

any and all distributions on the debt from the proceeds of the receivership or bankruptcy estate. If any holder of the FDIC-guaranteed debt has received any distribution from the receivership or bankruptcy estate prior to the FDIC's payment under the guarantee, the guaranteed amount paid by the FDIC shall be reduced by the amount the holder has received in the distribution from the receivership or bankruptcy estate. All such demands must be made within 60 days of the occurrence of the payment default upon which the demand is based. Upon receipt of a conforming proof of claim, if timely filed, the FDIC will make a payment of the amount guaranteed.

(iii) Any demand under this subsection shall be made in writing and directed to the Director, Division of Resolutions and Receiverships, Federal Deposit Insurance Corporation, Washington, DC., and must include all supporting evidence as set forth in the previous subsections, and shall certify to the accuracy thereof.

(iv) *Demand period.* Failure of the holder of the FDIC-guaranteed debt or an authorized representative to make demand for payment within sixty (60) days of the occurrence of payment default will deprive the holder of the FDIC-guaranteed debt of all further rights and remedies with respect to the guarantee claim.

(4) *Subrogation.* Upon payment under either method under paragraph (b)(2) of this section, the FDIC will be subrogated to the rights of any debtholder against the issuer, including in respect of any insolvency proceeding, to the extent of the payments made under the guarantee.

(5) *Release and satisfaction.* Payment under paragraph (b)(2) of this section shall constitute, to the extent of payments made, satisfaction of all FDIC obligations under the debt guarantee program with respect to that debtholder or holders. Acceptance of any such payments shall constitute a release of any liability of the FDIC under the debt guarantee program with respect to those payments. Each participating entity agrees and acknowledges that it shall be indebted to the FDIC for any payments made under these provisions (including amounts paid to a

participating entity in return for its assumption of a guaranteed debt issuance) and shall honor immediately a demand by the FDIC for reimbursement therefore. A participating entity's undertakings in this regard shall be evidenced and governed by the "Master Agreement" it shall execute and submit, in connection with its election pursuant to §370.6(b) to participate in the Debt Guarantee Program.

(6) *Final determination; review of final determination.* The FDIC's determination under this paragraph shall be a final administrative determination subject to judicial review. The holder of FDIC-guaranteed debt shall have the right to seek judicial review of the FDIC's final determination in the United States District Court for the District of Columbia or the United States District Court for the federal district where the issuer's principal place of business was located. Failure of the holder of the FDIC-guaranteed debt to seek such judicial review within sixty (60) days of the date of the rendering of the final determination will deprive the holder of the FDIC-guaranteed debt of all further rights and remedies with respect to the guarantee claim.

[73 FR 72266, Nov. 26, 2008, as amended at 74 FR 9525, Mar. 4, 2009; 74 FR 12085, Mar. 23, 2009; 74 FR 26945, June 5, 2009]

PART 371—RECORDKEEPING REQUIREMENTS FOR QUALIFIED FINANCIAL CONTRACTS

Sec.

- 371.1 Scope, purpose and applicability.
- 371.2 Definitions.
- 371.3 Form, availability and maintenance of records.
- 371.4 Content of records.
- 371.5 Enforcement actions.

APPENDIX A TO PART 371—FILE STRUCTURE FOR QUALIFIED FINANCIAL CONTRACT (QFC) RECORDS

AUTHORITY: 12 U.S.C. 1819(a)(Tenth); 1820(g); 1821(e)(8)(D) and (H); 1831g; 1831i, and 1831s.

SOURCE: 73 FR 78170, Dec. 22, 2008 unless otherwise noted.

§371.1

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§371.1 Scope, purpose and applicability.

(a) *Scope*. This part applies to insured depository institutions that are in a troubled condition as defined in §371.2(f).

(b) *Purpose*. This part establishes recordkeeping requirements with respect to qualified financial contracts for insured depository institutions that are in a troubled condition.

(c) *Applicability*. An insured depository institution shall comply with this part within 60 days after written notification by the institution's appropriate Federal banking agency or the FDIC that it is in a troubled condition under §371.2(f). The FDIC may, at its discretion, grant one or more extensions of time for compliance with this part. No single extension shall be for a period of more than 30 days. An insured depository institution may request an extension of time by submitting a written request to the FDIC at least 15 days prior to the deadline for its compliance with the requirements of this part. The written request for an extension must contain a statement of the reasons why the institution cannot comply by the deadline for compliance.

§371.2 Definitions.

For purposes of this part:

(a) *Affiliate* means any company that controls, is controlled by, or is under common control with another company.

(b) *Appropriate Federal banking agency* means the agency or agencies designated under 12 U.S.C. 1813(q).

(c) *Insured depository institution* means any bank or savings association, as defined in 12 U.S.C. 1813, the deposits of which are insured by the FDIC.

(d) *Position* means the rights and obligations of a person or entity as a party to an individual transaction under a QFC.

(e) *Qualified financial contracts* (QFCs) mean those qualified financial contracts that are defined in 12 U.S.C. 1821(e)(8)(D) to include securities contracts, commodity contracts, forward contracts, repurchase agreements, and swap agreements and any other contract determined by the FDIC to be a QFC as defined in that section.

(f) *Troubled condition* means for purposes of this part, any insured depository institution that:

(1) Has a composite rating, as determined by its appropriate Federal banking agency in its most recent report of examination, of 3 (only for insured depository institutions with total consolidated assets of ten billion dollars or greater), 4, or 5 under the Uniform Financial Institution Rating System, or in the case of an insured branch of a foreign bank, an equivalent rating;

(2) Is subject to a proceeding initiated by the FDIC for termination or suspension of deposit insurance;

(3) Is subject to a cease-and-desist order or written agreement issued by the appropriate Federal banking agency, as defined in 12 U.S.C. 1813(q), that requires action to improve the financial condition of the insured depository institution or is subject to a proceeding initiated by the appropriate Federal banking agency which contemplates the issuance of an order that requires action to improve the financial condition of the insured depository institution, unless otherwise informed in writing by the appropriate Federal banking agency;

(4) Is informed in writing by the insured depository institution's appropriate Federal banking agency that it is in troubled condition for purposes of 12 U.S.C. 1831i on the basis of the institution's most recent report of condition or report of examination, or other information available to the institution's appropriate Federal banking agency; or

(5) Is determined by the appropriate Federal banking agency or the FDIC in consultation with the appropriate Federal banking agency to be experiencing a significant deterioration of capital or significant funding difficulties or liquidity stress, notwithstanding the composite rating of the institution by its appropriate Federal banking agency in its most recent report of examination.

§371.3 Form, availability and maintenance of records.

(a) *Form and availability*. The records required to be maintained by an insured depository institution for QFCs under this part—

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(1) Except for records that must be maintained through electronic files under appendix A of this part, may be maintained in any form, including in an electronic file, provided that the records are updated at least daily;

(2) If the records are not maintained in written form, will be capable of being reproduced or printed in written form; and

(3) Will be made available upon written request by the FDIC immediately at the close of processing of the institution's business day, for a period provided in that written request.

(b) *Maintenance of records after the institution is no longer in a troubled condition.* Insured depository institutions that are in a troubled condition as defined in §371.2(f) shall continue to maintain the capacity to produce records required under this part on a daily basis for a period of one year after the date that the appropriate Federal banking agency notifies the institution that it is no longer in a troubled condition as defined in §371.2(f).

(c) *Maintenance of records after an acquisition of an institution that is in a troubled condition.* If an insured depository institution that has been determined by the appropriate Federal banking agency to be in a troubled condition ceases to exist as an insured depository institution as a result of a merger or a similar transaction into an insured depository institution that is not in a troubled condition immediately following the acquisition, the obligation to maintain records under this part on a daily basis will terminate when the institution in a troubled condition ceases to exist as a separately insured depository institution.

§371.4 Content of records.

For each QFC for which an insured depository institution is a party or is subject to a master netting agreement involving the QFC, that institution must maintain records as listed under appendix A of this part.

§371.5 Enforcement actions.

Violating the terms or requirements of the recordkeeping requirements set forth in this part constitutes a violation of a regulation and subjects the participating entity to enforcement actions under Section 8 of the FDI Act (12 U.S.C. 1818).

APPENDIX A TO PART 371—FILE STRUCTURE FOR QUALIFIED FINANCIAL CONTRACT (QFC) RECORDS

QFC RECORDKEEPING REQUIREMENTS

A. Electronic Files To Be Maintained for QFCs

Any insured depository institution that is subject to this part (“institution”) must produce and maintain, in an electronic file in a format acceptable to the FDIC, the position level data found in Table A1 for all open positions in QFCs entered into by that institution or for which the institution is subject. To fulfill this requirement, not later than three business days after the institution's receipt of the written notification from the FDIC under §371.1(c) of this part, the institution must provide the FDIC with (i) a directory of the electronic files that will be used by the institution to maintain the position level data found in Table A1 and (ii) a point of contact at the institution should the FDIC have follow-up questions concerning this information. In addition, for such data, the institution must produce at the close of processing of the institution's business day a report in a format acceptable to the FDIC that aggregates the current market value and the amount of QFCs by each of the fields in Table A1. The institution must produce the report within 60 days of a written notification by the FDIC for the period specified in the notification. Notwithstanding the above requirements, for institutions in a troubled condition with less than twenty open QFC positions upon receipt of the written notification from the FDIC or the institution's appropriate Federal banking agency under part 371 and this appendix, the data required in Table A1 are not required to be recorded and maintained in electronic form as would otherwise be required by this part, so long as all required information is capable of being updated on a daily basis. If at any time after receiving such notification an institution has twenty or more open QFC positions at any point in time, it must within 60 days after that first occurs, comply with all provisions of part 371.

TABLE A1—POSITION-LEVEL DATA

| Field | Example | Data application |
|---|---|---|
| Unique position identifier and CUSIP, if available | 99999999AU | Information needed to readily track and distinguish positions; unique trade confirmation number if available. |
| Portfolio location identifier (to identify the headquarters or branch where the position is booked). | XY12Z | Information needed to determine the headquarters or branch where the position is booked (see section B.1 of this Appendix). |
| Type of position (including the general nature of the reference asset or interest rate). | Interest rate swap, credit default swap, equity swap, foreign exchange forward, securities repurchase agreement, loan repurchase agreement. | Information needed to determine the extent to which the institution is involved in any particular QFC market. |
| Purpose of the position (if the purpose consists of hedging strategies, include the general category of the item(s) hedged). | Trading, hedging mortgage servicing, hedging certificates of deposit. | Information needed to determine the role of the QFC in the institution's business strategy. |
| Termination date (date the position terminates or is expected to terminate, expire, mature, or when final performance is required). | 3/31/2010 | Information needed to determine when the institution's rights and obligations regarding the position are expected to end. |
| Next call, put, or cancellation date | 9/30/08 | Information needed to determine when a call, put, or cancellation may occur with respect to a position. |
| Next payment date | 9/30/08 | Information needed to anticipate potential upcoming obligations. |
| Current market value of the position (as of the date of the file). | \$995,000 | Information needed to determine if the institution is in or out-of-the money with the counterparty. |
| Unique counterparty identifier | AB999C | Information needed to aggregate positions by counterparty. |
| Notional or principal amount of the position (this is the notional amount, where applicable). | \$1,000,000 | Information needed to help evaluate the position. |
| Documentation status of position | Affirmed, confirmed, or neither affirmed nor confirmed. | Information needed to determine reliability of a booked position and its legal status. |

Also, the institution must maintain, in an electronic file in a format acceptable to the FDIC, the counterparty-level data found in Table A2 for all open positions in QFCs entered into by that institution. In addition, the institution must, at the FDIC's written request, produce immediately at the close of processing of the institution's business day, for a period provided in that written request, a report in a format acceptable to the FDIC that (i) itemizes, by each counterparty and by each of its affiliates, the data required in each field in Table A2, and (ii) aggregates by field, for each counterparty and its affiliates, the data required in each field in Table A2. Notwithstanding the above requirements, for

institutions in a troubled condition with less than twenty open QFC positions upon receipt of the written notification from the FDIC or the institution's appropriate Federal banking agency under part 371 and this Appendix, the data required in Table A2 is not required to be recorded in electronic form as would otherwise be required by this part, so long as all required information is maintained and is capable of being updated on a daily basis. If at any time after receiving such notification an institution has twenty or more open QFC positions at any point in time, it must within 60 days after that first occurs, comply with all provisions of part 371.

TABLE A2—COUNTERPARTY-LEVEL DATA

| Field | Example | Data Application |
|---|-----------------------------|--|
| Unique counterparty identifier | AB999C | Information needed to aggregate positions by counterparty. |
| Current market value of all positions, as aggregated and, to the extent permitted under each applicable agreement, netted ²⁹ (as of the date of the file). | (\$1,000,000) | Information needed to help evaluate the positions. |
| Current market value of all collateral and the type of collateral, if any, that the institution has posted against all positions with each counterparty. | \$950,000; U.S. treasuries. | Information needed to determine the extent to which the institution has provided collateral. |

TABLE A2—COUNTERPARTY-LEVEL DATA—Continued

| Field | Example | Data Application |
|--|---|---|
| Current market value of all collateral and the type of collateral, if any, that the counterparty has posted against all positions. | \$50,000; U.S. treasuries (\$25,000) | Information needed to determine the extent to which the counterparty has provided collateral. |
| Institution's collateral excess or deficiency with respect to all of the institution's positions, as determined under each applicable agreement including thresholds and haircuts where applicable ²⁹ . | \$50,000 | Information needed to determine the extent to which the institution has satisfied collateral requirements under each applicable agreement. |
| Counterparty's collateral excess or deficiency with respect to all of the institution's positions with each counterparty, as determined under each applicable agreement including thresholds and haircuts where applicable. | (\$50,000) | Information needed to determine the extent to which the counterparty has satisfied collateral requirements under each applicable agreement. |
| The institution's collateral excess or deficiency with respect to all the positions, based on the aggregate market value of the positions (after netting to the extent permitted under each applicable agreement) and the aggregate market value of all collateral posted by the institution against the positions, in whole or in part. | | Information needed to determine the extent to which the institution's obligations regarding the positions may be unsecured. |

²⁹ If one or more positions cannot be netted against others, they should be maintained as separate entries.³⁰ If all positions are not secured by the same collateral, then separate entries should be maintained for each position or set of positions secured by the same collateral.

*B. Other Files (in Written or Electronic Form)
To Be Maintained for QFCs*

Within 60 days after the written notification by the FDIC, the institution must, produce the following files at the close of processing of the institution's business day, for a period provided in that written notification.

1. Each institution must maintain the following files in written or electronic form:
 - A list of counterparty identifiers, with the associated counterparties and contact information;
 - A list of the affiliates of the counterparties that are also counterparties to QFC transactions with the institution or its affiliates, and the specific master netting agreements, if any, under which they are counterparties;
 - A list of affiliates of the institution that are counterparties to QFC transactions where such transactions are subject to a master agreement that also governs QFC transactions entered into by the institution. Such list must specify (i) which affiliates are direct or indirect subsidiaries of the institution and (ii) the specific master agreements under which those affiliates are counterparties to QFC transactions; and
 - A list of portfolio identifiers (see Table A1), with the associated booking locations.
2. For each QFC, the institution must maintain in a readily-accessible format all of the following documents:
 - Agreements (including master agreements and annexes, supplements or other modifications with respect to the agreements) between the institution and its counterparties that govern the QFC transactions;

- Documents related to and affirming the position;

- Active or “open” confirmations, if the position has been confirmed;
 - Credit support documents; and
 - Assignment documents, if applicable, including documents that confirm that all required consents, approvals, or other conditions precedent for such assignment(s) have been obtained or satisfied.

3. The institution must maintain:
 - A legal-entity organizational chart, showing the institution, its corporate parent and all other affiliates, if any; and
 - An organizational chart, including names and position titles, of all personnel significantly involved in QFC-related activities at the institution, its parent and its affiliates.

4. The institution must maintain a list of vendors supporting the QFC-related activities and their contact information.

PART 380—ORDERLY LIQUIDATION AUTHORITY

Subpart A—General and Miscellaneous Provisions

Sec.

- 380.1 Definitions.
- 380.2 [Reserved]
- 380.3 Treatment of personal service agreements.
- 380.4 [Reserved]