

## Federal Deposit Insurance Corporation

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(ii) A description of core business lines;

(iii) Consolidated or segment financial information regarding assets, liabilities, capital and major funding sources;

(iv) A description of derivative activities and hedging activities;

(v) A list of memberships in material payment, clearing and settlement systems;

(vi) A description of foreign operations;

(vii) The identities of material supervisory authorities;

(viii) The identities of the principal officers;

(ix) A description of the corporate governance structure and processes related to resolution planning;

(x) A description of material management information systems; and

(xi) A description, at a high level, of the covered company's resolution strategy, covering such items as the range of potential purchasers of the covered company, its material entities, and its core business lines.

(3) *Public section of reduced resolution plans.* The public section of a reduced resolution plan shall consist of an executive summary of the resolution plan that describes the business of the covered company and includes, to the extent material to an understanding of the covered company:

(i) The names of material entities;

(ii) A description of core business lines;

(iii) The identities of the principal officers; and

(iv) A description, at a high level, of the covered company's resolution strategy, referencing the applicable resolution regimes for its material entities.

(d) *Confidential treatment of resolution plans.* (1) The confidentiality of resolution plans and related materials shall be determined in accordance with applicable exemptions under the Freedom of Information Act (5 U.S.C. 552(b)), 12 CFR part 261 (the Board's Rules Regarding Availability of Information), and 12 CFR part 309 (the Corporation's Disclosure of Information rules).

(2) Any covered company submitting a resolution plan or related materials pursuant to this part that desires con-

fidential treatment of the information under 5 U.S.C. 552(b)(4), 12 CFR part 261 (the Board's Rules Regarding Availability of Information), and 12 CFR part 309 (the Corporation's Disclosure of Information rules) may file a request for confidential treatment in accordance with those rules.

(3) To the extent permitted by law, information comprising the Confidential Section of a resolution plan will be treated as confidential.

(4) To the extent permitted by law, the submission of any nonpublic data or information under this part shall not constitute a waiver of, or otherwise affect, any privilege arising under Federal or state law (including the rules of any Federal or state court) to which the data or information is otherwise subject. Privileges that apply to resolution plans and related materials are protected pursuant to section 18(x) of the Federal Deposit Insurance Act (12 U.S.C. 1828(x)).

### § 381.12 Enforcement.

The Board and Corporation may jointly enforce an order jointly issued by the Board and Corporation under § 381.9(a) or (c). The Board, in consultation with the Corporation, may take any action to address any violation of this part by a covered company under section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818).

## PART 382—RESTRICTIONS ON QUALIFIED FINANCIAL CONTRACTS

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382.7 Exclusion of certain QFCs.

AUTHORITY: 12 U.S.C. 1816, 1818, 1819, 1820(g), 1828, 1828(m), 1831n, 1831o, 1831p-1, 1831(u), 1831w.

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### § 382.1 Definitions.

*Affiliate* has the same meaning as in section 12 U.S.C. 1813(w).

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*Central counterparty (CCP)* has the same meaning as in §324.2 of this chapter.

*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.

*Control* has the same meaning as in section 3(w) of the Federal Deposit Insurance Act (12 U.S.C. 1813(w)).

*Covered bank* means a covered bank as defined by the Office of the Comptroller of the Currency in 12 CFR part 47.

*Covered entity* means a covered entity as defined by the Federal Reserve Board in 12 CFR 252.82.

*Covered QFC* means a QFC as defined in §382.2 of this part.

*Credit enhancement* means a QFC of the type set forth in sections 210(c)(8)(D)(ii)(XII), (iii)(X), (iv)(V), (v)(VI), or (vi)(VI) of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5390(c)(8)(D)(ii)(XII), (iii)(X), (iv)(V), (v)(VI), or (vi)(VI)) or a credit enhancement that the Federal Deposit Insurance Corporation determines 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)).

*Default right* means:

(1) 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, agree-

ment, 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 §382.4, 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.

*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

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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 12 CFR 252.153; or a nonbank financial institution supervised by the Board of Governors of the Federal Reserve System under Title I of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5323);

(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) and (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. 2001 *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 within 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)(45)); 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 section 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 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 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) through (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.

*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 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)).

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*Retail customer or counterparty* has the same meaning as in § 329.3 of this chapter.

*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.

*State* means any State, commonwealth, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, or the United States Virgin Islands.

*Subsidiary of a covered FSI* means any subsidiary of a covered FSI as defined in 12 U.S.C. 1813(w).

*U.S. agency* has the same meaning as the term "agency" in 12 U.S.C. 3101.

*U.S. branch* has the same meaning as the term "branch" in 12 U.S.C. 3101.

*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.

[82 FR 50261, 50267, Oct. 30, 2017; 82 FR 61443, Dec. 28, 2017]

### § 382.2 Applicability.

(a) *General requirement.* A covered FSI must ensure that each covered QFC conforms to the requirements of §§ 382.3 and 382.4 of this part.

(b) *Covered FSI.* For purposes of this part a covered FSI means

(1) Any State savings association or State non-member bank (as defined in the Federal Deposit Insurance Act, 12

U.S.C. 1813(e)(2)) that is a direct or indirect subsidiary of:

(i) A global systemically important bank holding company that has been designated pursuant to § 252.82(a)(1) of the Federal Reserve Board's Regulation YY (12 CFR 252.82); or

(ii) A global systemically important foreign banking organization that has been designated pursuant to subpart I of 12 CFR part 252 (FRB Regulation YY), and

(2) Any subsidiary of a covered FSI other than:

(i) A subsidiary that is owned in satisfaction of debt previously contracted in good faith;

(ii) A portfolio concern that is 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 that has received from the Small Business Administration notice to proceed to qualify for a license as a Small Business Investment Company, which notice or license has not been revoked; or

(iii) A subsidiary designed 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- to moderate-income communities or families (such as providing housing, services, or jobs).

(c) *Covered QFCs.* For purposes of this part, a covered QFC is:

(1) With respect to a covered FSI that is a covered FSI on January 1, 2018, an in-scope QFC that the covered FSI:

(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 FSI or any affiliate that is a covered entity, covered bank, or covered FSI 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 FSI that becomes a covered FSI after January 1, 2018, an in-scope QFC that the covered FSI:

(i) Enters, executes, or otherwise becomes a party to on or after the later

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of the date the covered FSI first becomes a covered FSI 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 FSI, if the covered FSI or any affiliate that is a covered entity, covered bank or covered FSI 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) of this section with respect to the covered FSI.

(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 FSI; or

(2) Provides one or more default rights with respect to a QFC that may be exercised against a covered FSI.

(e) *Rules of construction.* For purposes of this part,

(1) A covered FSI 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 FSI that is a covered FSI on January 1, 2018 must conform the covered QFC to the requirements of this part by:

(i) January 1, 2019, if each party to the covered QFC is a covered entity, covered bank, or covered FSI.

(ii) July 1, 2019, if each party to the covered QFC (other than the covered FSI) is a financial counterparty that is not a covered entity, covered bank or covered FSI; or

(iii) January 1, 2020, if a party to the covered QFC (other than the covered FSI) is not described in paragraph (f)(1)(i) or (ii) of this section or if, notwithstanding paragraph (f)(1)(ii), a party to the covered QFC (other than the covered FSI) is a small financial institution.

(2) With respect to each of its covered QFCs, a covered FSI that is not a cov-

ered FSI on January 1, 2018 must conform the covered QFC to the requirements of this part by:

(i) The first day of the calendar quarter immediately following 1 year after the date the covered FSI first becomes a covered FSI if each party to the covered QFC is a covered entity, covered bank, or covered FSI;

(ii) The first day of the calendar quarter immediately following 18 months from the date the covered FSI first becomes a covered FSI if each party to the covered QFC (other than the covered FSI) is a financial counterparty that is not a covered entity, covered bank or covered FSI; or

(iii) The first day of the calendar quarter immediately following 2 years from the date the covered FSI first becomes a covered FSI if a party to the covered QFC (other than the covered FSI) is not described in paragraph (f)(2)(i) or (ii) of this section or if, notwithstanding paragraph (f)(2)(ii), a party to the covered QFC (other than the covered FSI) is a small financial institution.

(g) *Rights of receiver unaffected.* Nothing in this part shall in any manner limit or modify the rights and powers of the FDIC as receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Act, including, without limitation, the rights of the receiver to enforce provisions of the Federal Deposit Insurance Act or Title II of the Dodd-Frank Act that limit the enforceability of certain contractual provisions.

[82 FR 50261, Oct. 30, 2017; 82 FR 61443, Dec. 28, 2017]

§ 382.3 U.S. special resolution regimes.

(a) *Covered QFCs not required to be conformed.* (1) Notwithstanding § 382.2 of this part, a covered FSI 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 FSI, 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 FSI 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 FSI 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 FSI or an affiliate of the covered FSI 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 FSI 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 § 382.4(d), (f), and (h) of this part.

#### § 382.4 Insolvency proceedings.

This section does not apply to proceedings under Title II of the Dodd-Frank Act.

(a) *Covered QFCs not required to be conformed.* Notwithstanding § 382.2 of this part, a covered FSI 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, covered

bank, or covered FSI 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, covered bank, or covered FSI is a party.

(2) *Covered affiliate credit enhancement.* Covered affiliate credit enhancement means an affiliate credit enhancement in which a covered entity, covered bank, or covered FSI 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 affil-

iate 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 p.m. (EST) 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 (d) and (f) of this section, which are inapplicable to FDI Act proceedings, and 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 that is related, directly or

indirectly, to the covered affiliate support provider becoming subject to FDI Act proceedings only in the following circumstances:

(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)–(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.

#### § 382.5 Approval of enhanced creditor protection conditions.

(a) *Protocol compliance.* (1) Unless the FDIC determines otherwise based on the specific facts and circumstances, a covered QFC is deemed to comply with this part 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

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minor or technical amendments there-  
to;

(ii) The U.S. protocol means a pro-  
tocol that is the same as the universal  
protocol other than as provided in  
paragraphs (a)(3)(ii)(A) through (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, covered banks, and  
covered FSIIs and may be limited with  
respect to resolutions under the Ident-  
ified 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, covered banks, and  
covered FSIIs;

(C) The provisions of Section  
4(b)(i)(A) of the attachment to the uni-  
versal protocol must not apply with re-  
spect to U.S. special resolution re-  
gimes;

(D) The provisions of Section 4(b) of  
the attachment to the universal pro-  
tocol may only be effective to the ex-  
tent that the covered QFCs affected by  
an adherent's election thereunder  
would continue to meet the require-  
ments of this part;

(E) The provisions of Section 2(k) of  
the attachment to the universal pro-  
tocol 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 para-  
graphs (a)(3)(ii)(A) through (E) of this  
section.

(iii) Amended by the universal pro-  
tocol 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 UNI-  
VERSAL RESOLUTION STAY PRO-  
TOCOL."

(b) *Proposal of enhanced creditor pro-  
tection conditions.* (1) A covered FSI  
may request that the FDIC approve as  
compliant with the requirements of

§§ 382.3 and 382.4 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 con-  
ditions means a set of limited exemp-  
tions to the requirements of § 382.4(b) of  
this part that is different than that of  
§ 382.4(d), (f), and (h).

(3) A covered FSI making a request  
under paragraph (b)(1) of this section  
must provide

(i) An analysis of the proposal that  
addresses each consideration in para-  
graph (d) of this section;

(ii) A written legal opinion verifying  
that proposed provisions or amend-  
ments would be valid and enforceable  
under applicable law of the relevant ju-  
risdictions, 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 FDIC requests.

(c) *FDIC approval.* The FDIC may ap-  
prove, subject to any conditions or  
commitments the FDIC may set, a pro-  
posal by a covered FSI under paragraph  
(b) of this section if the proposal, as  
compared to a covered QFC that con-  
tains only the limited exemptions in  
§ 382.4(d), (f), and (h) or that is amended  
as provided under paragraph (a) of this  
section, would promote the safety and  
soundness of covered FSIIs by miti-  
gating the potential destabilizing ef-  
fects of the resolution of a global sig-  
nificantly important banking entity  
that is an affiliate of the covered FSI  
to at least the same extent.

(d) *Considerations.* In reviewing a pro-  
posal under this section, the FDIC may  
consider all facts and circumstances  
related to the proposal, including:

(1) Whether, and the extent to which,  
the proposal would reduce the resili-  
ency of such covered FSIIs during dis-  
tress or increase the impact on U.S. fi-  
nancial stability were one or more of  
the covered FSIIs to fail;

(2) Whether, and the extent to which,  
the proposal would materially decrease  
the ability of a covered FSI, or an affil-  
iate of a covered FSI, to be resolved in  
a rapid and orderly manner in the

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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 FSIs;

(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 FSIs;

(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.

### § 382.6 [Reserved]

### § 382.7 Exclusion of certain QFCs.

(a) *Exclusion of QFCs with FMUs.* Notwithstanding § 382.2 of this part, a covered FSI is not required to conform to the requirements of this part a covered QFC to which:

(1) A CCP is party; or

(2) Each party (other than the covered FSI) is an FMU.

(b) *Exclusion of certain covered entity and covered bank QFCs.* If a covered QFC is also a covered QFC under part 252 or part 47 of this title that an affiliate of the covered FSI is also required to conform pursuant to part 252 or part 47 and the covered FSI is:

(1) The affiliate credit enhancement provider with respect to the covered QFC, then the covered FSI is required to conform the credit enhancement to the requirements of this part but is not required to conform the direct QFC to the requirements of this part; or

(2) The direct party to which the covered entity or covered bank is the affiliate credit enhancement provider, then the covered FSI is required to conform the direct QFC to the requirements of this part but is not required to conform the credit enhancement to the requirements of this part.

(c) *Exclusion of certain contracts.* Notwithstanding § 382.2 of this part, a covered FSI is not required to conform the following types of contracts or agreements to the requirements of this part:

(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 into 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 FSI 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

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covered FSI or an affiliate of the covered FSI; and

(ii) Was issued prior to January 1, 2018.

(d) *Exemption by order.* The FDIC may exempt by order one or more covered FSI(s) from conforming one or more contracts or types of contracts to one or more of the requirements of this part after considering:

(1) The potential impact of the exemption on the ability of the covered FSI(s), or affiliates of the covered FSI(s), 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 FDIC deems relevant.

**PART 390—REGULATIONS TRANSFERRED FROM THE OFFICE OF THRIFT SUPERVISION**

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**Subpart X–Z [Reserved]**

AUTHORITY: 12 U.S.C. 1819.  
 Subpart Q also issued under 12 U.S.C. 1462; 1462a; 1463; 1464.  
 Subpart W also issued under 12 U.S.C. 1462a; 1463; 1464; 15 U.S.C. 78c; 78l; 78m; 78n; 78p; 78w.  
 SOURCE: 76 FR 47655, Aug. 5, 2011, unless otherwise noted.

**Subparts A–P [Reserved]**