsidiaries, and U.S. branches, subsidiaries or agencies of foreign GSIBS are called "**Covered Entities**" and each GSIB and its subsidiaries is called a "**Covered Entity Group**."

These rules are called the "**QFC Stay Rules**." These QFC Stay Rules are comparable, in many ways, to the resolution stay rules, which have been issued and implemented under the special resolution regimes for GSIB banks in France, Germany, Japan, Switzerland and the UK. Under these QFC Stay Rules, the U.S. Bank Regulators make substantive differentiations regarding QFCs, designating some QFCs as "In-scope QFCs" and further designating some In-scope QFCs as "Covered QFCs."

The primary purpose of these QFC Stay Rules is ensuring that the U.S. Bank Regulators can implement an "orderly resolution" of a financially-troubled GSIB under the two special resolution regimes enacted under U.S. laws for a failing financial company, namely (i) the OLA, which was enacted in 2010 with passage of the Dodd-Frank Act, and (ii) the FDIC's previously existing resolution authority under the Federal Deposit Insurance Act ("**FDIA**," which is referred to collectively with OLA as the "**U.S. Special Resolution Regimes**").

In support of these U.S. Special Resolution Regimes, the U.S. Bank Regulators prohibit a GSIB's ultimate parent, the top-tier bank holding company ("**BHC**") sitting at the top of a GSIB's organization chart, from entering into new operating contracts, such as QFCs, thereby ensuring that a GSIB's BHC is a clean holding company ("**CHC**"). In addition, the U.S. Bank Regulators require that adequate levels of capital will be funded down into each such operating subsidiary, so that each such subsidiary can continue to perform its obligations under its various contracts, including QFCs, even as the BHC, as a CHC, is in resolution under one of the U.S. Special Resolution Regimes. Finally, the Dodd-Frank Act requires GSIBs to develop resolution plans (so-called "living wills") for approval by the U.S. Bank Regulators, under which a GSIB will describe a plan for putting itself into resolution, often using a single point of entry ("**SPOE**") resolution process, in order to achieve an orderly resolution if it were to fail.

Under a SPOE resolution, the losses of the operating subsidiaries are passed up to the top-tier BHC and such losses are then borne by shareholders and unsecured creditors by subjecting the top-tier BHC to resolution, while the operating subsidiaries continue to perform all obligations under their QFCs. The U.S. Bank Regulators hope that utilizing this SPOE resolution process can result in a transfer of the BHC's assets to a healthy bank or a bridge financed company within the "stay period" of the greater of "one business day or 48 hours" established under the U.S. Special Resolution Regimes.

As we will explain in greater detail below in this QFC User's Guide, implementation of the QFC Stay Rules is intended to complete the package insofar as ensuring an orderly resolution of a GSIB under the U.S. Special Resolution Regimes, because the QFC Stay Rules will ensure QFC continuity which will help to ensure that the GSIB entities remain viable during the resolution process under the U.S. Special Resolution Regimes.

B. Defining Qualified Financial Contracts or QFCs. From an energy company's perspective, one needs to know which of the company's contracts with a GSIB are QFCs, are any of the company's QFCs "In-scope" and, if so, how many of the company's In-scope QFCs are "covered QFCs?"

i. Definition of QFC in Dodd-Frank Act. Title II of the Dodd-Frank Act includes a definition of Qualified Financial Contract, which is discussed below in this QFC User's Guide, but to really understand what contracts will be QFCs, one needs to understand the objective of Title II of the Dodd-Frank Act and the U.S. Bank Regulators' objectives in enacting the QFC Stay Rules.

In that regard, looking back at the Lehman Brothers bankruptcy proceeding, filed on September 15, 2008, provides some valuable perspective.

In a normal proceeding for a financially-troubled company under the U.S. Bankruptcy Code, the Bankruptcy Court will issue a stay order that prevents all parties to most contracts with the bankrupt company from terminating their contracts with the bankrupt company, which allows the bankruptcy court to protect and preserve the bankrupt company's estate for the benefit of creditors in a Chapter 7 liquidation and to restructure the bankrupt company's various assets in order to reorganize the company and return it to a financially healthy business in a Chapter 11 reorganization.

However, certain financial contracts have been given a so-called "safe harbor" status, which allows the non-bankrupt counterparties to those "safe harbor" contracts to exercise certain default rights based on the bankruptcy of the other party. Those default rights, include suspending performance by the non-bankrupt party under the "safe harbor" contract, calculating damages owed by the bankrupt counterparty, setting off such damages against amounts owed to the bankrupt counterparty, foreclosing on any cash, letters of credit or other collateral provided as credit support by the bankrupt counterparty, and terminating those "safe harbor" contracts. Under some "safe harbor" contracts, the non-bankrupt counterparty can declare a default if an affiliate (such as the parent) of the other party (the "**Direct Party**") becomes subject to a

receivership, insolvency, liquidation, resolution, bankruptcy or similar proceeding, even though the Direct Party continues performing all of its obligations under the "safe harbor" contract. Under some "safe harbor" contracts, the non-bankruptcy counterparty can prevent a transfer of that "safe harbor" contract to any third party.

During the bankruptcy of Lehman Brothers bank in September 2008, the impact of multiple exercises of default rights, including terminations, of Lehman Brothers' "safe harbor" contracts with financial institutions and other counterparties led to foreclosure and seizure of collateral, margin calls, claims for damages and termination payments, fire-sales of assets as parties sought cash to meet these obligations, and, as a result of the interconnectedness of these "safe harbor" contracts involving multiple large financial companies, these events spread financial contagion leading to the near-collapse of the financial system. In response, the G-20 countries enacted special resolution regimes and other new laws, such as the Dodd-Frank Act, intended to prevent any recurrence of such events in the future.

In that context, it is helpful to think of QFCs as being any contract that may be eligible for "safe harbor" treatment under the Bankruptcy Code.

Section 210(c)(8)(D)(i) of Title II of the Dodd-Frank Act defines "qualified financial contract" very broadly as "any securities contract [e.g., securities lending and borrowing agreements], **commodity contract**, **forward contract**, repurchase agreement, **swap agreement**, and any similar agreement that the [FDIC] determines by regulation, resolution, or order to be a qualified financial contract for purposes of this paragraph." The various subsections of Section 210(c)(8)(D) go further and say that any security agreement, credit enhancement, guarantee, or reimbursement agreement related to any of the foregoing, as well as any master agreement that provides for any of the foregoing, are also qualified financial contracts.

For our purposes, Section 210(c)(8)(D)(iii) expands on the term "<u>commodity contract</u>" to include a futures contract, an option on a futures contract, or a commodity option.

For our purposes, Section 210(c)(8)(D)(iv) expands on the term "<u>forward contract</u>" to include "a contract (other than a commodity contract) for the purchase, sale, or transfer of a commodity or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade, or product or byproduct thereof, with a maturity date that is more than 2 days after the date on which the contract is entered into, including a repurchase or reverse repurchase transaction (whether or not such repurchase or reverse repurchase transaction is a "repurchase agreement", as defined in clause (v)), consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any other similar agreement;"

For our purposes, Section 210(c)(8)(D)(vi) expands on the term "<u>swap agreement</u>" to include: "an interest rate swap, option, future, or forward agreement, including a rate floor, rate cap, rate collar, cross-currency rate swap, and basis swap; a spot, same day-tomorrow, tomorrow-next, forward, or other foreign exchange, precious metals, or other commodity agreement; a currency swap, option, future, or forward agreement; an equity index or equity swap, option, future, or forward agreement; a debt index or debt swap, option, future, or forward agreement; a total

return, credit spread or credit swap, option, future, or forward agreement; weather swap, option, future, or forward agreement; or an inflation swap, option, future, or forward agreement;"

Based on the foregoing, in addition to QFCs that consist of swap transactions related to "other commodities" (which would include energy commodities), interest rates, currency exchange, etc., and the related ISDA Master Agreements, guarantees, security interests, and other credit enhancements, **the term QFC also includes contracts for the sale and delivery of physical commodities.**

The FRB confirmed this fact in the preamble to the FRB's final QFC Stay Rule[28], when the FRB provided its response to comments urging "the exclusion [from the definition of QFC] of contracts for the purchase of commodities in the ordinary course of business." In its response, the FRB said:

> "Commenters also urged the exclusion of contracts for the purchase of commodities in the ordinary course of business (*e.g.*, utility and gas energy supply contracts) or physical delivery commodity contracts more broadly.[footnote 108] In general, commenters argued that exempting these contracts would not increase systemic risk but would help ensure the smooth operation of utilities and the physical commodities markets. [footnote 109] Commenters indicated that failure to make commodity deliveries on time can result in the accrual of damages and penalties beyond the accrual of interest (*e.g.*, demurrage and other fines in shipping) and that counterparties may not be able to obtain appropriate compensation for amendment of default rights due to the difficulty of pricing the risk associated with an operational failure due to the failure to deliver a commodity on time. Commenters also contended that agreements with power operators governed by regulatory tariffs would be difficult, if not impossible, to remediate.[footnote 110]
>
> The final rule applies to any "covered QFC," which generally is defined as any "in-scope QFC" that a covered entity enters into, executes, or to which the covered entity otherwise becomes a party. [footnote 111] As under the proposal, "qualified financial contract" or "QFC" is defined in the final rule as in section 210(c)(8)(D) of Title II of the Dodd-Frank Act and includes swaps, repo and reverse repo transactions, securities lending and borrowing transactions, commodity contracts, and forward agreements.[footnote 112] Parties that enter into contracts with covered entities have been potentially subject to the stay-and- transfer provisions of Title II of the Dodd-Frank Act since its enactment. **Consistent with Title II, the final rule does not exempt QFCs involving physical commodities.** However, as explained below, the final rule responds to concerns regarding the smooth operation of physical commodities end users and markets by allowing counterparties to terminate QFCs based on the failure to pay or perform." (Emphasis added.)

[28] See Restrictions on Qualifying Financial Contracts of Systemically Important U.S. Banking Organizations and the U.S. Operations of Systemically Important Foreign Banking Organizations (**FRB Final QFC Stay Rule**), 82 Fed. Reg. 42882, at 42895 (September 12, 2017).

As noted in the quoted text shown above, the FRB elaborated further in the FRB Final QFC Stay Rule with respect to QFCs involving physical delivery of commodities, by saying:[29]

> "Some commenters also requested specific provisions related to physical commodity contracts, including a provision that would allow regulators to override a stay if necessary to avoid disruption of the supply or prevent exacerbation of price movements in a commodity or a provision that would allow the exercise of default rights of counterparties delivering or taking delivery of physical commodities if a covered entity defaults on any physical delivery obligation to any counterparty. As noted above, **QFCs may permit a counterparty to exercise its default rights immediately, even during the stay period, if the covered entity fails to pay or perform on the covered QFC with the counterparty** (or another contract between the same parties that gives rise to a default under the covered QFC)." (Emphasis added.)

In any event, for an energy company, it is important to realize that when it is amending all its QFCs with the universe of Covered Entities (i.e., the GSIBs and their subsidiaries), it is not just amending its financial derivatives agreements with one or more Covered Entities, but it is also amending any physical commodity supply contracts it may have entered into with a Covered Entity.

ii. In-scope QFCs. The QFCs that are subject to the QFC Stay Rules are called "In-scope QFCs," which are defined as QFCs that explicitly restrict the transfer of the QFC from a Covered Entity or which explicitly provide default rights that may be exercised against a Covered Entity, including direct default rights, defined as rights arising due to a default by the Covered Entity that is a party to the QFC, and cross-default rights, defined as rights arising due to a default by an affiliate of the Covered Entity that is a party to the QFC.

iii. Covered QFCs. A "Covered QFC" is defined as an In-scope QFC that a Covered Entity (i) enters, executes, or otherwise becomes a party to on or after January 1, 2019; or (ii) entered, executed, or otherwise became a party to before January 1, 2019, if the Covered Entity, or any affiliate that is a Covered Entity, also enters, executes, or otherwise becomes a party to an In-scope QFC with the same person or a consolidated affiliate of the same person on or after January 1, 2019. The definition of "Covered QFC" is intended to limit the restrictions of the QFC Stay Rules to those financial transactions whose disorderly unwind has substantial potential to frustrate the orderly resolution of a G-SIB. By adopting the Dodd-Frank Act's definition of QFC, with the definition of In-scope QFCs and Covered QFCs, the QFC Stay Rules intend to extend the stay and transfer protections of resolution under the OLA to resolution under the FDIA.

iv. Exempt QFCs. As described in the next section of this QFC User's Guide, under the QFC Stay Rules, a Covered Entity is under no obligation to conform a QFC that does not have transfer restrictions, direct default rights based, directly or indirectly, on a Covered Entity that is a direct party to such QFC becoming subject to resolution, or cross-default rights based, directly or indirectly, on an affiliate of such Covered Entity becoming subject to resolution.

[29] See FRB Final QFC Stay Rule, 82 Fed. Reg. at 42906.

C. Conforming Amendments Required for Covered QFCs. Whether amending an existing QFC or inserting QFC Stay Rule compliance provisions into a new QFC, the QFC Stay Rules require Covered Entities to ensure that Covered QFCs contain contractual provisions that opt into the stay and transfer treatment under the FDIA and the OLA. See, for example, 12 C.F.R. Sections 252.83, U.S. Special Resolution Regimes, and 252.84, Insolvency Proceedings, of the FRB Final QFC Stay Rule.

i. The first conforming amendment of the QFC Stay Rules requires the Covered QFC to include provisions acknowledging, and agreeing to be bound by, the U.S. Special Resolution Regimes. See, for example, 12 C.F.R. 252.83 of the FRB Rules (an essentially identical provision is included in the FDIC Rules and the OCC Rules), under which a Covered Entity is required to ensure that each Covered QFC explicitly provides that:

> (1) In the event the Covered Entity becomes subject to a proceeding under a U.S. Special Resolution Regime, the **transfer of the Covered QFC** (and any interest and obligation in or under, and any property securing, the Covered QFC) **from the Covered Entity will be effective to the same extent as the transfer would be effective under the U.S. Special Resolution Regime** if the Covered QFC were governed by the laws of the U.S. or a State of the U.S.; and
>
> (2) In the event the Covered Entity or an affiliate of the Covered Entity becomes subject to a proceeding under a U.S. Special Resolution Regime, **default rights with respect to the Covered QFC that may be exercised against the Covered Entity are permitted to be exercised to no greater extent than the default rights could be exercised under the U.S. Special Resolution Regime** if the Covered QFC were governed by the laws of the U.S. or a State of the U.S..

The foregoing requirement is subject to an exception. A Covered QFC is not required to be conformed to include the two provisions shown above, if (1) such Covered QFC (a) explicitly provides that the Covered QFC is governed by the laws of the U.S. or a State of the U.S., and (b) does not explicitly provide that one or both of the U.S. Special Resolution Regimes, or a broader set of laws that includes a U.S. Special Resolution Regime, is excluded from the laws governing the Covered QFC, and (2) each party to the Covered QFC, other than the Covered Entity, is: (a) an individual that is domiciled in the U.S., including any State; (b) a company that is incorporated in or organized under the laws of the U.S. or any State; (c) a company the principal place of business of which is located in the U.S., including any State; or (d) a U.S. branch or a U.S. agency.

Essentially, this exception says that if a Covered QFC is between two U.S. persons and is subject to the laws of the U.S. or any State, then that Covered QFC is already subject to the requirements of this first "conforming amendment," because the laws effecting the two U.S. Special Resolution Regimes are applicable to both the Covered QFC and the U.S. persons that are the parties to such a Covered QFC. This means that the parties to such a Covered QFC do not need to agree to be bound by the U.S. Special Resolution Regime, they are already bound.

This difference explains the many differences between the "first conforming amendment" and the "second conforming amendment" (discussed immediately below), to which parties that are U.S. persons, even when they are parties to a Covered QFC that is subject to U.S. laws or the laws of a State, must nevertheless agree to be bound by those provisions, because of the gap in FDIA. This gap in FDIA arises because FDIA, unlike OLA, does not otherwise address the right of a non-GSIB to exercise Default Rights that arise from an affiliate of a Direct Party to a Covered QFC (i.e., a BHCA Affiliate of a GSIB that is the Direct Party under a Covered QFC) becoming subject to an Insolvency Proceeding.

Note also that the provisions of the QFC Stay Rules addressing this "first conforming amendment," requiring recognition of the U.S. Special Resolution Regimes, explicitly state that the rights of a non-GSIB to exercise Default Rights arising upon the occurrence of the "Creditor Protection Provisions" set forth in the provisions of the QFC Stay Rules addressing the "second conforming amendment," regarding Insolvency Proceedings (as shown below), are expressly subject to this "first conforming amendment." See, for example, Section 252.83(c) of the FRB Rule (12 C.F.R. 252.83(c)), which says:

> "(c) *Relevance of creditor protection provisions*. The requirements of this section apply notwithstanding paragraphs (d), (f), and (h) of §252.84."

We read this provision as focusing on the difference between the U.S. Special Resolution Regimes, which are the focus of the "first conforming amendment" under the QFC Stay Rules, and the Insolvency Proceedings, which are the focus of the "second conforming amendment" under the QFC Stay Rules. To us, this provision means, for example, that while a Counterparty may exercise Default Rights under paragraph (d)(1) of the Creditor Protection Provisions (if its Covered QFC permits it to do so) arising upon the Direct Party to such Covered QFC becoming "subject to an Insolvency Proceeding," if the Direct Party to such Covered QFC instead became "subject to a proceeding under a U.S. special resolution proceeding," then the Counterparty would be allowed to exercise Default Rights "to no greater extent than the default rights could be exercised under the U.S. Special Resolution Regime."

We think this means that the FDIC could (and probably would) prohibit a Counterparty from exercising Default Rights arising under a Covered QFC upon the Direct Party becoming subject to an Insolvency Proceeding if that Direct Party also became subject to a proceeding under a U.S. Special Resolution Regime.

ii. The second conforming amendment of the QFC Stay Rules requires the Covered QFC to include provisions specifically addressing a BHCA Affiliate of a Direct Party becoming subject to Insolvency Proceedings. See, for example, 12 C.F.R. 252.84(b) of the FRB Rules (an essentially identical provision is included in the FDIC Rules and the OCC Rules), under which a Covered Entity is required to ensure that each Covered QFC explicitly provides that:

> "(1) A covered QFC may not permit the exercise of any default right with respect to the covered QFC that is related, directly or indirectly, to an affiliate of the direct party

becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding.

(2) A covered QFC may not prohibit the transfer of a covered affiliate credit enhancement, any interest or obligation in or under the covered affiliate credit enhancement, or any property securing the covered affiliate credit enhancement to a transferee upon or following an affiliate of the direct party becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding unless the transfer would result in the supported party being the beneficiary of the credit enhancement in violation of any law applicable to the supported party."

The foregoing requirement is also subject to an exception. A Covered QFC is not required to be conformed to include the two provisions in clauses (1) and (2) above, if:

(a) such Covered QFC does not explicitly provide any default right with respect to the Covered QFC that is related, directly or indirectly, to an affiliate of the Covered Entity that is a direct party to the Covered QFC becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding; and

(b) such Covered QFC does not explicitly prohibit the transfer of a credit enhancement provided by an affiliate of the Covered Entity, any interest or obligation in or under such credit enhancement, or any property securing such credit enhancement to a transferee upon or following an affiliate of the Covered Entity that is a direct party to the Covered QFC becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding or would prohibit such a transfer only if the transfer would result in the supported party to the Covered QFC being the beneficiary of the credit enhancement in violation of any law applicable to such supported party.

We note too that each of the Creditor Protection Provisions contained in Paragraphs (d), (f), and (h) of the QFC Stay Rules, begins with "Notwithstanding paragraph (b) of this section," which refers to the general prohibition on the exercise of Default Rights arising from a BHCA Affiliate of the Direct Party becoming subject to an Insolvency Proceeding as set forth in this "second conforming amendment" of the QFC Stay Rules. To us, this means that a Counterparty Entity (i.e., the non-GSIB party to a Covered QFC) may exercise Default Rights, to the extent permitted by its Covered QFC, upon the occurrence of any of the CPP Events of Default listed in paragraphs (d), (f), and (h) notwithstanding the prohibition specified in paragraph (b) [See for example Section 252.84(b) of the FRB Rules] against exercising Default Rights arising from a BHCA Affiliate of the Direct Party becoming subject to an Insolvency Proceeding.

We note further, however, that while the prohibition against a Counterparty Entity exercising Default Rights under paragraph (b) [See for example Section 252.84(b) of the FRB Rules prohibiting the exercise of Default Rights arising because a BHCA Affiliate of a Covered Entity has become subject to an Insolvency Proceeding] is subject to the Creditor Protection Provisions authorizing a Counterparty Entity to exercise Default Rights under paragraphs (d), (f), and (h) upon the occurrence of any of the CPP Events of Default, these same rights to exercise Default Rights under the Creditor Protection Provisions in paragraphs (d), (f) and (h) are themselves

subject to the prohibition against exercising Default Rights in paragraph (b) of the provisions requiring recognition of the U.S. Special Resolution Regimes [See for example Section 252.83(b) and (c) of the FRB Rules].

As noted above, we think this means that the FDIC could (and probably would) prohibit a Counterparty Entity from exercising Default Rights arising under a Covered QFC upon the Direct Party becoming subject to an Insolvency Proceeding if that Direct Party also became subject to a proceeding under a U.S. Special Resolution Regime.

D. Phased-In Compliance Dates. The QFC Stay Rules include phased-in compliance dates, so that (i) a Covered QFC between two GSIBs must be amended by 1/1/2019; (ii) a Covered QFC between a GSIB and a financial institution that is not a GSIB (such as a swap dealer or major swap participant) must be amended by 7/1/2019; and (iii) a Covered QFC between a GSIB and any other person must be amended by 1/1/2020.

The QFC Stay Rules are a little ambiguous. For example, Section 252.82(c) of the FRB's QFC Stay Rules defines a "covered QFC" as follows: "a covered QFC is: (1) with respect to a covered entity [i.e., a GSIB] that is a covered entity on November 13, 2017, an in-scope QFC that the covered entity (i) enters, executes, or otherwise becomes a party to on or after January 1, 2019; or (ii) Entered, executed, or otherwise became a party to before January 1, 2019, if the covered entity or any affiliate that is a covered entity or excluded bank also enters, executes, or otherwise becomes a party to a QFC with the <u>same person or a consolidated affiliate of the same person on or after January 1, 2019</u>." (Emphasis added.)

This definition of "covered QFC" certainly suggests that something happens to cause in-scope QFCs (e.g., ISDA Master Agreements) entered into prior to January 1, 2019 to become "covered QFCs" if the counterparty or a consolidated affiliate becomes a party to a new QFC (e.g., a new ISDA Master Agreement) at any time on or after January 1, 2019.

This provision forms the basis for some GSIBs saying that any ISDA Master Agreement entered into on or after January 1, 2019, has to include QFC Stay Rule Compliance Provisions.

However, Section 252.82(e), "Initial applicability of requirements for covered QFCs," of the FRB's QFC Stay Rules specifies in Section 252.82(e)(1) that:

"With respect to each of its covered QFCs, a covered entity that is a covered entity on November 13, 2017 must conform the covered QFC to the requirements of this subpart by:

(i) January 1, 2019, if each party to the covered QFC is a covered entity or an excluded bank;

(ii) July 1, 2019, if each party to the covered QFC (other than the covered entity [i.e., the GSIB]) is a financial counterparty that is not a covered entity or excluded bank [i.e., such party is a swap dealer or major swap participant]; or

(iii) <u>January 1, 2020, if a party to the covered QFC (other than the covered entity) is not described in paragraph (f)(1)(i) or (f)(1)(ii) of this section</u> or if, notwithstanding paragraph

(f)(1)(ii), a party to the covered QFC (other than the covered entity) is a small financial institution." (Emphasis added.)

Since most Counterparty Entities (which are not banks, swap dealers, or major swap participants) are not described in paragraph (f)(1(i) or (f)(1)(ii), those Counterparty Entities are described in paragraph (f)(1)(iii), which means that such a Counterparty Entity's GSIB counterparties are obligated to conform (i.e., either (I) amend any existing ISDA Master Agreement to include QFC Stay Rule compliance provisions or (II) modify any new ISDA Master Agreement to include QFC Stay Rule compliance provisions) by "January 1, 2020."

Similarly, Section 1(d) of the ISDA 2018 U.S. Resolution Stay Protocol says:
"(d) As between an Adhering Party [i.e., a non-GSIB Counterparty Entity] and a Regulated Entity [i.e., a GSIB] …, the agreement to make the amendments contemplated by this Protocol, on the terms and conditions set forth in this Protocol, will be effective on the Implementation Date and the amendments shall be made on the later of (i) the Implementation Date and (ii) the Compliance Date.

(i) The Compliance Date with respect to a Protocol Covered Agreement shall be determined as follows: (A) if each party to such Protocol Covered Agreement is an Entity Subject to U.S. Regulations [i.e., a GSIB], 1 January 2019; (B) if each party to such Protocol Covered Agreement (other than the Entity Subject to U.S. Regulations) is a Financial Counterparty that is not an Entity Subject to U.S. Regulations, 1 July 2019; and (C) if a party to such Protocol Covered Agreement (other than the Entity Subject to U.S. Regulations) is not described in clause (A) or (B) or if, notwithstanding (B), a party to such Protocol Covered Agreement (other than the Entity Subject to U.S. Regulations) is a Small Financial Institution, 1 January 2020.

(ii) The Implementation Date with respect to any Adhering Party and a Regulated Entity shall be the date of acceptance by ISDA, as agent, of an Adherence Letter … from the later of such two Adhering Parties to adhere." (Emphasis added.)

On this basis, it appears to us that the date by which most Counterparty Entities (which are not GSIBs, non-GSIB banks, swap dealers, or major swap participants) must amend their existing Covered QFCs and any new Covered QFC is most likely January 1, 2020, but there is an ambiguity in the QFC Stay Rules.

E. "Creditor Protection Provisions" from QFC Stay Rules. As set forth in the QFC Stay Rules, the Creditor Protection Provisions (often referred to as "Paragraphs (d), (f), and (h)") read as follows:

> "(d) *General creditor protections.*
> Notwithstanding paragraph (b) of this section, a covered direct QFC and covered affiliate credit enhancement that supports the covered direct QFC may permit the exercise of a default right with respect to the covered QFC that arises as a result of:
>
> (1)The direct party becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding;

(2)The direct party not satisfying a payment or delivery obligation pursuant to the covered QFC or another contract between the same parties that gives rise to a default right in the covered QFC; or
(3) The covered affiliate support provider or transferee not satisfying a payment or delivery obligation pursuant to a covered affiliate credit enhancement that supports the covered direct QFC.

(e) *Definitions relevant to the general creditor protections—*
(1) *Covered direct QFC.* Covered direct QFC means a direct QFC to which a covered entity or excluded bank is a party.
(2) Covered affiliate credit enhancement. Covered affiliate credit enhancement means an affiliate credit enhancement in which a covered entity or excluded bank is the obligor of the credit enhancement.
(3) Covered affiliate support provider. Covered affiliate support provider means, with respect to a covered affiliate credit enhancement, the affiliate of the direct party that is obligated under the covered affiliate credit enhancement and is not a transferee.
(4) Supported party. Supported party means, with respect to a covered affiliate credit enhancement and the direct QFC that the covered affiliate credit enhancement supports, a party that is a beneficiary of the covered affiliate support provider's obligation(s) under the covered affiliate credit enhancement.

(f) *Additional creditor protections for supported QFCs.* Notwithstanding paragraph (b) of this section, with respect to a covered direct QFC that is supported by a covered affiliate credit enhancement, the covered direct QFC and the covered affiliate credit enhancement may permit the exercise of a default right after the stay period that is related, directly or indirectly, to the covered affiliate support provider becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding if:

(1) The covered affiliate support provider that remains obligated under the covered affiliate credit enhancement becomes subject to a receivership, insolvency, liquidation, resolution, or similar proceeding, other than a Chapter 11 proceeding;

(2) Subject to paragraph (h) of this section, the transferee, if any, becomes subject to a receivership, insolvency, liquidation, resolution, or similar proceeding;

(3) 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 with respect to:

(i) The covered affiliate credit enhancement;

(ii) All other covered affiliate credit enhancements provided by the covered affiliate support provider in support of other covered direct QFCs between the direct party and the supported party under the covered affiliate credit enhancement referenced in paragraph (f)(3)(i) of this section; and

(iii) All covered affiliate credit enhancements provided by the covered affiliate support provider in support of covered direct QFCs between the direct party and affiliates of the supported party referenced in paragraph (f)(3)(ii) of this section; or

(4) In the case of a transfer of the covered affiliate credit enhancement to a transferee,

(i) All of the ownership interests of the direct party directly or indirectly held by the covered affiliate support provider are not transferred to the transferee; or

(ii) Reasonable assurance has not been provided that all or substantially all of the assets of the covered affiliate support provider (or net proceeds therefrom), excluding any assets reserved for the payment of costs and expenses of administration in the receivership, insolvency, liquidation, resolution, or similar proceeding, will be transferred or sold to the transferee in a timely manner.

(g) *Definitions relevant to the additional creditor protections for supported QFCs*—

(1) *Stay period.* Stay period means, with respect to a receivership, insolvency, liquidation, resolution, or similar proceeding, the period of time beginning on the commencement of the proceeding and ending at the later of 5:00 p.m. (eastern time) on the business day following the date of the commencement of the proceeding and 48 hours after the commencement of the proceeding.

(2) Business day. Business day means a day on which commercial banks in the jurisdiction the proceeding is commenced are open for general business (including dealings in foreign exchange and foreign currency deposits).

(3) *Transferee.* Transferee means a person to whom a covered affiliate credit enhancement is transferred upon the covered affiliate support provider entering a receivership, insolvency, liquidation, resolution, or similar proceeding or thereafter as part of the resolution, restructuring, or reorganization involving the covered affiliate support provider.

(h) *Creditor protections related to FDI Act proceedings.* Notwithstanding paragraphs (b), (d), and (f) of this section, with respect to a covered direct QFC that is supported by a covered affiliate credit enhancement, the covered direct QFC and the covered affiliate credit enhancement may permit the exercise of a default right that is related, directly or indirectly, to the covered affiliate support provider becoming subject to FDI Act proceedings:

(1) After the FDI Act stay period, if the covered affiliate credit enhancement is not transferred pursuant to 12 U.S.C. 1821(e)(9)–(e)(10) and any regulations promulgated thereunder; or

(2) During the FDI Act stay period, if the default right may only be exercised so as to permit the supported party under the covered affiliate credit enhancement to suspend performance with respect to the supported party's obligations under the covered direct QFC to the same extent as the supported party would be entitled to do if the covered direct QFC were with the covered affiliate support provider and were treated in the same manner as the covered affiliate credit enhancement.

(i) *Prohibited terminations.* A covered QFC must require, after an affiliate of the direct party has become subject to a receivership, insolvency, liquidation, resolution, or similar proceeding:

(1) The party seeking to exercise a default right to bear the burden of proof that the exercise is permitted under the covered QFC; and

(2) Clear and convincing evidence or a similar or higher burden of proof to exercise a default right."

F. Description of the "Additional Features," Favored by the U.S. Bank Regulators, Arising due to Universal Adherence with all G-SIBS under the ISDA 2018 U.S. Protocol, including Agreeing to be Bound by the Special Resolution Regimes in the U.S. plus Five Additional Jurisdictions: France, Germany, Japan, Switzerland and the UK. Contrary to some of the early statements that were made by various persons, a GSIB is not required by the QFC Stay Rules to compel its Counterparties to amend their existing Covered QFCs by adhering to the ISDA 2018 U.S. Protocol. The U.S. Bank Regulators prefer adherence to the ISDA 2018 U.S. Protocol, because by that one act, a Counterparty automatically amends all its Covered QFCs with all GSIBs and agrees to be bound by the Special Resolution Regimes in the U.S., France, Germany, Japan, Switzerland and the UK. This feature of the ISDA 2018 U.S. Protocol is called "universal adherence."

Remember that the primary objective of the U.S. Bank Regulators under the QFC Stay Rules is causing the most Counterparties under "safe harbor" contracts with GSIBs to contractually agree to give up their "safe harbor" rights under the U.S. Bankruptcy Code, thereby giving the U.S. Bank Regulators a greater ability to ensure an "orderly" resolution of a financially-troubled GSIB by transferring a greater portion of the financially-troubled GSIB's assets and operating agreements to a financially-healthy bank or a bridge-financed entity that is financed by the U.S. Bank Regulators.

If a Counterparty is able to exercise its safe harbor rights under the U.S. Bankruptcy Code and, thereby, exercise its contractually-granted and statutorily-granted Default Rights, that Counterparty may terminate one or more Covered QFCs with a financially-troubled GSIB.

For that reason, the U.S. Bank Regulators prefer that a GSIB's Counterparties amend their Covered QFCs by adhering to the ISDA 2018 U.S. Protocol.

This does not mean that the U.S. Bank Regulators compel or limit a GSIB or a Counterparty to complying with the QFC Stay Rules by adhering to the ISDA® Protocol.

This point was made by the FRB and the FDIC in their "Final Guidance for the 2019 and subsequent resolution plan submissions by the eight largest, complex U.S. banking organizations," 84 Fed. Reg. 1438, at 1448 (February 4, 2019) ("**Final Guidance**").

In that Final Guidance, the FRB and the FDIC responded to a comment that "by requiring the production of additional plan content related to a firm's method of complying with the QFC stay rules only from those firms that do not adhere to the [ISDA® Protocol], the guidance may have the effect of discouraging firms from complying with the QFC stay rules through any means other than ISDA® Protocol adherence." This requirement for the production of additional plan content regarding a firm's method of complying with the QFC stay rules only from those firms that do not adhere to the ISDA® Protocol was found in footnote 37 of the Proposed Resolution Planning Guidance, 83 Fed. Reg. 32856 (July 16, 2018), which said: "If the firm complies with the QFC stay rules other than through adherence to the Protocol, the plan also should explain how the alternative compliance method differs from the Protocol, how those differences affect the analysis and other expectations of this "Legal Obstacles Associated with Emergency Motions" section, and how the firm plans to satisfy any different conditions or requirements of the alternative compliance method."

In response to the comment noted above, the FRB and the FDIC stated (*see* Final Guidance at 1448):

> "In connection with promulgating the QFC stay rules, the Agencies have recognized that the ability to comply with the QFC stay rules by adhering to the ISDA Protocol may be a desirable alternative to implementing the rules' restrictions on a counterparty-by-counterparty basis. … For firms that choose to adhere to the ISDA Protocol through other means, any additional plan content they provide can assist the Agencies in understanding how a firm's chosen alternative compliance method addresses these risks."

[We note that there appears to be a typographical error in the immediately preceding sentence, in which the words "adhere to the ISDA Protocol" should likely have been changed to "comply with the QFC stay rules" so that the clause at the beginning of such sentence would have read: "For firms that choose to comply with the QFC stay rules through means other than adherence to the ISDA Protocol, any additional plan content…"]

The FRB and the FDIC concluded their discussion of this topic by saying (*see* Final Guidance at 1448):

> "Notably, prior to the effective date of the QFC stay rules, all eight U.S. GSIBs elected to adhere to the ISDA Protocol and incur any fees associated with adhering to the ISDA Protocol. Therefore, as long as the U.S. GSIBs continue to adhere, <u>the Agencies will not expect these firms to submit additional plan content related to compliance with the QFC</u>

stay rules through a method other than adherence to the ISDA Protocol." (Emphasis added.)

Accordingly, compliance with the QFC Stay Rules by adhering to the ISDA 2018 U.S. Protocol is not mandatory. A GSIB and a Counterparty choosing to amend a Covered QFC by bilateral amendment is entirely lawful.

VIII. DETAILED REVIEW AND ANALYSIS OF SECTIONS 3.1(d) AND (f) AND 3.5 OF THE ISDA® BILATERAL AMENDMENT

Shown below is a detailed analysis of the IECA drafting team's concerns with the representations in Sections 3.1(d) and (f) and the undertaking in Section 3.5 of the ISDA® Bilateral Amendment, which led the drafting team to revise those provisions in the IECA Bilateral Amendment.

A. Problematic Representations in Sections 3.1(d) and (f) and Undertaking in Section 3.5 of ISDA® Bilateral Amendment. There are two representations and an undertaking (i.e., an obligation) in the ISDA Bilateral Amendment, which are also explicitly set forth as representations and an undertaking in the ISDA® Protocol, that need to be carefully considered by market participants prior to either signing the ISDA Bilateral Amendment or adhering to the ISDA® Protocol.

All the representations in Sections 3.1 and 3.2 of the ISDA Bilateral Amendment will be brought into each of the Covered Agreements (i.e., each in-scope QFC) amended by the ISDA Bilateral Amendment by application of Section 3.3 of the ISDA Bilateral Amendment, which Section 3.3 states "[if] a Covered Agreement contains a Default Right based on a misrepresentation or other analogous provision, the Parties hereto agree that, for purposes of such provisions, each of the foregoing representations will be deemed to be a representation under such Covered Agreement." (Emphasis added.)

Accordingly, any breach by a Counterparty Entity of either or both of the representations in Sections 3.1(d) and 3.1(f) of the ISDA Bilateral Amendment could give rise to a claim by the applicable Covered Entity that such Counterparty Entity is in default under the amended Covered Agreement(s) as a result of such representation being incorporated into such Covered Agreement(s).

We note that the representation in Section 3.1(d) of the ISDA Bilateral Amendment is explicitly set forth in Paragraph 2(a)(iv) of the ISDA® Protocol and the representation in Section 3.1(f) of the ISDA Bilateral Amendment is explicitly set forth in Paragraph 2(a)(vi) of the ISDA® Protocol. In addition, just like in the ISDA Bilateral Amendment, Paragraph 2(b) of the ISDA® Protocol also incorporates both representations into each Protocol Covered Agreement (i.e., each in-scope QFC) that is amended by the ISDA® Protocol.

Accordingly, any breach by a Counterparty Entity of either or both of the representations in Paragraphs 2(a)(iv) or 2(a)(vi) of the ISDA® Protocol could give rise to a claim by the

applicable Covered Entity that such Counterparty Entity is in default under the amended Covered Agreement(s) as a result of such representation being incorporated into such Covered Agreement(s).

We also note that while a Covered Entity may not likely have any reason to declare a Counterparty Entity to be in default under an amended Covered Agreement amended by the ISDA Bilateral Amendment or the ISDA® Protocol, if that Covered Entity is in a bankruptcy proceeding and a trustee has been appointed by the applicable Bankruptcy Court to protect the interests of all unsecured creditors, then that trustee may be obligated, pursuant to its fiduciary duty as a trustee, to exercise any such default rights that may be available to the bankrupt Covered Entity under the amended Covered Agreement(s).

We therefore recommend that Counterparty Entities proceed with caution in addressing, or electing not to address, these issues, regardless of whether such Counterparty Entity is considering entering into an ISDA Bilateral Amendment or adhering to the ISDA® Protocol.

B. Representation in Section 3.1(d) that all consents have been obtained. Section 3.1(d) of the ISDA Bilateral Amendment contains the following representation by each Counterparty Entity:

"(d) Consents. All governmental and other consents that are required to have been obtained by it with respect to this Agreement and the Covered Agreement, as amended by this Agreement, have been obtained and are in full force and effect and all conditions of any such consents have been complied with."

The same representation is also explicitly set forth in Paragraph 2(a)(iv) of the ISDA® Protocol.

C. Representation in Section 3.1(f) that no adverse impact on underlying credit support arrangements arises as a result of amending the Covered Agreements. Section 3.1(f) of the ISDA Bilateral Amendment contains the following representation by each Counterparty Entity:

"(f) Credit Support. Its amendment under this Agreement (other than any amendments affecting when rights in respect of a Credit Enhancement or Third Party Credit Enhancement may be exercised) will not, in and of itself, adversely affect the enforceability, effectiveness or validity of any obligations owed, whether by it or by any Third Party, under any Credit Enhancement or Third Party Credit Enhancement in respect of its obligations relating to the Covered Agreement as amended by this Agreement."

The same representation is also explicitly set forth in Paragraph 2(a)(vi) of the ISDA® Protocol.

D. Section 3.5 of the ISDA® Bilateral Amendment contains a further "undertaking" by a Counterparty Entity with respect to any required "consent." Section 3.5 of the ISDA Bilateral Amendment specifies that:

"[as to] any Covered Agreement or Third Party Credit Enhancement that expressly requires the consent, approval, agreement, authorization or other action (each a "consent") of a Third Party to

be obtained, each Party whose obligations under such arrangements are secured, guaranteed or otherwise supported by such Third Party Credit Enhancement undertakes that it has obtained the consent of such Third Party…" (Emphasis added.)

Such quoted portion of Section 3.5 of the ISDA Bilateral Amendment is also explicitly set forth in Paragraph 2(c) of the ISDA® Protocol.

E. Relief for Counterparty Entities from a Potential Breach of these Representations and Undertaking is Very Narrowly Provided in Section 3.5 of the ISDA® Bilateral Amendment; The IECA's Customized Version of the ISDA® Bilateral Amendment (i.e., the IECA Bilateral Amendment) has Revised these Provisions to Provide Much Broader Relief. Section 3.5 of the ISDA® Bilateral Amendment, as originally published on November 2, 2018, contains the statement "To the extent any such required consent has not been obtained, the relevant Covered Agreement supported by such Third Party will not be amended hereby." (Emphasis added.) This provision in Section 3.5 of the ISDA® Bilateral Amendment will afford some relief with respect to the potential risk to a Counterparty Entity that a misrepresentation under Section 3.1(d) could cause a default under the Covered Agreements amended by the ISDA® Bilateral Amendment, if the Counterparty Entity has not, in fact, obtained all of the consents required to amend its Covered Agreements.

This provision in Section 3.5 of the ISDA® Bilateral Amendment does not explicitly address the additional circumstances, not expressly requiring a Counterparty Entity to obtain a "consent" from a Third Party, that could result in a breach of the representation in Section 3.1(f). The relief-providing sentence in Section 3.5 of the ISDA® Bilateral Amendment is limited to "Third Party Credit Enhancement that expressly requires the consent" of a third party, and therefore may not be adequate to forestall a breach of the Section 3.1(f) representation if the underlying guaranty, even if not "expressly" requiring third party consent, does not, for example, contain an express waiver by the guarantor of its suretyship defenses, thereby allowing the beneficiary of the guaranty and the company whose obligations are guaranteed to amend the underlying agreement without obtaining the consent of the guarantor.

For example, California Civil Code §2819 provides: "A surety is ***exonerated***, ... if by any act of the creditor, without the consent of the surety, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal [are] ... in any way impaired or suspended." This is not a requirement of consent; it is a consequence of consent not being obtained.

Therefore, a guaranty governed by the law of any state, with a comparable suretyship doctrine to the California example shown above, that does not contain a waiver by the guarantor of suretyship defenses could result in the guarantor being "exonerated" (i.e., relieved of its obligations as a guarantor) as a result of a Counterparty Entity amending the applicable Covered Agreement by either adhering to the ISDA® Protocol or entering into the ISDA Bilateral Amendment.

As a further consequence of such exoneration, Section 5(a)(iii)(2) of the 2002 ISDA® Master Agreement provides that "the ceasing of such Credit Support Document ... to be in full force and

effect" is an Event of Default. Section 5.1(h)(iv) of the EEI Master Power Purchase and Sale Agreement (EEI Master Agreement) and Section 22.1(e)(iv) of the WSPP Agreement contain comparable provisions if the in-scope QFC under consideration is an EEI Master Agreement or a WSPP Agreement.

Plus, there are other types of provisions that could also adversely affect the continued effectiveness of the underlying Credit Enhancement or Third Party Credit Enhancement as a result of the amendment of a Covered Agreement by an ISDA Bilateral Amendment or an ISDA® Protocol. For example, a provision in a loan agreement, a guarantee, or other Credit Enhancement that specifies that any amendment of the underlying supported agreement will cause one or more elements of the loan agreement, guarantee or other Credit Enhancement to be null and void, could "adversely affect the enforceability, effectiveness or validity of any obligations owed … under any Credit Enhancement or Third Party Credit Enhancement."

To address this further issue, the IECA customized its version of the IECA Bilateral Amendment to include the following additional sentence:

"To the extent that any amendment of a Covered Agreement would "adversely affect the enforceability, effectiveness or validity of any obligations owed under any Credit Enhancement or Third Party Credit Enhancement" as specified in Section 3.1(f), the relevant Covered Agreement supported by such Credit Enhancement or Third Party Credit Enhancement will not be amended hereby."

The IECA drafting team added this provision into Section 3.5 of the IECA Bilateral Amendment in order to minimize the risk of a Counterparty Entity violating the representation in Section 3.1(f) of the IECA Bilateral Amendment. As a result, the text of Section 3.5 of the IECA Bilateral Amendment now protects Counterparty Entities from a potential breach of the representations in both Section 3.1(d) and Section 3.1(f) of the IECA Bilateral Amendment, which protection is not found in the ISDA Bilateral Amendment.

<u>Nevertheless, prior to signing the IECA Bilateral Amendment or the ISDA® Bilateral Amendment, each Counterparty Entity should perform a due diligence review of whether any consents are required to amend any of its Covered Agreements or whether any such amendment of a Covered Agreement could otherwise adversely affect the enforceability, effectiveness or validity of any obligations owed under any Credit Enhancement or Third Party Credit Enhancement.</u>

Under the QFC Stay Rules, a Covered Entity (i.e., a G-SIB and certain affiliates of such G-SIB) must require its Counterparty under any existing in-scope QFCs to amend such Covered Agreement to comply with the QFC Stay Rules of such Covered Entity's U.S. bank regulator. While the provisions of Section 3.5 of the IECA Bilateral Amendment have been revised to minimize the risk of any breach of such representations, by declaring that such QFCs are not "Covered Agreements," the Covered Entity is still obligated to amend such existing in-scope QFCs. Accordingly, some additional arrangement will need to be negotiated between the applicable Covered Entity and such Counterparty Entity in order to address the necessary amendment of such an in-scope QFC to comply with the QFC Stay Rules.

In order to minimize the risk of a breach of the representation in Section 3.1(f) of the ISDA® Bilateral Amendment, we encourage Counterparty Entities contemplating entering into the ISDA® Bilateral Amendment, to consider entering into the IECA Bilateral Amendment in lieu of the ISDA® Bilateral Amendment.

F. Relief for Counterparty Entities from a potential breach of these Representations and the related Undertaking is broadly provided in Section 3.5 of the IECA Bilateral Amendment, but such relief appears to be extremely restricted in the ISDA® Protocol. With respect to Counterparty Entities contemplating adhering to the ISDA® Protocol, we note that neither the two relief-providing sentences found in Section 3.5 of the IECA Bilateral Amendment, nor the single relief-providing sentence found in Section 3.5 of the ISDA® Bilateral Amendment, are found in the corresponding Paragraph 2(c) of the ISDA® Protocol.

In lieu of the above-referenced two relief-providing sentences or one relief-providing sentence found, respectively, in Section 3.5 of the IECA Bilateral Amendment or Section 3.5 of the ISDA® Bilateral Amendment, the definitions of "Covered Agreement" and "Covered Credit Enhancement" in the ISDA® Protocol appear to be intended to provide some comparable measure of relief from such a breach of the representations in Paragraphs 2(a)(iv) and 2(a)(vi) of the ISDA® Protocol, but, depending on how such provisions are to be interpreted, such relief in the ISDA® Protocol appears to be extremely limited when compared to the relief provided in the ISDA® Bilateral Amendment or the IECA Bilateral Amendment.

In the ISDA® Protocol, "Covered Credit Enhancement" and "Covered Agreement" are defined as follows:

"**Covered Agreement** means, with respect to an Adhering Party and a Regulated Entity, subject to an Adhering Party's right to deliver a Revocation Notice pursuant to paragraph 1(f) above:—
(a) an In-scope QFC, other than a Credit Enhancement, between such Adhering Party and such Regulated Entity, provided by such Regulated Entity to such Adhering Party or provided by such Adhering Party to such Regulated Entity, in each case, entered into by the Adhering Parties on or prior to the Implementation Date (and including all outstanding transactions thereunder);

(b) an In-scope QFC, other than a Credit Enhancement, that is an ISDA Master Agreement entered into at any time after the Implementation Date and prior to the Cut-off Date by execution by such Adhering Party and such Regulated Entity of a confirmation pursuant to which such Adhering Party and such Regulated Entity are deemed to have entered into such ISDA Master Agreement until such time as an ISDA Master Agreement has been executed by such Adhering Party and such Regulated Entity, provided that if:

(i) any consent, approval, agreement, authorization or other action of any Third Party is expressly required, under the terms of a Third Party Credit Enhancement or such ISDA Master Agreement, to amend or otherwise modify such ISDA Master Agreement; or

(ii) such Third Party Credit Enhancement or such ISDA Master Agreement includes express terms to the effect that any amendment or modification of such ISDA Master Agreement without

the consent, approval, agreement, authorization or other action of any such Third Party would void, impair or otherwise adversely affect existing or future obligations owed under such Third Party Credit Enhancement; or

(iii) such ISDA Master Agreement, if amended or modified in accordance with this Protocol without the consent, approval, agreement, authorization or other action of any such Third Party would void, impair or otherwise adversely affect existing or future obligations owed under such Third Party Credit Enhancement,

then such ISDA Master Agreement shall not be a Covered Agreement unless such consent, approval, agreement, authorization or other action has been obtained or is deemed to have been given under paragraph 2(d) above; and

(c) an Agent Covered Agreement signed by the Agent and the Regulated Entity prior to adherence by both the Regulated Entity and the Agent on behalf of the relevant Client (and including all outstanding transactions thereunder and outstanding Credit Enhancements entered into in connection therewith),

provided that an Excluded Agreement shall not be a Covered Agreement."

"**Covered Credit Enhancement** means, subject to an Adhering Party's right to deliver a Revocation Notice pursuant to paragraph 1(f) above any (a) Credit Enhancement that is an In-Scope QFC executed by two Adhering Parties or entered into by such Adhering Parties on or prior to the Implementation Date or (b) Credit Enhancement that is an In-Scope QFC executed by an Adhering Party and provided to another Adhering Party on or prior to the Implementation Date, or in the case of an Agent Covered Credit Enhancement, executed by the Agent and an Adhering Party, or by the Agent and provided to an Adhering Party or by an Adhering Party and provided to the Agent, prior to adherence by both the Adhering Party and the Agent on behalf of the relevant Client provided that if:—

(a) any consent, approval, agreement, authorization or other action of a Third Party is expressly required under the terms of such Credit Enhancement or a Third Party Credit Enhancement, to amend or otherwise modify such Credit Enhancement; or

(b) such Credit Enhancement or a Third Party Credit Enhancement includes express terms to the effect that any amendment or modification of such Credit Enhancement without the consent, approval, agreement, authorization or other action of a Third Party would void, impair or otherwise adversely affect existing or future obligations owed under such Credit Enhancement or such Third Party Credit Enhancement; or

(c) such Credit Enhancement, if amended or modified in accordance with this Protocol without the consent, approval, agreement, authorization or other action of a Third Party would void, impair or otherwise adversely affect existing or future obligations owed under a Third Party Credit Enhancement,

then such Credit Enhancement shall not be a Covered Credit Enhancement unless such consent, approval, agreement, authorization or other action has been obtained or is deemed to have been given under paragraph 2(d) above, provided further that an Excluded Agreement shall not be a Covered Credit Enhancement."

In the definition of "Covered Agreement" in the ISDA® Protocol, there are three clauses (i), (ii) and (iii), each of which describes a circumstance in which a "consent, approval, agreement, authorization or other action of a Third Party" is required to be obtained for the amendment of an "In-Scope QFC, other than a Credit Enhancement, that is an ISDA Master Agreement entered into at any time after the Implementation Date" of the ISDA® Protocol, and if such "consent, approval, agreement, authorization or other action of a Third Party" is not obtained, then such "ISDA Master Agreement shall not be a Covered Agreement." These clauses (i), (ii) and (iii), however, only apply to an ISDA Master Agreement in the unique circumstance of clause (b) of the definition of "Covered Agreement," a circumstance in which the Covered Entity and a Counterparty Entity have entered into a long-form confirmation "at any time after the Implementation Date" of the ISDA® Protocol, and such parties are "deemed to have entered into such ISDA Master Agreement."

In this unique circumstance described in clause (b) of the definition of "Covered Agreement," failure to obtain such "consent, approval, agreement, authorization or other action of a Third Party" will cause such ISDA Master Agreement to not be a Covered Agreement, thereby avoiding a breach of the representation in Paragraph 2(a)(iv) of the ISDA® Protocol and a breach of the undertaking in Paragraph 2(c) of the ISDA® Protocol that all consents necessary to amend all Covered Agreements have been obtained.

However, no such relief is available for the circumstance described in clause (a) of the definition of "Covered Agreement," which describes "an In-Scope QFC, other than a Credit Enhancement, between such Adhering Party and such Regulated Entity, provided by such Regulated Entity to such Adhering Party or provided by such Adhering Party to such Regulated Entity, in each case, entered into by the Adhering Parties on or prior to the Implementation Date…" Accordingly, if an In-Scope QFC, other than a Credit Enhancement, was entered into on or prior to the Implementation Date of the ISDA® Protocol and such In-Scope QFC requires a "consent, approval, agreement, authorization or other action of a Third Party," which was not obtained, then the Counterparty Entity has breached the representation in Paragraph 2(a)(iv) of the ISDA® Protocol and it has breached the undertaking in Paragraph 2(c) of the ISDA® Protocol.

In the definition of "Covered Credit Enhancement" in the ISDA® Protocol, a comparable exclusion is provided so that a "Credit Enhancement shall not be a Covered Credit Enhancement unless such consent, approval, agreement, authorization or other action" has been obtained and this exclusion, as described in the circumstances set forth in clauses (a), (b) and (c), does appear to apply to "any (a) Credit Enhancement that is an In-Scope QFC executed by two Adhering Parties or entered into by such Adhering Parties on or prior to the Implementation Date or (b) Credit Enhancement that is an In-Scope QFC executed by an Adhering Party and provided to another Adhering Party on or prior to the Implementation Date."

As shown above, the definitions of "Covered Agreement" and "Covered Credit Enhancement" in the ISDA® Protocol are written differently and neither definition is completely unambiguous. However, as described in the preceding four paragraphs, it is clear that the relief-providing text in these two definitions, which we believe was intended to provide some measure of relief to avoid a breach of the representations in Paragraphs 2(a)(iv) and 2(a)(vi) and the undertaking in Paragraph 2(c) are very limited and, certainly do not provide any relief for any In-Scope QFC, not a Credit Enhancement, that was entered into prior to the Implementation Date of the ISDA® Protocol.

As a result of this different approach to the definition of "Covered Agreement" in the ISDA® Protocol, this relief-providing text in the definition of "Covered Agreement" in the ISDA® Protocol provides absolutely no relief for any Covered Agreement, that is not a Credit Enhancement, if such Covered Agreement was entered into prior to the Implementation Date under the ISDA® Protocol (i.e., no relief is provided for any existing Covered Agreement, that is not a Credit Enhancement, if the Counterparty Entity, as Adhering Party under the ISDA® Protocol, has not obtained any required "consent, approval, agreement, authorization or other action of a Third Party").

In the circumstance described in the immediately preceding paragraph, a Counterparty Entity (as the applicable Adhering Party) will have breached the representation in Paragraph 2(a)(iv) and the undertaking obligation in Paragraph 2(c) of the ISDA® Protocol, which could have significant adverse consequences for the Counterparty Entity.

From our perspective, we do not understand why the relief-providing text in the definition of "Covered Agreement" of the ISDA® Protocol was so narrowly written in the ISDA® Protocol, but we have confirmed that the definitions of Covered Agreement and Covered Credit Enhancement in the ISDA® Protocol in 2018 are unchanged from the words used to define those terms in the two prior ISDA® protocols for dealers in 2014 and 2015.[30]

We therefore urge entities considering adhering to the ISDA® Protocol to pay special attention to the definition of "Covered Agreement" and its impact on the potential for a breach of the representation in Paragraph 2(a)(iv) of the ISDA® Protocol that all required consents have been obtained and a breach of the related undertaking in Paragraph 2(c) of the ISDA® Protocol.

<u>Based on the preceding paragraphs of this analysis and commentary, before electing to adhere to the ISDA® Protocol, we urge each Counterparty Entity to complete its due diligence review with respect to the representations in Paragraphs 2(a)(iv) and 2(a)(vi) of the ISDA® Protocol (which correspond to the representations in Sections 3.1(d) and 3.1(f) of this Bilateral QFC Amendment), the undertaking in Paragraph 2(c) of the ISDA® Protocol (which corresponds to the undertaking in Section 3.5 of the Bilateral QFC Amendment), and the underlying documents to be amended by such ISDA® Protocol in order to avoid (i) breaching such representations, (ii)</u>

[30] The definitions of "Covered Agreement" and "Covered Credit Enhancement" in the ISDA® Protocol, published on July 31, 2018, are unchanged from the two prior ISDA® protocols for Dealers produced by ISDA®, namely the ISDA® 2015 Universal Dealers Protocol, published on November 4, 2015, and the ISDA® 2014 Resolution Stay (Dealers) Protocol, published on November 4, 2014, which suggests that such definitions were not likely subjected to much, if any, review when the ISDA® Protocol was produced in 2018.

breaching such undertaking, and (iii) thereby giving the Covered Entity the right to declare the Counterparty Entity to be in default under the ISDA® Protocol and in default under the corresponding amended Covered Agreement(s) or amended Covered Credit Enhancement(s).

Exhibit A

QFC Stay Rules
(FRB Final Order, 82 Fed. Reg. 42882, at 42920 (September 12, 2017))

PART 252—ENHANCED PRUDENTIAL STANDARDS (REGULATION YY)

■ 5. The authority citation for part 252 continues to read as follows:

Authority: 12 U.S.C. 321–338a, 481–486, 1467a, 1818, 1828, 1831n, 1831o, 1831p–l,1831w, 1835, 1844(b), 1844(c), 3101 *et seq.,* 3101 note, 3904, 3906–3909, 4808, 5361,5362, 5365, 5366, 5367, 5368, 5371.

■ 6. Add subpart I to read as follows:

Subpart I—Requirements for Qualified Financial Contracts of Global Systemically Important Banking Organizations

Sec.
252.81 Definitions.
252.82 Applicability.
252.83 U.S. Special Resolution Regimes.
252.84 Insolvency proceedings.
252.85 Approval of enhanced creditor protection conditions.
252.86 Foreign bank multi-branch master agreements.
252.87 Identification of global systemically important foreign banking organizations.
252.88 Exclusion of certain QFCs.

Subpart I—Requirements for Qualified Financial Contracts of Global Systemically Important Banking Organizations

§ 252.81 Definitions.

For purposes of this subpart:

Central counterparty (CCP) has the same meaning as in § 217.2 of the Board's Regulation Q (12 CFR 217.2).

Chapter 11 proceeding means a proceeding under Chapter 11 of Title 11, United States Code (11 U.S.C. 1101– 74.).

Consolidated affiliate means an affiliate of another company that
(1) Either consolidates the other company, or is consolidated by the other company, on financial statements prepared in accordance with U.S. Generally Accepted Accounting Principles, the International Financial Reporting Standards, or other similar standards;
(2) Is, along with the other company, consolidated with a third company on a financial statement prepared in accordance with principles or standards referenced in paragraph (1) of this definition; or
(3) For a company that is not subject to principles or standards referenced in paragraph (1), if consolidation as described in paragraph (1) or (2) of this definition would have occurred if such principles or standards had applied.

Default right (1) Means, with respect to a QFC, any:
(i) Right of a party, whether contractual or otherwise (including, without limitation, rights incorporated by reference to any other contract, Agreement, or document, and rights afforded by statute, civil code, regulation, and common law), to liquidate, terminate, cancel, rescind, or accelerate such agreement or transactions thereunder, set off or net amounts owing in respect thereto (except rights related to same-day payment netting), exercise remedies in respect of collateral or other credit support or property related thereto (including the purchase and sale of property), demand payment or delivery thereunder or in respect thereof (other than a right or operation of a contractual provision arising solely from a change in the value of collateral or margin or a change in the amount of an economic exposure), suspend, delay, or defer payment or performance thereunder, or modify the obligations of a party thereunder, or any similar rights; and
(ii) 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 initial amount, threshold amount, variation margin, minimum transfer amount, the margin value of collateral, or any similar amount, that entitles a party to demand the return of any collateral or margin transferred by it to the other party or a custodian or that modifies a transferee's right to reuse collateral or margin (if such right previously existed), or any similar rights, in each case, other than a right or operation of a contractual provision arising solely from a change in the value of collateral or margin or a change in the amount of an economic exposure;

(2) With respect to § 252.84, does not include any right under a contract that allows 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.

Excluded bank: (1) Means a national bank, a Federal savings association, a Federal branch, a Federal agency, or an FSI that is exempted from the scope of this subpart pursuant to paragraph (b)(2) or (b)(3) of § 252.82;
(2) Does not include any entity described in paragraph (1) of this definition that is owned pursuant to section 3(a)(A)(ii) of the Bank Holding Company Act (12 U.S.C. 1842(a)(A)(ii)); is owned by a depository institution in satisfaction of debt previously contracted in good faith; is a portfolio concern, as defined under 13 CFR 107.50, that is controlled by a small business investment company, as defined in section 103(3) of the Small Business Investment Act of 1958 (15 U.S.C. 662); is owned pursuant to paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24); or is a DPC branch subsidiary.

FDI Act proceeding means a proceeding in which the Federal Deposit Insurance Corporation is appointed as conservator or receiver under section 11 of the Federal Deposit Insurance Act (12 U.S.C. 1821).

FDI Act stay period means, in connection with an FDI Act proceeding, the period of time during which a party to a QFC with a party that is subject to an FDI Act proceeding may not exercise any right that the party that is not subject to an FDI Act proceeding has to terminate, liquidate, or net such QFC, in accordance with section 11(e) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)) and any implementing regulations.

Financial counterparty means a person that is:
(1)(i) A bank holding company or an affiliate thereof; a savings and loan holding company as defined in section 10(n) of the Home Owners' Loan Act (12 U.S.C. 1467a(n)); a U.S. intermediate holding company that is established or designated for purposes of compliance with this part; or a nonbank financial company supervised by the Board;
(ii) A depository institution as defined in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)); an organization that is organized under the laws of a foreign country and that engages directly in the business of banking outside the United States; a Federal credit union or State credit union as defined in section 2 of the Federal Credit Union Act (12 U.S.C. 1752(1) & (6)); an institution that functions solely in a trust or fiduciary capacity as described in section 2(c)(2)(D) of the Bank Holding Company Act (12 U.S.C. 1841(c)(2)(D)); an industrial loan company, an industrial bank, or other similar institution described in section 2(c)(2)(H) of the Bank Holding Company Act (12 U.S.C. 1841(c)(2)(H));
(iii) An entity that is state-licensed or registered as:
(A) A credit or lending entity, including a finance company; money lender; installment lender; consumer lender or lending company; mortgage lender, broker, or bank; motor vehicle title pledge lender; payday or deferred deposit lender; premium finance company; commercial finance or lending company; or commercial mortgage company; except entities registered or licensed solely on account of financing the entity's direct sales of goods or services to customers;
(B) A money services business, including a check casher; money transmitter; currency dealer or exchange; or money order or traveler's check issuer;
(iv) A regulated entity as defined in section 1303(20) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (12 U.S.C. 4502(20)) or any entity for which the Federal Housing Finance Agency or its successor is the primary federal regulator;
(v) Any institution chartered in accordance with the Farm Credit Act of 1971, as amended, 12 U.S.C. 2002 *et seq.,* that is regulated by the Farm Credit Administration;
(vi) Any entity registered with the Commodity Futures Trading Commission as a swap dealer or major swap participant pursuant to the Commodity Exchange Act of 1936 (7 U.S.C. 1 *et seq.*), or an entity that is registered with the U.S. Securities and Exchange Commission as a security based swap dealer or a major security based swap participant pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*);
(vii) A securities holding company, with the meaning specified in section 618 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 1850a); a broker or dealer as defined in sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(4)–(5)); an investment adviser as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)); an investment company registered with the U.S. Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*); or a company that has elected to be regulated as a business development company pursuant to section 54(a) of the Investment Company Act of 1940 (15 U.S.C. 80a–53(a));
(viii) A private fund as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b– 2(a)); an entity that would be an investment company under section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a–3) but for section 3(c)(5)(C); or an entity that is deemed not to be an investment company under section 3 of the Investment Company Act of 1940 pursuant to Investment Company Act Rule 3a–7 (17 CFR 270.3a–7) of the U.S. Securities and Exchange Commission;

(ix) A commodity pool, a commodity pool operator, or a commodity trading advisor as defined, respectively, in sections 1a(10), 1a(11), and 1a(12) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(10), 1a(11), and 1a(12)); a floor broker, a floor trader, or introducing broker as defined, respectively, in sections 1a(22), 1a(23) and 1a(31) of the
Commodity Exchange Act of 1936 (7 U.S.C. 1a(22), 1a(23), and 1a(31)); or a futures commission merchant as defined in section 1a(28) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(28));
(x) An employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income and Security Act of 1974 (29 U.S.C. 1002);
(xi) An entity that is organized as an insurance company, primarily engaged in writing insurance or reinsuring risks underwritten by insurance companies, or is subject to supervision as such by a State insurance regulator or foreign
insurance regulator; or
(xii) An entity that would be a financial counterparty described in paragraphs (1)(i)–(xi) of this definition, if the entity were organized under the laws of the United States or any state thereof.
(2) The term ''financial counterparty'' does not include any counterparty that is:
(i) A sovereign entity;
(ii) A multilateral development bank; or
(iii) The Bank for International Settlements.

Financial market utility (FMU) means any person, regardless of the jurisdiction in which the person is located or organized, that manages or operates a multilateral system for the purpose of transferring, clearing, or settling payments, securities, or other financial transactions among financial institutions or between financial institutions and the person, but does not include:
(1) Designated contract markets, registered futures associations, swap data repositories, and swap execution facilities registered under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), or national securities exchanges, national securities associations, alternative trading systems, security based swap data repositories, and swap execution facilities registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), solely by reason of their providing facilities for comparison of data respecting the terms of settlement of securities or futures transactions effected on such exchange or by means of any electronic system operated or controlled by such entities, provided that the exclusions in this clause apply only with respect to the activities that require the entity to be so registered; or
(2) Any broker, dealer, transfer agent, or investment company, or any futures commission merchant, introducing broker, commodity trading advisor, or commodity pool operator, solely by reason of functions performed by such institution as part of brokerage, dealing, transfer agency, or investment company activities, or solely by reason of acting on behalf of a FMU or a participant therein in connection with the furnishing by the FMU of services to its participants or the use of services of the FMU by its participants, provided that services performed by such institution do not constitute critical risk management or processing functions of the FMU.

FSI means a state savings association or state nonmember bank (as the terms are defined in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. 1813).

Investment advisory contract means any contract or agreement whereby a person agrees to act as investment adviser to or to manage any investment or trading account of another person.

Master agreement means a QFC of the type set forth in sections 210(c)(8)(D)(ii)(XI), (iii)(IX), (iv)(IV), (v)(V), or (vi)(V) of Title II of the Dodd- Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5390(c)(8)(D)(ii)(XI), (iii)(IX), (iv)(IV), (v)(V), or (vi)(V)) or a master agreement that the Federal Deposit Insurance Corporation determines by regulation is a QFC pursuant to section 210(c)(8)(D)(i) of Title II of the act (12 U.S.C.
5390(c)(8)(D)(i)).

Person has the same meaning as in 12 CFR 225.2.

Qualified financial contract (QFC) has the same meaning as in section 210(c)(8)(D) of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5390(c)(8)(D)).

Retail customer or counterparty has the same meaning as in § 249.3 of the Board's Regulation WW (12 CFR 249.3).

Small financial institution means a company that:
(1) Is organized as a bank, as defined in section 3(a) of the Federal Deposit Insurance Act, the deposits of which are insured by the Federal Deposit Insurance Corporation; a savings association, as defined in section 3(b) of the Federal Deposit Insurance Act, the deposits of which are insured by the Federal Deposit Insurance Corporation; a farm credit system institution chartered

under the Farm Credit Act of 1971; or an insured Federal credit union or State-chartered credit union under the Federal Credit Union Act; and
(2) Has total assets of $10,000,000,000 or less on the last day of the company's most recent fiscal year.

U.S. special resolution regimes means the Federal Deposit Insurance Act (12 U.S.C. 1811–1835a) and regulations promulgated thereunder and Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5381–5394) and regulations promulgated thereunder.

§ 252.82 Applicability.
(a) *General requirement.* A covered entity must ensure that each covered QFC conforms to the requirements of §§ 252.83 and 252.84.

(b) *Covered entities.* For purposes of this subpart, a covered entity is:
(1) A bank holding company that is identified as a global systemically important BHC pursuant to 12 CFR 217.402;
(2) A subsidiary of a company identified in paragraph (b)(1) of this section other than a subsidiary that is:
(i) A national bank, a Federal savings association, a Federal branch, a Federal agency, an FSI;
(ii) A company owned pursuant to section 3(a)(A)(ii), 4(c)(2), 4(k)(4)(H), or 4(k)(4)(I) of the Bank Holding Company Act (12 U.S.C. 1842(a)(A)(ii), 1843(c)(2), 1843(k)(4)(H), 1843(k)(4)(I));
(iii) A company owned by a depository institution in satisfaction of debt previously contracted in good faith;
(iv) A portfolio concern, as defined under 13 CFR 107.50, that is controlled by a small business investment company, as defined in section 103(3) of the Small Business Investment Act of 1958 (15 U.S.C. 662); or
(v) A company the business of which is to make investments that are designed primarily to promote the public welfare, of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), including the welfare of low- and moderate-income communities or families (such as providing housing, services, or jobs)); or
(3) A U.S. subsidiary, U.S. branch, or U.S. agency of a global systemically important foreign banking organization other than a U.S. subsidiary, U.S. branch, or U.S. agency that is:
(i) A national bank, a Federal savings association, a Federal branch, a Federal agency, an FSI;
(ii) A company owned pursuant to section 3(a)(A)(ii), 4(c)(2), 4(k)(4)(H), or 4(k)(4)(I) of the Bank Holding Company Act (12 U.S.C. 1842(a)(A)(ii), 1843(c)(2), 1843(k)(4)(H), 1843(k)(4)(I));
(iii) A company owned by a depository institution in satisfaction of debt previously contracted in good faith;
(iv) A portfolio concern, as defined under 13 CFR 107.50, that is controlled by a small business investment company, as defined in section 103(3) of the Small Business Investment Act of 1958 (15 U.S.C. 662);
(v) A company the business of which is to make investments that are designed primarily to promote the public welfare, of the type permitted under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), including the welfare of low- and moderate-income communities or families (such as providing housing, services, or jobs);
(vi) A section 2(h)(2) company; or
(vii) A DPC branch subsidiary.

(c) *Covered QFCs.* For purposes of this subpart, a covered QFC is:
(1) With respect to a covered entity that is a covered entity on November 13, 2017, an in-scope QFC that the covered entity:
(i) Enters, executes, or otherwise becomes a party to on or after January 1, 2019; or
(ii) Entered, executed, or otherwise became a party to before January 1, 2019, if the covered entity or any affiliate that is a covered entity or excluded bank also enters, executes, or otherwise becomes a party to a QFC with the same person or a consolidated affiliate of the same person on or after January 1, 2019.
(2) With respect to a covered entity that becomes a covered entity after November 13, 2017, an in-scope QFC that the covered entity:
(i) Enters, executes or otherwise becomes a party to on or after the later of the date the covered entity first becomes a covered entity and January 1, 2019; or
(ii) Entered, executed, or otherwise became a party to before the date identified in paragraph (c)(2)(i) of this section with respect to the covered entity, if the covered entity or any affiliate that is a covered entity or excluded bank also enters, executes, or otherwise becomes a party to a QFC with the same person or consolidated affiliate of the same person on or after the date identified in paragraph (c)(2)(i) with respect to the covered entity.

(d) *In-scope QFCs.* An in-scope QFC is a QFC that explicitly:
(1) Restricts the transfer of a QFC (or any interest or obligation in or under, or any property securing, the QFC) from a covered entity; or
(2) Provides one or more default rights with respect to a QFC that may be exercised against a covered entity.

(e) *Rules of construction.* For purposes of this subpart:
(1) A covered entity does not become a party to a QFC solely by acting as agent with respect to the QFC; and
(2) The exercise of a default right with respect to a covered QFC includes the automatic or deemed exercise of the default right pursuant to the terms of the QFC or other arrangement.

(f) *Initial applicability of requirements for covered QFCs.* (1) With respect to each of its covered QFCs, a covered entity that is a covered entity on November 13, 2017 must conform the covered QFC to the requirements of this subpart by:
(i) January 1, 2019, if each party to the covered QFC is a covered entity or an excluded bank;
(ii) July 1, 2019, if each party to the covered QFC (other than the covered entity) is a financial counterparty that is not a covered entity or excluded bank; or
(iii) January 1, 2020, if a party to the covered QFC (other than the covered entity) is not described in paragraph (f)(1)(i) or (f)(1)(ii) of this section or if, notwithstanding paragraph (f)(1)(ii), a party to the covered QFC (other than the covered entity) is a small financial institution.
(2) With respect to each of its covered QFCs, a covered entity that is not a covered entity on November 13, 2017 must conform the covered QFC to the requirements of this subpart by:
(i) The first day of the calendar quarter immediately following 1 year after the date the covered entity first becomes a covered entity, if each party to the covered QFC is a covered entity or an excluded bank;
(ii) The first day of the calendar quarter immediately following 18 months from the date the covered entity first becomes a covered entity if each party to the covered QFC (other than the covered entity) is a financial counterparty that is not a covered entity or excluded bank; or
(iii) The first day of the calendar quarter immediately following 2 years from the date the covered entity first becomes a covered entity if a party to the covered QFC (other than the covered entity) is not described in paragraph (f)(2)(i) or (f)(2)(ii) of this section or if, notwithstanding paragraph (f)(2)(ii), a party to the covered QFC (other than the covered entity) is a small financial institution.

§ 252.83 U.S. Special Resolution Regimes.
(a) *Covered QFCs not required to be conformed.* (1) Notwithstanding § 252.82, a covered entity is not required to conform a covered QFC to the requirements of this section if:
(i) The covered QFC designates, in the manner described in paragraph (a)(2) of this section, the U.S. special resolution regimes as part of the law governing the QFC; and
(ii) Each party to the covered QFC, other than the covered entity, is:
(A) An individual that is domiciled in the United States, including any State;
(B) A company that is incorporated in or organized under the laws of the United States or any State;
(C) A company the principal place of business of which is located in the United States, including any State; or
(D) A U.S. branch or U.S. agency.
(2) A covered QFC designates the U.S. special resolution regimes as part of the law governing the QFC if the covered QFC:
(i) Explicitly provides that the covered QFC is governed by the laws of the United States or a state of the United States; and
(ii) Does not explicitly provide that one or both of the U.S. special resolution regimes, or a broader set of laws that includes a U.S. special resolution regime, is excluded from the laws governing the covered QFC.

(b) *Provisions required.* A covered QFC must explicitly provide that:
(1) In the event the covered entity becomes subject to a proceeding under a U.S. special resolution regime, the transfer of the covered QFC (and any interest and obligation in or under, and any property securing, the covered QFC) from the covered entity will be effective to the same extent as the transfer would be effective under the U.S. special resolution regime if the covered QFC (and any interest and obligation in or under, and any property securing, the covered QFC) were governed by the laws of the United States or a state of the United States; and
(2) In the event the covered entity or an affiliate of the covered entity becomes subject to a proceeding under a U.S. special resolution regime, default rights with respect to the covered QFC that may be exercised against the covered entity are permitted to be exercised to no greater extent than the default rights could be exercised under the U.S. special resolution regime if the covered QFC were governed by the laws of the United States or a state of the United States.

(c) *Relevance of creditor protection provisions.* The requirements of this section apply notwithstanding paragraphs (d), (f), and (h) of § 252.84.

§ 252.84 Insolvency proceedings.
(a) *Covered QFCs not required to be conformed.* Notwithstanding § 252.82, a covered entity is not required to conform a covered QFC to the requirements of this section if the covered QFC:

(1) Does not explicitly provide any default right with respect to the covered QFC that is related, directly or indirectly, to an affiliate of the direct party becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding; and
(2) Does not explicitly prohibit the transfer of a covered affiliate credit enhancement, any interest or obligation in or under the covered affiliate credit enhancement, or any property securing the covered affiliate credit enhancement to a transferee upon or following an affiliate of the direct party becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding or would prohibit such a transfer only if the transfer would result in the supported party being the beneficiary of the credit enhancement in violation of any law applicable to the supported party.

(b) *General prohibitions.* (1) A covered QFC may not permit the exercise of any default right with respect to the covered QFC that is related, directly or indirectly, to an affiliate of the direct party becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding.
(2) A covered QFC may not prohibit the transfer of a covered affiliate credit enhancement, any interest or obligation in or under the covered affiliate credit enhancement, or any property securing the covered affiliate credit enhancement to a transferee upon or following an affiliate of the direct party becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding unless the transfer would result in the supported party being the beneficiary of the credit enhancement in violation of any law applicable to the supported party.

(c) *Definitions relevant to the general prohibitions—*
(1) *Direct party.* Direct party means a covered entity or excluded bank that is a party to the direct QFC.
(2) *Direct QFC.* Direct QFC means a QFC that is not a credit enhancement, *provided that,* for a QFC that is a master agreement that includes an affiliate credit enhancement as a supplement to the master agreement, the direct QFC does not include the affiliate credit enhancement.
(3) *Affiliate credit enhancement.* Affiliate credit enhancement means a credit enhancement that is provided by an affiliate of a party to the direct QFC that the credit enhancement supports.

(d) *General creditor protections.* Notwithstanding paragraph (b) of this section, a covered direct QFC and covered affiliate credit enhancement that supports the covered direct QFC may permit the exercise of a default right with respect to the covered QFC that arises as a result of:
(1) The direct party becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding;
(2) The direct party not satisfying a payment or delivery obligation pursuant to the covered QFC or another contract between the same parties that gives rise to a default right in the covered QFC; or
(3) The covered affiliate support provider or transferee not satisfying a payment or delivery obligation pursuant to a covered affiliate credit enhancement that supports the covered direct QFC.

(e) *Definitions relevant to the general creditor protections—*
(1) *Covered direct QFC.* Covered direct QFC means a direct QFC to which a covered entity or excluded bank is a party.
(2) *Covered affiliate credit enhancement.* Covered affiliate credit enhancement means an affiliate credit enhancement in which a covered entity or excluded bank is the obligor of the credit enhancement.
(3) *Covered affiliate support provider.* Covered affiliate support provider means, with respect to a covered affiliate credit enhancement, the affiliate of the direct party that is obligated under the covered affiliate credit enhancement and is not a transferee.
(4) *Supported party.* Supported party means, with respect to a covered affiliate credit enhancement and the direct QFC that the covered affiliate credit enhancement supports, a party that is a beneficiary of the covered affiliate support provider's obligation(s) under the covered affiliate credit enhancement.

(f) *Additional creditor protections for supported QFCs.* Notwithstanding paragraph (b) of this section, with respect to a covered direct QFC that is supported by a covered affiliate credit enhancement, the covered direct QFC and the covered affiliate credit enhancement may permit the exercise of a default right after the stay period that is related, directly or indirectly, to the covered affiliate support provider becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding if:
(1) The covered affiliate support provider that remains obligated under the covered affiliate credit enhancement becomes subject to a receivership, insolvency, liquidation, resolution, or similar proceeding, other than a Chapter 11 proceeding;
(2) Subject to paragraph (h) of this section, the transferee, if any, becomes subject to a receivership, insolvency, liquidation, resolution, or similar proceeding;
(3) 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 with respect to:
(i) The covered affiliate credit enhancement;

(ii) All other covered affiliate credit enhancements provided by the covered affiliate support provider in support of other covered direct QFCs between the direct party and the supported party under the covered affiliate credit enhancement referenced in paragraph (f)(3)(i) of this section; and
(iii) All covered affiliate credit enhancements provided by the covered affiliate support provider in support of covered direct QFCs between the direct party and affiliates of the supported party referenced in paragraph (f)(3)(ii) of this section; or
(4) In the case of a transfer of the covered affiliate credit enhancement to a transferee,
(i) All of the ownership interests of the direct party directly or indirectly held by the covered affiliate support provider are not transferred to the transferee; or
(ii) Reasonable assurance has not been provided that all or substantially all of the assets of the covered affiliate support provider (or net proceeds therefrom), excluding any assets reserved for the payment of costs and expenses of administration in the receivership, insolvency, liquidation, resolution, or similar proceeding, will be transferred or sold to the transferee in a timely manner.

(g) *Definitions relevant to the additional creditor protections for supported QFCs—*
(1) *Stay period.* Stay period means, with respect to a receivership, insolvency, liquidation, resolution, or similar proceeding, the period of time beginning on the commencement of the proceeding and ending at the later of 5:00 p.m. (eastern time) on the business day following the date of the commencement of the proceeding and 48 hours after the commencement of the proceeding.
(2) *Business day.* Business day means a day on which commercial banks in the jurisdiction the proceeding is commenced are open for general business (including dealings in foreign exchange and foreign currency deposits).
(3) *Transferee.* Transferee means a person to whom a covered affiliate credit enhancement is transferred upon the covered affiliate support provider entering a receivership, insolvency, liquidation, resolution, or similar proceeding or thereafter as part of the resolution, restructuring, or reorganization involving the covered affiliate support provider.

(h) *Creditor protections related to FDI Act proceedings.* Notwithstanding paragraphs (b), (d), and (f) of this section, with respect to a covered direct QFC that is supported by a covered affiliate credit enhancement, the covered direct QFC and the covered affiliate credit enhancement may permit the exercise of a default right that is related, directly or indirectly, to the covered affiliate support provider becoming subject to FDI Act proceedings:
(1) After the FDI Act stay period, if the covered affiliate credit enhancement is not transferred pursuant to 12 U.S.C. 1821(e)(9)–(e)(10) and any regulations promulgated thereunder; or
(2) During the FDI Act stay period, if the default right may only be exercised so as to permit the supported party under the covered affiliate credit enhancement to suspend performance with respect to the supported party's obligations under the covered direct QFC to the same extent as the supported party would be entitled to do if the
covered direct QFC were with the covered affiliate support provider and were treated in the same manner as the covered affiliate credit enhancement.

(i) *Prohibited terminations.* A covered QFC must require, after an affiliate of the direct party has become subject to a receivership, insolvency, liquidation, resolution, or similar proceeding:
(1) The party seeking to exercise a default right to bear the burden of proof that the exercise is permitted under the covered QFC; and
(2) Clear and convincing evidence or a similar or higher burden of proof to exercise a default right.

§ 252.85 Approval of enhanced creditor protection conditions.
(a) *Protocol compliance.* (1) Unless the Board determines otherwise based on the specific facts and circumstances, a covered QFC is deemed to comply with this subpart if it is amended by the universal protocol or the U.S. protocol.
(2) A covered QFC will be deemed to be amended by the universal protocol for purposes of paragraph (a)(1) of this section notwithstanding the covered QFC being amended by one or more Country Annexes, as the term is defined
in the universal protocol.
(3) For purposes of paragraphs (a)(1) and (2) of this section:
(i) The universal protocol means the ISDA 2015 Universal Resolution Stay Protocol, including the Securities Financing Transaction Annex and Other Agreements Annex, published by the International Swaps and Derivatives Association, Inc., as of May 3, 2016, and minor or technical amendments thereto;
(ii) The U.S. protocol means a protocol that is the same as the universal protocol other than as provided in paragraphs (a)(3)(ii)(A)–(F) of this section.
(A) The provisions of Section 1 of the attachment to the universal protocol may be limited in their application to covered entities and excluded banks and may be limited with respect to resolutions under the Identified Regimes, as those regimes are identified by the universal protocol;
(B) The provisions of Section 2 of the attachment to the universal protocol may be limited in their application to covered entities and excluded banks;

(C) The provisions of Section 4(b)(i)(A) of the attachment to the universal protocol must not apply with respect to U.S. special resolution regimes;
(D) The provisions of Section 4(b) of the attachment to the universal protocol may only be effective to the extent that the covered QFCs affected by an adherent's election thereunder would continue to meet the requirements of this subpart;
(E) The provisions of Section 2(k) of the attachment to the universal protocol must not apply; and
(F) The U.S. protocol may include minor and technical differences from the universal protocol and differences necessary to conform the U.S. protocol to the differences described in paragraphs (a)(3)(ii)(A)–(E) of this section;
(iii) Amended by the universal protocol or the U.S. protocol, with respect to covered QFCs between adherents to the protocol, includes amendments through incorporation of the terms of the protocol (by reference or otherwise) into the covered QFC; and
(iv) The attachment to the universal protocol means the attachment that the universal protocol identifies as ''ATTACHMENT to the ISDA 2015 UNIVERSAL RESOLUTION STAY PROTOCOL."

(b) *Proposal of enhanced creditor protection conditions.* (1) A covered entity may request that the Board approve as compliant with the requirements of §§ 252.83 and 252.84 proposed provisions of one or more forms of covered QFCs, or proposed amendments to one or more forms of covered QFCs, with enhanced creditor protection conditions.
(2) Enhanced creditor protection conditions means a set of limited exemptions to the requirements of § 252.84(b) that is different than that of paragraphs (d), (f), and (h) of § 252.84.
(3) A covered entity making a request under paragraph (b)(1) of this section must provide:
(i) An analysis of the proposal that addresses each consideration in paragraph (d) of this section;
(ii) A written legal opinion verifying that proposed provisions or amendments would be valid and enforceable under applicable law of the relevant jurisdictions, including, in the case of proposed amendments, the validity and enforceability of the proposal to amend the covered QFCs; and
(iii) Any other relevant information that the Board requests.

(c) *Board approval.* The Board may approve, subject to any conditions or commitments the Board may set, a proposal by a covered entity under paragraph (b) of this section if the proposal, as compared to a covered QFC that contains only the limited exemptions in paragraphs of (d), (f), and (h) of § 252.84 or that is amended as provided under paragraph (a) of this section, would prevent or mitigate risks to the financial stability of the United States that could arise from the failure of a global systemically important BHC, a global systemically important foreign banking organization, or the subsidiaries of either and would protect the safety and soundness of bank holding companies and state member banks to at least the same extent.

(d) *Considerations.* In reviewing a proposal under this section, the Board may consider all facts and circumstances related to the proposal, including:
(1) Whether, and the extent to which, the proposal would reduce the resiliency of such covered entities during distress or increase the impact on U.S. financial stability were one or more of the covered entities to fail;
(2) Whether, and the extent to which, the proposal would materially decrease the ability of a covered entity, or an affiliate of a covered entity, to be resolved in a rapid and orderly manner in the event of the financial distress or failure of the entity that is required to submit a resolution plan;
(3) Whether, and the extent to which, the set of conditions or the mechanism in which they are applied facilitates, on an industry-wide basis, contractual modifications to remove impediments to resolution and increase market certainty, transparency, and equitable treatment with respect to the default rights of non-defaulting parties to a covered QFC;
(4) Whether, and the extent to which, the proposal applies to existing and future transactions;
(5) Whether, and the extent to which, the proposal would apply to multiple forms of QFCs or multiple covered entities;
(6) Whether the proposal would permit a party to a covered QFC that is within the scope of the proposal to adhere to the proposal with respect to only one or a subset of covered entities;
(7) With respect to a supported party, the degree of assurance the proposal provides to the supported party that the material payment and delivery obligations of the covered affiliate credit enhancement and the covered direct QFC it supports will continue to be performed after the covered affiliate support provider enters a receivership, insolvency, liquidation, resolution, or similar proceeding;
(8) The presence, nature, and extent of any provisions that require a covered affiliate support provider or transferee to meet conditions other than material payment or delivery obligations to its creditors;
(9) The extent to which the supported party's overall credit risk to the direct party may increase if the enhanced creditor protection conditions are not met and the likelihood that the supported party's credit risk to the direct party would decrease or remain the same if the enhanced creditor protection conditions are met; and
(10) Whether the proposal provides the counterparty with additional default rights or other rights.

§ 252.86 Foreign bank multi-branch master agreements.

(a) *Treatment of foreign bank multibranch master agreements.* With respect to a U.S. branch or U.S. agency of a global systemically important foreign banking organization, a foreign bank multi-branch master agreement that is a covered QFC solely because the master agreement permits agreements or transactions that are QFCs to be entered into at one or more U.S. branches or U.S. agencies of the global systemically important foreign banking organization will be considered a covered QFC for purposes of this subpart only with respect to such agreements or transactions booked at such U.S. branches and U.S. agencies.

(b) *Definition of foreign bank multibranch master agreements.* A foreign bank multi-branch master agreement means a master agreement that permits a U.S. branch or U.S. agency and another place of business of a foreign bank that is outside the United States to enter transactions under the agreement.

§ 252.87 Identification of global systemically important foreign banking organizations.
(a) For purposes of this subpart, a toptier foreign banking organization that is or controls a covered company (as defined at 12 CFR 243.2(f)) is a global systemically important foreign banking organization if any of the following conditions is met:
(1) The top-tier foreign banking organization determines, pursuant to paragraph (c) of this section, that the top-tier foreign banking organization has the characteristics of a global systemically important banking organization under the global methodology; or
(2) The Board, using information available to the Board, determines:
(i) That the top-tier foreign banking organization would be a global systemically important banking organization under the global methodology;
(ii) That the top-tier foreign banking organization, if it were subject to the Board's Regulation Q (part 217 of this chapter), would be identified as a global systemically important BHC under § 217.402 of the Board's Regulation Q; or
(iii) That any U.S. intermediate holding company controlled by the toptier foreign banking organization, if the U.S. intermediate holding company is or were subject to § 217.402 of the Board's Regulation Q, is or would be identified as a global systemically important BHC.

(b) Each top-tier foreign banking organization that determines pursuant to paragraph (c) of this section that it has the characteristics of a global systemically important banking organization under the global methodology must notify the Board of the determination by January 1 of each calendar year.

(c) A top-tier foreign banking organization that is or controls a covered company (as defined at 12 CFR 243.2(f)) and prepares or reports for any purpose the indicator amounts necessary to determine whether the toptier foreign banking organization is a global systemically important banking organization under the global methodology must use the data to determine whether the top-tier foreign banking organization has the characteristics of a global systemically important banking organization under the global methodology.

(d) Each top-tier foreign banking organization that controls a U.S. intermediate holding company and that meets the requirements of § 252.153(b)(5) and (6) also meets the requirements of paragraphs (b) and (c) of this section.

§ 252.88 Exclusion of certain QFCs.
(a) *Exclusion of QFCs with FMUs.* Notwithstanding § 252.82, a covered entity is not required to conform to the requirements of this subpart a covered QFC to which:
(1) A CCP is party; or
(2) Each party (other than the covered entity) is an FMU.

(b) *Exclusion of certain excluded bank QFCs.* If a covered QFC is also a covered QFC under parts 47 or 382 of this title that an affiliate of the covered entity is also required to conform pursuant to parts 47 or 382 of this title and the covered entity is:
(1) The affiliate credit enhancement provider with respect to the covered QFC, then the covered entity is required to conform the credit enhancement to the requirements of this subpart but is not required to conform the direct QFC to the requirements of this subpart; or
(2) The direct party to which the excluded bank is the affiliate credit enhancement provider, then the covered entity is required to conform the direct QFC to the requirements of this subpart but is not required to conform the credit enhancement to the requirements of this subpart.

(c) *Exclusion of certain contracts.* Notwithstanding § 252.82, a covered entity is not required to conform the following types of contracts or agreements to the requirements of this subpart:
(1) An investment advisory contract that:
(i) Is with a retail customer or counterparty;

(ii) Does not explicitly restrict the transfer of the contract (or any QFC entered pursuant thereto or governed thereby, or any interest or obligation in or under, or any property securing, any such QFC or the contract) from the covered entity except as necessary to comply with section 205(a)(2) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–5(a)(2)); and
(iii) Does not explicitly provide a default right with respect to the contract or any QFC entered pursuant thereto or governed thereby.
(2) A warrant that:
(i) Evidences a right to subscribe to or otherwise acquire a security of the covered entity or an affiliate of the covered entity; and
(ii) Was issued prior to November 13, 2017.

(d) *Exemption by order.* The Board may exempt by order one or more covered entities from conforming one or more contracts or types of contracts to one or more of the requirements of this subpart after considering:
(1) The potential impact of the exemption on the ability of the covered entity(ies), or affiliates of the covered entity(ies), to be resolved in a rapid and orderly manner in the event of the financial distress or failure of the entity that is required to submit a resolution plan;
(2) The burden the exemption would relieve; and
(3) Any other factor the Board deems relevant.

By order of the Board of Governors of the Federal Reserve System, September 1, 2017.
Ann E. Misback,
Secretary of the Board.