

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF THE TREASURY

### Office of the Comptroller of the Currency

#### 12 CFR Parts 3, 47 and 50

[Docket ID OCC–2016–0009]

RIN 1557–AE05

### Mandatory Contractual Stay Requirements for Qualified Financial Contracts

**AGENCY:** Office of the Comptroller of the Currency, Treasury (OCC).

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The OCC is proposing to add a new part to its rules to enhance the resilience and the safety and soundness of federally chartered and licensed financial institutions by addressing concerns relating to the exercise of default rights of certain financial contracts that could interfere with the orderly resolution of certain systemically important financial firms. Under this proposed rule, a covered bank would be required to ensure that a covered qualified financial contract (1) contains a contractual stay-and-transfer provision analogous to the statutory stay-and-transfer provision imposed under Title II of the Dodd-Frank Act and in the Federal Deposit Insurance Act, and (2) limits the exercise of default rights based on the insolvency of an affiliate of the covered bank. In addition, this proposed rule would make conforming amendments to the OCC's Capital Adequacy Standards and the Liquidity Risk Measurement Standards in its regulations. The requirements of this proposed rule are substantively identical to those contained in a notice of proposed rulemaking issued by the Board of Governors of the Federal Reserve System on May 3, 2016.

**DATES:** Comments must be received by October 18, 2016.

**ADDRESSES:** Because paper mail in the Washington, DC area and at the OCC is subject to delay, commenters are

encouraged to submit comments through the Federal eRulemaking Portal or email, if possible. Please use the title “Mandatory Contractual Stay Requirements for Qualified Financial Contracts” to facilitate the organization and distribution of the comments. You may submit comments by any of the following methods:

- **Federal eRulemaking Portal—“Regulations.gov”:** Go to [www.regulations.gov](http://www.regulations.gov). Enter “Docket ID OCC–2016–0009” in the Search Box and click “Search.” Click on “Comment Now” to submit public comments.

- Click on the “Help” tab on the *Regulations.gov* home page to get information on using *Regulations.gov*, including instructions for submitting public comments.

- **Email:** [regs.comments@occ.treas.gov](mailto:regs.comments@occ.treas.gov).

- **Mail:** Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency, 400 7th Street SW., Suite 3E–218, Mail Stop 9W–11, Washington, DC 20219.

- **Hand Delivery/Courier:** 400 7th Street SW., Suite 3E–218, Mail Stop 9W–11, Washington, DC 20219.

- **Fax:** (571) 465–4326.

**Instructions:** You must include “OCC” as the agency name and “Docket ID OCC–2016–0009” in your comment. In general, OCC will enter all comments received into the docket and publish them on the *Regulations.gov* Web site without change, including any business or personal information that you provide such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this rulemaking action by any of the following methods:

- **Viewing Comments Electronically:** Go to [www.regulations.gov](http://www.regulations.gov). Enter “Docket ID OCC–2016–0009” in the Search box and click “Search.” Click on “Open Docket Folder” on the right side of the screen and then “Comments.” Comments can be filtered by clicking on “View All” and then using the filtering tools on the left side of the screen.

- Click on the “Help” tab on the *Regulations.gov* home page to get information on using *Regulations.gov*. Supporting materials may be viewed by clicking on “Open Docket Folder” and then clicking on “Supporting Documents.” The docket may be viewed after the close of the comment period in the same manner as during the comment period.

- **Viewing Comments Personally:** You may personally inspect and photocopy comments at the OCC, 400 7th Street SW., Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 649–6700 or, for persons who are deaf or hard of hearing, TTY, (202) 649–5597. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect and photocopy comments.

#### FOR FURTHER INFORMATION CONTACT:

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## I. Introduction

In the wake of the financial crisis of 2007–08, U.S. and international financial regulators have placed increased focus on improving the resolvability of large, complex financial institutions that operate in multiple jurisdictions, often called global systemically important banking organizations (GSIBs).

In connection with these ongoing efforts, on May 3, 2016, the Board of Governors of the Federal Reserve System (FRB or Board) issued a notice of proposed rulemaking (NPRM) pursuant to section 165 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) as part of its ongoing efforts to improve the resolvability of U.S. GSIBs and foreign GSIBs that operate in the United States (collectively, “covered entities”<sup>1</sup>).<sup>2</sup> The OCC is issuing this parallel proposed rule applicable to OCC-regulated institutions that are part of a covered entity under the FRB NPRM. The OCC intends this proposed rule to complement and work in tandem with the FRB NPRM.

The purpose of the Board’s NPRM is to improve the resolvability of covered entities by “limiting disruptions to a failed GSIB through its financial contracts with other companies.”<sup>3</sup> Specifically, the Board’s NPRM addresses a threat to financial stability posed by the potential disorderly exercise of default rights contained in several important categories of financial contracts collectively known as “qualified financial contracts” (QFCs).<sup>4</sup>

<sup>1</sup> The FRB NPRM applies to “covered entities.” The term “covered entity” includes: any U.S. top-tier bank holding company identified as a GSIB under the Board’s NPRM establishing risk-based capital surcharges for GSIBs, set forth at 12 CFR 217.402; any subsidiary of such bank holding company (other than a “covered bank”); and any U.S. subsidiary, U.S. branch, or U.S. agency of a foreign GSIB (other than a “covered bank”). See FRB NPRM § 252.82. The term “covered entity” does not include “covered banks,” which are instead covered by the provisions of this proposed rule.

<sup>2</sup> “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,” 81 FR 29691, 29170 (May 11, 2016) (FRB Proposal, FRB NPRM, Board’s Proposal, or Board’s NPRM).

<sup>3</sup> *Id.* at 29170.

<sup>4</sup> *Id.* The Board’s Proposal adopts the definition of “qualified financial contract” set out in section 210(c)(8)(D) of the Dodd-Frank Act, 12 U.S.C. 5390(c)(8)(D). See Board’s Proposal § 252.81. This definition includes, among other things, derivatives, repurchase agreements (also known as “repos”) and reverse repos, and securities lending and borrowing agreements.

As described more fully in the Board’s NPRM and in the Background section of this preamble, this threat to financial stability arises because GSIBs are interconnected with other financial firms, including other GSIBs, through large volumes of QFCs. The failure of one entity within a GSIB can trigger disruptive terminations of these contracts if the counterparties of both the failed entity and its affiliates exercise their contractual rights to terminate the contracts and liquidate collateral.<sup>5</sup> These terminations, especially if counterparties lose confidence in the GSIB quickly, and in large numbers, can destabilize the financial system and potentially spark a financial crisis through several channels. For example, they can destabilize the failed entity’s otherwise solvent affiliates, causing them to weaken or fail with adverse consequences to their counterparties that can result in a chain reaction that ripples through the financial system. They also may result in “fire sales” of large volumes of financial assets, in particular, the collateral that secures the contracts, which can in turn weaken and cause stress for other firms by depressing the value of similar assets that they hold.

As discussed in detail in the Section I.B., the OCC, as the primary regulator for national banks, Federal savings associations (FSAs), and Federal branches and agencies, has a strong safety and soundness interest in preventing such a disorderly termination of QFCs upon a GSIB’s entry into resolution proceedings. QFCs are typically entered into by various operating entities in the GSIB group, which will often include a large depository institution that is subject to the OCC’s supervision. These OCC-supervised entities are some of the largest entities by asset size in the GSIB group, and often a party to large volumes of QFCs, making these entities highly interconnected with other large financial firms.<sup>6</sup> The exercise of default rights against an otherwise healthy national bank, FSA, or Federal branch or agency resulting from the failure of its affiliate, for example its top-tier U.S. holding company, may cause it to weaken or fail, and in turn spread

<sup>5</sup> As used in this proposed rule, the term “GSIB” can refer to any entity in the GSIB group, including the top-tier parent entity or any subsidiary thereof. The term “GSIB entity” is sometimes used to refer to an individual component of the GSIB group.

<sup>6</sup> 81 FR 29619, 29172 (“From the standpoint of financial stability, the most important of these operating subsidiaries are generally a U.S. insured depository institution, a U.S. broker-dealer, and similar entities organized in other countries.”).

contagion throughout the financial system, including among the system of federally chartered and licensed institutions that the OCC supervises, by causing a chain of failures by other financial institutions—including other national banks, FSAs, or Federal branches or agencies—that are its QFC counterparties. Furthermore, if an OCC-supervised entity itself were to fail, it is imperative that the default rights triggered by such an event are exercised in an orderly manner, both by domestic and foreign counterparties, to ensure that contagion does not spread to other federally chartered and licensed institutions and beyond throughout the Federal banking system.<sup>7</sup>

Accordingly, OCC-supervised affiliates or branches of U.S. or foreign GSIBs are exposed, through the interconnectedness of their QFCs and their affiliates’ QFCs, to destabilizing effects if their counterparties or the counterparties of their affiliates exercise default rights upon the entry into resolution of the covered bank itself or its GSIB affiliate. These potential destabilizing effects are best addressed by requiring all GSIB entities to amend their QFCs to include contractual provisions aimed at avoiding such destabilization. As the primary supervisor of covered banks, the OCC has a significant interest in preventing or mitigating these destabilizing effects; otherwise, the result will be adverse to safety and soundness of covered banks individually and collectively, with the potential for spill-over beyond GSIB-affiliated banks and Federal branches and agencies to the Federal banking system.

As described in the Board’s NPRM, measures aimed at improving financial stability and the probability of a successful resolution of GSIBs likely will affect the operations of GSIB subsidiaries. In most cases, the largest GSIB subsidiary by asset size is a national bank supervised by the OCC. While the ultimate aim of the Board’s NPRM and this proposed rule is focused on the resolution of a GSIB, the proposed preventative measures would be required to be implemented by GSIBs while they are going concerns. The OCC has an inherent supervisory interest in ensuring that measures aimed at improving resolvability in the event of a GSIB’s failure are also consistent with

<sup>7</sup> As used in this proposed rule, the term “Federal banking system” refers to all OCC-supervised entities, including national banks, Federal savings associations, and Federal branches and agencies. Accordingly, references to impacts on the Federal banking system refer to how destabilization can adversely affect all such entities, not just covered banks.

the safe and sound operation of the OCC-supervised subsidiary as a going concern. Accordingly, to ensure that the QFCs entered into by such entities do not threaten the stability or safety and soundness of covered banks individually or collectively, the OCC is issuing this proposed rule, which imposes substantively identical requirements contained in the FRB NPRM on national banks, FSAs, and Federal branches and agencies (covered banks). The OCC worked closely with the FRB to develop this proposed rule.<sup>8</sup> In addition, the OCC plans to work with the FRB to coordinate the development of the final rule and may share comments received in response to the proposed rule, as appropriate.

## II. Background

The following background discussion describes in detail the financial contracts that are the subject of this proposed rule, the default rights often contained in such contracts, and impacts on financial stability resulting from the exercise of such default rights. This section also provides background information on the resolution strategies for GSIBs and how they fit within the resolution frameworks in the United States.<sup>9</sup>

### A. Qualified Financial Contracts, Default Rights, and Financial Stability

The proposed rule covers QFCs, which include swaps, other derivative contracts, repurchase agreements (repos) and reverse repos, and securities lending and borrowing agreements. GSIB entities enter into QFCs to borrow money to finance their investments, to lend money, to manage risk, to attempt to profit from market movements, and to enable their clients and counterparties to perform these financial activities.

QFCs play a role in economically valuable financial intermediation when markets are functioning normally. But they are also a major source of financial interconnectedness, which may pose a threat to financial stability in times of stress. This proposed rule, along with the FRB NPRM, focuses on one of the most serious threats to both a global systemically important bank holding company (BHC) and its covered banks subsidiaries—the failure of a GSIB that is party to large volumes of QFCs, which are likely to involve QFCs with

counterparties that are themselves systemically important.

By contract, a party to a QFC generally has the right to take certain actions if its counterparty defaults on the QFC (that is, if it fails to meet certain contractual obligations). Common default rights include the right to suspend performance of the non-defaulting party's obligations, the right to terminate or accelerate the contract, the right to set off amounts owed between the parties, the right to seize and liquidate the defaulting party's collateral. In general, default rights allow a party to a QFC to reduce the credit risk associated with the QFC by granting it the right to exit the QFC and thereby reduce its exposure to its counterparty upon the occurrence of a specified condition, such as its counterparty's entry into resolution proceedings.

This proposed rule focuses on two distinct scenarios in which a non-defaulting party to a QFC is commonly able to exercise default rights. These two scenarios involve a default that occurs when either the defaulting party to the QFC or an affiliate of that party enters a resolution proceeding.<sup>10</sup>

The first scenario occurs when a legal entity that is itself a party to the QFC enters a resolution proceeding. This proposed rule refers to such a scenario as a “direct default” and refers to the contractual default rights that arise from a direct default as “direct default rights.”<sup>11</sup>

The second scenario occurs when an affiliate of the legal entity that is a direct party to the QFC (such as the direct party's parent holding company) enters a resolution proceeding. This proposed rule refers to such a scenario as a “cross-default” and refers to contractual

default rights that arise from a cross-default as “cross-default rights.” For example, a GSIB parent entity might guarantee the derivatives transactions of its subsidiaries and those derivatives contracts could contain cross-default rights against a subsidiary of the GSIB that would be triggered by the bankruptcy filing of the GSIB parent entity even though the subsidiary continues to meet all of its financial obligations.

Direct default rights and cross-default rights are referred to collectively in this proposed rule as “default rights.”

As noted in the FRB NPRM, if a significant number of QFC counterparties exercise their default rights precipitously and in a manner that would impede an orderly resolution of a GSIB, all QFC counterparties and the broader financial system, including institutions supervised by the OCC, may potentially be worse off and less stable.

The destabilization can occur in several ways. First, counterparties' exercise of default rights may drain liquidity from the troubled GSIB, forcing it to sell off assets at depressed prices, both because the sales must be done on a short timeframe and because the elevated supply will push prices down. These asset “fire sales” may cause or deepen balance-sheet insolvency at the GSIB, reducing the amount that its other creditors can recover and thereby imposing losses on those creditors and threatening their solvency (and, indirectly, the solvency of their own creditors, and so on). The GSIB may also respond by withdrawing liquidity that it had offered to other firms, forcing them to engage in asset fire sales. Alternatively, if the GSIB's QFC counterparty itself liquidates the QFC collateral at fire sale prices, the effect will again be to weaken the GSIB's balance sheet, because the debt satisfied by the liquidation would be less than what the value of the collateral would have been outside the fire sale context. The counterparty's setoff rights may allow it to further drain the GSIB's capital and liquidity by withholding payments owed to the GSIB. The GSIB may also have rehypothecated collateral that it received from QFC counterparties, for instance in back-to-back repo or securities lending transactions, in which case demands from those counterparties for the early return of their rehypothecated collateral could be especially disruptive.

The asset fire sales can also spread contagion throughout the financial system by increasing volatility and by lowering the value of similar assets held by other financial institutions, potentially causing them to suffer

<sup>8</sup> 12 U.S.C. 5365(b)(4) (requiring the Board to consult with each Financial Stability Oversight Council (FSOC) member that primarily supervises any subsidiary when any prudential standard is likely to have a “significant impact” on such subsidiary).

<sup>9</sup> See 81 FR 29169, 29170–73 (May 11, 2016), from which this discussion is adapted.

<sup>10</sup> This preamble uses phrases such as “entering a resolution proceeding” and “going into resolution” to refer to the concept of “becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding.” These phrases refer to proceedings established by law to deal with a failed legal entity. In the context of the failure of a global systemically important bank holding company, the most relevant types of resolution proceeding include: (1) For most U.S.-based legal entities, the bankruptcy process established by the U.S. Bankruptcy Code (Title 11, United States Code); (2) for U.S. insured depository institutions, a receivership administered by the Federal Deposit Insurance Corporation (FDIC) under the Federal Deposit Insurance Act (12 U.S.C. 1821); (3) for companies whose “resolution under otherwise applicable Federal or State law would have serious adverse effects on the financial stability of the United States,” the Dodd-Frank Act's Orderly Liquidation Authority (12 U.S.C. 5383(b)(2)); and, (4) for entities based outside the United States, resolution proceedings created by foreign law.

<sup>11</sup> For convenience, this preamble uses the general term “default” to refer specifically to a default that occurs when a QFC party or its affiliate enters a resolution proceeding.

diminished market confidence in their own solvency, mark-to-market losses, margin calls, and creditor runs (which could lead to further fire sales, worsening the contagion). Finally, the early terminations of derivatives that the defaulting GSIB relied on to hedge its risks could leave major risks unhedged, increasing the GSIB's probable losses going forward.

Where there are significant simultaneous terminations and these effects occur contemporaneously, such as upon the failure of a GSIB that is party to a large volume of QFCs, they may pose a substantial risk to financial stability. In short, QFC continuity is important for the orderly resolution of a GSIB so that the instability caused by asset fire sales can be avoided.<sup>12</sup>

As will be discussed further, the proposed rule is primarily concerned only with default rights that run *against* a GSIB—that is, direct default rights and cross-default rights that arise from the entry into resolution of a GSIB. The proposed rule would not affect contractual default rights that a GSIB (or any other entity) may have against a counterparty that is not a GSIB. The OCC believes that this limited scope is appropriate because the risk posed to financial stability by the exercise of QFC default rights is greatest when the defaulting counterparty is a GSIB.

### B. QFC Default Rights and GSIB Resolution Strategies

Under the Dodd-Frank Act, many complex GSIBs are required to submit resolution plans to the Board and the Federal Deposit Insurance Corporation (FDIC), detailing how the company can be resolved in a rapid and orderly manner in the event of material financial distress or failure of the company. In response to these requirements, these firms have

developed resolution strategies that, broadly speaking, fall into two categories: The single-point-of-entry (SPOE) strategy and the multiple-point-of-entry (MPOE) strategy. As noted in the Board's Proposal, cross-default rights in QFCs pose a potential obstacle to the implementation of either of these strategies.

In an SPOE resolution, only a single legal entity—the GSIB's top-tier BHC—would enter a resolution proceeding. The losses that led to the GSIB's failure would be passed up from the operating subsidiaries that incurred the losses to the holding company and would then be imposed on the equity holders and unsecured creditors of the holding company through the resolution process. This strategy is designed to help ensure that the GSIB's subsidiaries remain adequately capitalized. An SPOE resolution could thereby prevent those operating subsidiaries from failing or entering resolution themselves and allow them to instead continue normal operations. The expectation that the holding company's equity holders and unsecured creditors would absorb the GSIB's losses in the event of failure would help to maintain the confidence of the operating subsidiaries' creditors and counterparties (including QFC counterparties), reducing their incentive to engage in potentially destabilizing funding runs or margin calls and thus lowering the risk of asset fire sales.

An SPOE proceeding can avoid the need for covered banks to be placed into receivership or similar proceedings, as they would continue to operate as going concerns, only if the parent's entry into resolution proceedings does not trigger the exercise of cross-default rights. Accordingly, this proposed rule, by limiting such cross-default rights based on an affiliate's entry into resolution proceedings, enables the SPOE strategy, and in turn, would assist in stabilizing both the covered bank and the Federal banking system.

This proposed rule would also yield benefits for resolution under the MPOE strategy. Unlike the SPOE strategy, an MPOE strategy involves several entities in the GSIB group entering proceedings. For example, an MPOE strategy might involve a foreign GSIB's U.S. intermediate holding company going into resolution or a GSIB's U.S. insured depository institution entering resolution under the Federal Deposit Insurance Act. Similar to the benefits associated with the SPOE strategy, this proposed rule would help support the continued operation of affiliates of an entity experiencing resolution to the extent the affiliate continues to perform on its QFCs.

### C. Default Rights and Relevant Resolution Laws

In order to understand the connection between direct defaults, cross-defaults, the SPOE and MPOE resolution strategies, and the threats to financial stability discussed previously, it is necessary to understand how QFCs, and the default rights contained therein, are treated when an entity enters resolution. The following sections discuss the treatment of QFCs in greater detail under three U.S. resolution laws: the Bankruptcy Code, the Orderly Liquidation Authority, and the Federal Deposit Insurance Act. As discussed in these sections, each of these resolution laws has special provisions detailing the treatment of QFCs upon an entity's entry into such proceedings.

*U.S. Bankruptcy Code.* While covered banks themselves are not subject to resolution under the Bankruptcy Code, in general, if a BHC were to fail, it would be resolved under the Bankruptcy Code. When an entity goes into resolution under the Bankruptcy Code, attempts by the creditors of the debtor to enforce their debts through any means other than participation in the bankruptcy proceeding (for instance, by suing in another court, seeking enforcement of a preexisting judgment, or seizing and liquidating collateral) are generally blocked by the imposition of an automatic stay, which generally persists throughout the bankruptcy proceeding.<sup>13</sup> A key purpose of the automatic stay, and of bankruptcy law in general, is to maximize the value of the bankruptcy estate and the creditors' ultimate recoveries by facilitating an orderly liquidation or restructuring of the debtor. As a result, the automatic stay addresses the collective action problem, in which the creditors' individual incentives to race to recover as much from the debtor as possible, before other creditors can do so, collectively cause a value-destroying disorderly liquidation of the debtor.<sup>14</sup>

The Bankruptcy Code, however, largely exempts QFC counterparties from the automatic stay through special "safe harbor" provisions.<sup>15</sup> Under these provisions, any contractual rights that a QFC counterparty has to terminate the contract, set off obligations, and liquidate collateral in response to a direct default or cross-default are not

<sup>12</sup> The Board and the FDIC identified the exercise of default rights in financial contracts as a potential obstacle to orderly resolution in the context of resolution plans filed pursuant to section 165(d) of the Dodd-Frank Act and, accordingly, instructed the most systemically important firms to demonstrate that they are "amending, on an industry-wide and firm-specific basis, financial contracts to provide for a stay of certain early termination rights of external counterparties triggered by insolvency proceedings." FRB and FDIC, "Agencies Provide Feedback on Second Round Resolution Plans of 'First-Wave' Filers" (August 5, 2014), available at <http://www.federalreserve.gov/newsevents/press/bcreg/20140805a.htm>. See also FRB and FDIC, "Agencies Provide Feedback on Resolution Plans of Three Foreign Banking Organizations" (March 23, 2015), available at <http://www.federalreserve.gov/newsevents/press/bcreg/20150323a.htm>; FRB and FDIC, "Guidance for 2013 165(d) Annual Resolution Plan Submissions by Domestic Covered Companies that Submitted Initial Resolution Plans in 2012" 5–6 (April 15, 2013), available at <http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20130415c2.pdf>.

<sup>13</sup> See 11 U.S.C. 362.

<sup>14</sup> See, e.g., *Aiello v. Provident Financial Corp.*, 239 F.3d 876, 879 (7th Cir. 2001).

<sup>15</sup> 11 U.S.C. 362(b)(6), (7), (17), (27), 362(o), 555, 556, 559, 560, 561.

subject to the stay and may be exercised at any time.<sup>16</sup>

Where the failed firm is a GSIB's holding company with covered banks that are going concerns and are party to large volumes of QFCs, the mass exercise of default rights under the QFCs based on the affiliate default represents a significant impediment to the SPOE resolution strategy.<sup>17</sup> This is because the failure of a covered bank's affiliate will trigger the mass exercise of cross-default rights against the covered bank, which will not be stayed by the affiliate's entry into bankruptcy proceedings. This will in turn lead to fire sales that will threaten the ongoing viability of the covered bank and the successful resolution of the particular GSIB—and thus will also pose a threat to the federal banking system and broader financial system.

*Special Resolution Regimes Under U.S. Law.* For purposes of this proposed rule, there are two special resolution regimes under U.S. law: Title II of the Dodd-Frank Act and the Orderly Liquidation Authority (OLA); and the Federal Deposit Insurance Act (FDIA). While these regimes both impose certain limitations on the ability of counterparties to exercise default rights—thus mitigating the potential for disorderly resolution due to the exercise by counterparties of such default rights—these limitations may not be applicable or clearly enforceable in certain contexts.

*Title II of the Dodd-Frank Act and the Orderly Liquidation Authority.* Title II of the Dodd-Frank Act establishes an alternative resolution framework intended “to provide the necessary authority to liquidate failing financial companies that pose a significant risk to the financial stability of the United States in a manner that mitigates such risk and minimizes moral hazard.”<sup>18</sup>

As noted, although a failed BHC would generally be resolved under the Bankruptcy Code, Congress recognized that a U.S. financial company might fail under extraordinary circumstances, in which an attempt to resolve it through the bankruptcy process would have

serious adverse effects on financial stability in the United States. Title II therefore authorizes the Secretary of the Treasury, upon the recommendation of other government agencies and a determination that several preconditions are met, to place a U.S. financial company into a receivership conducted by the FDIC as an alternative to bankruptcy.

Title II empowers the FDIC, when it acts as receiver in an OLA resolution, to protect financial stability against the QFC-related threats discussed previously. Title II addresses direct default rights in a number of ways. First, Title II empowers the FDIC to transfer the QFCs to some other financial company that is not in a resolution proceeding.<sup>19</sup> To give the FDIC time to effect this transfer, Title II temporarily stays QFC counterparties of the failed entity from exercising termination, netting, and collateral liquidation rights “solely by reason of or incidental to” the failed entity's entry into OLA resolution, its insolvency, or its financial condition.<sup>20</sup> Second, once the QFCs are transferred in accord with the statute, Title II permanently stays the exercise of those direct default rights based on the prior event of default and receivership.<sup>21</sup>

Title II addresses cross-default rights through a similar procedure. It empowers the FDIC “to enforce contracts of subsidiaries or affiliates” of the failed company that are guaranteed or otherwise supported by or linked to the covered financial company, notwithstanding any contractual right to cause the termination, liquidation, or acceleration of such contracts based solely on the insolvency, financial condition, or receivership of the failed company, so long as the FDIC takes certain steps to protect the QFC counterparty's interests by the end of the business day following the company's entry into OLA resolution.<sup>22</sup>

These stay-and-transfer provisions of the Dodd-Frank Act go far to mitigate the threat posed by QFC default rights by preventing mass closeouts against the entity that has entered into OLA

proceedings or its going concern affiliates. At the same time, they allow for appropriate protections for QFC counterparties of the failed financial company. They only stay the exercise of default rights based on the failed company's entry into resolution, the fact of its insolvency, or its financial condition. And the stay period is brief, unless the FDIC transfers the QFCs to another financial company that is not in resolution and should therefore be capable of performing under the QFCs.

*Federal Deposit Insurance Act.* Under the FDIA, a failing insured depository institution would generally enter a receivership administered by the FDIC.<sup>23</sup> The FDIA addresses direct default rights in the failed bank's QFCs with stay-and-transfer provisions that are substantially similar to the provisions of Title II of the Dodd-Frank Act as discussed.<sup>24</sup> However, the FDIA does not address cross-default rights, leaving the QFC counterparties of the failed depository institution's affiliates free to exercise any contractual rights they may have to terminate, net, and liquidate collateral based on the depository institution's entry into resolution.

### III. Description of the Proposal

#### A. Overview, Purpose, and Authority

As discussed previously, and in the Board's Proposal, the exercise of default rights by counterparties of a failed GSIB can have a significant impact on financial stability. This financial stability concern is necessarily intertwined with the safety and soundness of covered banks and the federal banking system—the disorderly exercise of default rights can produce a sudden, contemporaneous threat to the safety and soundness of individual institutions throughout the system, which in turn threatens the system as a whole. Accordingly, national banks, FSAs, and Federal branches and agencies are affected by financial instability—even if such instability is precipitated outside the Federal banking system—and can themselves also be sources of financial destabilization due to the interconnectedness of these institutions to each other and to other entities within the financial system. Thus, safety and soundness of individual national banks, FSAs, and Federal branches and agencies, the federal banking system, and financial stability of the system as a whole are interconnected.

<sup>16</sup> The Bankruptcy Code does not itself confer any default rights upon QFC counterparties; it merely permits QFC counterparties to exercise certain contractual rights that they have under the terms of the QFC. This proposed rule does not propose to restrict the exercise of any default rights that fall within the Bankruptcy Code's safe harbor provisions, which are described here to provide context.

<sup>17</sup> As noted previously, the MPOE strategy will similarly benefit from the override of cross-defaults. The SPOE strategy is used here for illustrative purposes only.

<sup>18</sup> 12 U.S.C. 5384(a) (Section 204(a) of the Dodd-Frank Act).

<sup>19</sup> 12 U.S.C. 5390(c)(9).

<sup>20</sup> 12 U.S.C. 5390(c)(10)(B)(i)(I). This temporary stay generally lasts until 5:00 p.m. eastern time on the business day following the appointment of the FDIC as receiver.

<sup>21</sup> If the QFCs are transferred to a solvent third party before the stay expires, the counterparty is permanently enjoined from exercising such rights based upon the appointment of the FDIC as receiver of the financial company (or the insolvency or financial condition of the financial company), but is not stayed from exercising such rights based upon other events of default. 12 U.S.C. 5390(c)(10)(B)(i)(II).

<sup>22</sup> 12 U.S.C. 5390(c)(16); 12 CFR 380.12.

<sup>23</sup> 12 U.S.C. 1821(c).

<sup>24</sup> See 12 U.S.C. 1821(e)(8)–(10).

The purpose of this proposed rule is to enhance the safety and soundness of covered banks and the federal banking system, thereby also bolstering financial stability generally, by addressing the two main issues raised by covered QFCs with the orderly resolution of these covered banks as generally described in the Board's Proposal.

While Title II and the FDIA empower the use of the QFC stay-and-transfer provisions, a court in a foreign jurisdiction may decline to enforce these important provisions. The proposed rule directly improves the safety and soundness of covered banks by clarifying the applicability of U.S. special resolution regimes to all counterparties, whether they are foreign or domestic. Although domestic entities are clearly subject to the temporary stay provisions of OLA and the FDIA, these stays may be difficult to enforce in a cross-border context. As a result, domestic counterparties of a failed U.S. financial institution may be disadvantaged relative to foreign counterparties, as the domestic counterparties would be subject to the stay, and accompanying potential market volatility, while if the stay was not enforced by foreign authorities, foreign counterparties could close out immediately. Furthermore, a mass close out by such foreign counterparties would likely exacerbate market volatility, which in turn would likely magnify harm to the stayed U.S. counterparties' positions, which are likely to include other national banks and FSAs. This proposed rule would eliminate the potential for these adverse consequences by requiring covered banks to condition the exercise of default rights in covered contracts on the stay provisions of OLA and the FDIA.

In spite of the QFC stay-and-transfer provisions in Title II and the FDIA, the affiliates of a global systemically important BHC that goes into resolution under the Bankruptcy Code may face disruptions to their QFCs as their counterparties exercise cross-default rights. Thus, a healthy covered bank whose parent BHC entered resolution proceedings could fail due to its counterparties exercising cross-default rights. This is clearly both a safety and soundness concern for the otherwise healthy covered bank, but it also has the additional negative effect of defeating the orderly resolution of the GSIB, since a key element of SPOE resolution in the United States is ensuring that critical operating subsidiaries—such as covered banks—continue to operate on a going concern basis. This proposed rule would address this issue by generally

restricting the exercise of cross-default rights by counterparties against a covered bank.

Moreover, a disorderly resolution like that described previously could jeopardize not just the covered bank and the orderly resolution of its failed parent BHC, but all surviving counterparties, many of which are likely to be other national banks and other FSAs, regardless of size or interconnectedness, by harming the overall condition of the Federal banking system and the financial system as a whole. A disorderly resolution could result in additional defaults, fire sales of collateral, and other consequences likely to amplify the systemic fallout of the resolution of a covered bank.

The proposed rule is designed to minimize such disorder, and therefore enhance the safety and soundness of all individual national banks, FSAs, and Federal branches and agencies, the Federal banking system, and the broader financial system. This is particularly important because financial institutions are more sensitive than other firms to the overall health of the financial system.<sup>25</sup>

The proposed rule covers the OCC-supervised operations of foreign banking organizations (FBOs) designated as systemically important, including national bank and FSA subsidiaries, as well as Federal branches and agencies, of these FBOs. As with a national bank or FSA subsidiary of a U.S. global systemically important BHC, the OCC believes that this proposed rule should apply to a national bank or FSA subsidiary of a global systemically important FBO for essentially the same reasons. While the national bank or FSA may not be considered systemically important itself, as part of a GSIB, the disorderly resolution of the covered national banks and FSAs could have a significant negative impact on the Federal banking system and on the U.S. financial system, in general.

Specifically, the proposed rule is designed to prevent the failure of a global systemically important FBO from disrupting the ongoing operations or orderly resolution of the covered bank by protecting the healthy national bank or FSA from the mass triggering of

<sup>25</sup> The OCC, along with the FDIC and FRB, recently made this point in the swap margin NPRM. 79 FR 57348, 57361 (September 24, 2014) (“Financial firms present a higher level of risk than other types of counterparties because the profitability and viability of financial firms is more tightly linked to the health of the financial system than other types of counterparties. Because financial counterparties are more likely to default during a period of financial stress, they pose greater systemic risk and risk to the safety and soundness of the covered swap entity.”).

default rights by the QFC counterparties. Additionally, the application of this proposed rule to the QFCs of these national bank and FSA subsidiaries should avoid creating what may otherwise be an incentive for counterparties to concentrate QFCs in these firms because they are subject to fewer counterparty restrictions.

Similarly, it is important to cover any Federal branch or agency of a global systemically important FBO in order to ensure the orderly resolution of these entities if the parent FBO were to be placed into resolution in its home jurisdiction. However, to avoid unduly broad application of the proposed rule and imposing unnecessary restrictions on the QFCs of global systemically important FBOs, the proposed rule would exclude certain QFCs that do not have a clear nexus to its U.S. operations. Specifically, the proposed rule would exclude covered QFCs under multi-branch arrangements that either are not booked at the Federal branch or agency or do not provide for payment or delivery at the Federal branch or agency. The OCC believes that this provides a reasonable limitation on the scope of the proposed rule to those QFCs of covered Federal branches and agencies that have a direct effect on the Federal banking system and the general financial stability of the United States.

The OCC is issuing this proposed rule under its authorities under the National Bank Act (12 U.S.C. 1 *et seq.*), the Home Owners' Loan Act (12 U.S.C. 1461 *et seq.*), and the International Banking Act of 1978 (12 U.S.C. 3101 *et seq.*), including its general rulemaking authorities.<sup>26</sup> As discussed in detail in Section I. B., the OCC views the proposed rule as consistent with its overall statutory mandate of assuring the safety and soundness of entities subject to its supervision, including national banks, FSAs, and Federal branches and agencies.<sup>27</sup>

#### B. Covered Banks (Section 47.3(a), (b), (c))

The proposed rule would apply to all “covered banks.” The term “covered bank” would be defined to include (i) any national bank or FSA that is a subsidiary of a global systemically important BHC that has been designated pursuant to subpart I of 12 CFR part 252 of this title (FRB Regulation YY); or (ii) is a national bank or FSA subsidiary, or Federal branch or agency of a global systemically important FBO that has

<sup>26</sup> See 12 U.S.C. 93a, 1463(a)(2), and 3108(a).

<sup>27</sup> See 12 U.S.C. 1. This primary responsibility is also defined in various provisions throughout the OCC's express statutory authorities with respect to each institution type under their respective statutes.

been designated pursuant to FRB Regulation YY.

The proposed rule defines global systemically important BHC and global systemically important FBO by cross-reference to newly added subpart I of 12 CFR part 252 of the Board's Proposal. The list of banking organizations that meet the methodology proposed in the FRB NPRM is currently the same set of banking organizations that meet the Basel Committee on Banking Supervision (BCBS) definition of a GSIB.<sup>28</sup>

This proposed rule covers national bank and FSA subsidiaries of global systemically important BHCs and FBOs, and Federal branches and agencies of global systemically important FBOs. In the United States, covered QFCs typically are entered into at the subsidiary level, which would include through the national bank, FSA or Federal branch or agency, rather than through the U.S. intermediate holding company.<sup>29</sup>

The OCC believes if the orderly resolution of a covered entity as defined under the FRB's Proposal is to be successful, then it is necessary that all national banks, FSAs, and Federal branches and agencies of systemically important global systemically important BHCs and FBOs be subject to the mandatory contractual requirements in this proposed rule. Moreover, this proposed rule would make clear that the mandatory contractual stay requirements apply to the subsidiaries of any national bank, FSA, or Federal branch or agency that is a covered bank. Under the proposed rule, the term covered bank also includes any subsidiary of a national bank, FSA, or Federal branch or agency. The definition of "subsidiary of covered bank" in the proposed rule mirrors the definition of subsidiary in the FRB's Regulation YY (12 CFR 252.2), and it is intended to be substantially the same as the FRB's definition with respect to a

subsidiary of a covered bank. Essentially, for the same reasons that it is necessary to cover all national banks, FSAs, and Federal branches and agencies of global systemically important BHCs and FBOs under the proposed rule, the OCC believes that it is necessary that all subsidiaries of those covered banks also be subject to the mandatory contractual stay requirements. As mentioned, unless all entities that are part of a GSIB are covered, counterparties might have incentives to migrate their covered QFCs to uncovered entities.

Question 1: While the exercise of mass closeout rights against any individual national bank, FSA or Federal branch or agency would raise concerns, the OCC is especially concerned about the potential spill-over effect such mass closeouts would have, either individually or collectively, on the Federal banking system if the entity itself is systemically important or part of a larger banking group that is systemically important. Are there alternative approaches for determining which national banks, FSAs and Federal branches and agencies should be considered systemically important?

Question 2: While the primary focus of this rule is on, covered banks—*i.e.*, those that are subsidiaries or branches of U.S. or foreign GSIBS—there is some concern that given the interconnected nature of QFCs, a market disruption could significantly impact all national banks, FSAs and Federal branches and agencies. Should this proposed rule be expanded to cover more OCC-regulated entities, for example, those national banks, FSAs or Federal branches and agencies with material levels of QFC activities? How could material levels of QFC activities be defined and measured?

Question 3: Conversely, is the scope of this proposed rule too broad? The proposed rule would apply to all covered QFCs of covered banks as well as all of their subsidiaries, regardless of size or volume of transactions. A key policy concern is that unless all subsidiaries of a covered bank are subject to the direct and cross-default restrictions of the proposed rule, covered banks and their counterparties would have the incentive to transfer their QFCs to unprotected subsidiaries of the covered bank. Could the scope of entities covered by the proposed rule be narrowed while still achieving its policy objectives? If so, what criteria could be used? For example, should a subsidiary of covered banks that only engages in some de minimis level of covered QFCs be safely excluded from the scope of this proposed rule? Are there alternative

ways to define what will be considered subsidiaries for purposes of this rule?

Question 4: Some of the subsidiaries of covered banks under the proposed rule could be subject to additional supervision by another U.S. agency, such as the case of a broker-dealer subsidiary of a national bank. Does the issue of potentially conflicting jurisdiction need to be addressed? If so, how? For example, should the rule provide a carve out for a subsidiary of a covered bank that is subject to comparable requirements under the regulations of another agency?

Question 5: The scope of this proposed rule is designed to cover any national bank or FSA that is a subsidiary of a global systemically important BHC or FBO under the FRB NPRM. While this scope of coverage ensures that all national banks or FSAs under a global systemically important BHC or FBO would be subject to the same substantive contractual mandatory stay under the FRB NPRM, the proposed rule does not take into account the potential situation of a standalone national bank or FSA, not under a BHC, that might itself be considered systemically important. Although no such entity exists currently, the OCC is considering whether to amend the definition of covered bank to include any national bank or FSB that meets a certain asset threshold test. In this case, the OCC is considering using the \$700 billion in total consolidated assets that is used in the Enhanced Supplementary Leverage Ratio.<sup>30</sup> Should the OCC decide to address standalone national banks and FSBs, what methodology and factors should the OCC consider in deciding which institutions to include?

#### C. Covered QFCs (Sections 47.4(a), 47.5(a), 47.7, 47.8)

General requirement. The proposed rule would require covered banks to ensure that each "covered QFC" conforms to the requirements of sections 47.4 and 47.5. These sections require that a covered QFC (1) contain contractual stay-and-transfer provisions similar to those imposed under Title II of the Dodd-Frank Act and the FDIA, and (2) limit the exercise of default rights based on the insolvency of an affiliate of the covered bank. A "covered QFC" is generally defined as any QFC that a covered bank enters, executes, or otherwise becomes party to. A party to a QFC includes a party acting as agent under the QFC. "Qualified financial contract" or "QFC" would be defined to have the same meaning as in section 210(c)(8)(D) of Title II of the Dodd-Frank

<sup>28</sup> In November 2015, the Financial Stability Board and BCBS published a list of banks that meet the BCBS definition of a global systemically important bank (BCBS G-SIB) based on year-end 2014 data. A list based on year-end 2014 data was published November 3, 2015 (available at <http://www.fsb.org/wp-content/uploads/2015-update-of-list-of-global-systemically-important-banks-G-SIBs.pdf>). The U.S. top-tier BHCs that are currently identified as a BCBS G-SIBs are Bank of America Corporation, Bank of New York Mellon Corporation, Citigroup Inc., Goldman Sachs Group, Inc., JP Morgan Chase & Co., Morgan Stanley, State Street Corporation, and Wells Fargo & Company.

<sup>29</sup> Under the clean holding company component of the FRB's recent Total Loss-Absorbing Capacity (TLAC) proposal, the U.S. intermediate holding companies of foreign GSIB entities would be prohibited from entering into QFCs with third parties. See 80 FR 74926 (November 30, 2015).

<sup>30</sup> See 79 FR 24528 (May 1, 2014).

Act and would include derivatives, swaps, repurchase, reverse repurchase, and securities lending and borrowing transactions.

Except for certain QFCs under multi-branch master agreements, the definition of QFC would include a single QFC, but also all QFCs under a master agreement. Master agreements are contracts that contain general terms that the parties wish to apply to multiple transactions between them; having executed the master agreement, the parties can then include those terms in future contracts through reference to the master agreement. The proposed rule defines master agreement as defined by Title II of the Dodd-Frank Act or any master agreement designated by regulation by the FDIC. Under the definition, master agreements for QFCs, together with all supplements to the master agreement (including underlying transactions), would be treated as a single QFC.<sup>31</sup>

The proposed definition of “QFC” is intended to cover those financial transactions whose disorderly unwind has substantial potential to frustrate, directly or indirectly, the orderly resolution of the covered bank or any affiliate of such covered bank. The Dodd-Frank Act uses its definition of “qualified financial contract” to determine the scope of the stay-and-transfer provisions that it applies to direct default and cross-default rights in an OLA resolution. By adopting the Dodd-Frank Act’s definition, the proposed rule would track Congress’s judgment as to which financial transactions could, if not subject to appropriate restrictions, pose an obstacle to the orderly resolution of a systemically important financial company.

*Question 6: With regard to the proposed definitions of “QFC” and “covered QFC” are there other types of financial contracts or transactions that should be included in the definition of a “covered QFC” in the proposed rule because they could pose a similar risk to the safety and soundness of the covered national banks, FSAs, and Federal branches and agencies and to the Federal banking system? Conversely, is the definition of covered QFC too broad? Are there types of financial contracts that fall within the definition of covered QFC that could be excluded*

*without compromising the policy objectives of the proposed rule?*

*Question 7: Should this proposed rule include a reservation of authority provision that would maintain OCC’s supervisory flexibility, on a case-by-case basis, to include or exclude from the proposed rule (1) specific OCC-supervised entities (and their subsidiaries) and (2) financial contracts or transactions, if consistent with the purposes of the proposed rule?*

Exclusion of cleared QFCs. The proposed rule would exclude from the definition of “covered QFC” all QFCs that are cleared through a central counterparty (CCP). The OCC continues to consider the appropriate treatment of centrally cleared QFCs, in light of differences between cleared and uncleared QFCs with respect to contractual arrangements, counterparty credit risk, default management, and supervision.

*Question 8: Should the QFCs between a CCP (or other financial market utility) and a member covered bank be subject to the requirements of this proposed rule? What additional risks do such cleared QFCs pose to the orderly resolution of covered banks and the Federal banking system? What other factors should be considered?*

Exclusion of certain QFCs under foreign bank multi-branch master agreements. Under the proposed rule, the definition of a “QFC” would include a master agreement that covers other QFCs. In addition, under this definition those QFCs covered by the master agreement would be treated as a single QFC. By design, this definition of QFC is intended to ensure that the proposed rule would apply to all of the relevant QFCs entered into by a covered bank. However, as applied to the QFCs of Federal branches and agencies under a multi-branch master agreement, this definition may be too broad in its scope.

Foreign banks have multi-branch master agreements that permit transactions to be entered into both at a U.S. branch or agency of the foreign bank and at a foreign branch (located outside of the United States) of the foreign bank. Under this proposed rule, a QFC of a Federal branch or agency, as well as all of the QFCs entered into by foreign branches under the same multi-branch master agreement would be treated as a single QFC of the Federal branch or agency, and would therefore be subject to the requirements of this proposed rule. Where the QFC of the foreign branch has some U.S. nexus, such as permitting payment or delivery in the United States, the OCC believes that subjecting those QFCs to this proposed rule is reasonable and

consistent with protecting the safety and soundness of the Federal banking system. However, where the QFC of the foreign branch does not permit any payment or delivery in the United States, the OCC believes that applying this proposed rule to such QFCs lacks a sufficient connection to the U.S. operations of the Federal branch or agency and may be unduly broad.

Absent the possibility under the QFC of payment or delivery in the United States, the OCC believes that the impact of such QFCs on the Federal branch or agency covered by this proposed rule, or on the Federal banking system and the United States as a whole, is indirect and relatively immaterial. For this reason, the proposed rule would exclude QFCs under such a “multi-branch master agreement” that are not booked at a Federal branch or agency covered by this proposed rule, and for which no payment or delivery may be made at the Federal branch or agency. Conversely, the multi-branch master agreement would be a covered QFC with respect to QFC transactions that are booked and permits payment and delivery at a Federal branch or agency covered by this proposed rule.

*Question 9: Should the scope of the proposed rule be limited to only those transactions that are booked, or provide for payment and delivery, at the Federal branch or agency?*

#### *D. Definition of “Default Right”*

As discussed previously, a party to a QFC generally has a number of rights that it can exercise if its counterparty defaults on the QFC by failing to meet certain contractual obligations. These rights are generally, but not always, contractual in nature. One common default right is a setoff right which is the right to reduce the total amount that the non-defaulting party must pay by the amount that its defaulting counterparty owes. A second common default right is the right to liquidate pledged collateral and use the proceeds to pay the defaulting party’s net obligation to the non-defaulting party. Other common rights include the ability to suspend or delay the non-defaulting party’s performance under the contract or to accelerate the obligations of the defaulting party.

Finally, the non-defaulting party typically has the right to terminate the QFC, meaning that the parties would not make payments that would have been required under the QFC in the future. The phrase “default right” in the proposed rule text at § 47.2 is broadly defined to include these common rights as well as “any similar rights.” Additionally, the definition includes all

<sup>31</sup> 12 U.S.C. 5390(c)(8)(D)(viii); see also 12 U.S.C. 1821(e)(8)(D)(vii); 109 H. Rpt. 31, Part 1 (April 8, 2005) (explaining that a “master agreement for one or more securities contracts, commodity contracts, forward contracts, repurchase agreements or swap agreements will be treated as a single QFC under the FDIA or the FCUA (but only with respect to the underlying agreements are themselves QFCs)”).

such rights regardless of source, including rights existing under contract, statute, or common law.

However, the proposed definition excludes two rights that are typically associated with the business-as-usual functioning of a QFC. First, same-day netting that occurs during the life of the QFC in order to reduce the number and amount of payments each party owes the other is excluded from the definition of “default right.”<sup>32</sup> Second, contractual margin requirements that arise solely from the change in the value of the collateral or the amount of an economic exposure are also excluded from the definition.<sup>33</sup> The effect of these exclusions is to leave such rights unaffected by the proposed rule. The exclusions are appropriate because the proposed rule is intended to improve resolvability by addressing default rights that could disrupt an orderly resolution, and not to interrupt the parties’ business-as-usual dealings under a QFC.

However, certain QFCs are also commonly subject to rights that would increase the amount of collateral or margin that the defaulting party (or a guarantor) must provide upon an event of default. The financial impact of such default rights on a covered bank could be similar to the impact of the liquidation and acceleration rights discussed previously. Therefore, the proposed definition of “default right” includes such rights (with the exception discussed in the previous paragraph for margin requirements that depend solely on the value of collateral or the amount of an economic exposure).<sup>34</sup>

Finally, contractual rights to terminate without the need to show cause, including rights to terminate on demand and rights to terminate at contractually specified intervals, are excluded from the definition of “default right” for purposes of the proposed rule’s restrictions on cross-default rights (section 47.5 of the proposed rule).<sup>35</sup> This is consistent with the proposed rule’s objective of restricting only default rights that are related, directly or indirectly, to the entry into resolution of an affiliate of the covered bank, while leaving other default rights unrestricted.

*Question 10: The OCC invites comment on all aspects of the proposed definition of “default right” In particular, are the proposed exclusions appropriate in light of the objectives of the proposal? To what extent does the exclusion of rights that allow 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” create an incentive for firms to include these rights in future contracts to evade the proposed restrictions? To what extent should other regulatory requirements (e.g., liquidity coverage ratio or the short-term wholesale funding components of the GSIB surcharge rule) be revised to create a counterincentive? Would additional exclusions be appropriate? To what extent should it be clarified that the “need to show cause” includes the need to negotiate alternative terms with the other party prior to termination or similar requirements (e.g., Master Securities Loan Agreement, Annex III—Term Loans)?*

#### *E. Required Contractual Provisions Related to U.S. Special Resolution Regimes (Section 47.4)*

Under the proposed rule, a covered QFC would be required to explicitly provide both (a) that the transfer of the QFC (and any interest or obligation in or under it and any property collateralizing it) from the covered bank to a transferee would be effective to the same extent as it would be under the U.S. special resolution regimes if the covered QFC were governed by the laws of the United States or of a state of the United States and (b) that default rights with respect to the covered QFC that could be exercised against a covered bank could be exercised to no greater extent than they could be exercised under the U.S. special resolution regimes if the covered QFC were governed by the laws of the United States or of a state of the United States.<sup>36</sup> The proposed rule would define the term “U.S. Special Resolution Regimes” to mean the FDIA<sup>37</sup> and Title II of the Dodd-Frank Act,<sup>38</sup> along with regulations issued under those statutes.<sup>39</sup>

The proposed requirements are not intended to imply that a given covered QFC is not governed by the laws of the United States or of a state of the United States, or that the statutory stay-and-transfer provisions would not in fact apply to a given covered QFC. This section of the proposed rule would not have any substantive impact on those covered QFCs that are already subject to the U.S. special resolution regimes. Rather, the requirements are intended to provide certainty that all covered QFCs would be treated the same way in the

context of a receivership of a covered bank under the Dodd-Frank Act or the FDIA. Thus, the purpose of this provision is to ensure that if a national bank or FSA covered by this proposed rule is placed into receivership under any U.S. special resolution regime, the stay-and-transfer provisions would extend to all foreign counterparties as a matter of contract law.

The stay-and-transfer provisions of the U.S. special resolution regimes should be enforced with respect to all contracts of any U.S. GSIB entity that enters resolution under a U.S. special resolution regime as well as all transactions of the subsidiaries of such an entity. Nonetheless, it is possible that a court in a foreign jurisdiction would decline to enforce those provisions in cases brought before it (such as a case regarding a covered QFC between a covered bank and a non-U.S. entity that is governed by non-U.S. law and secured by collateral located outside the United States). By requiring that the effect of the statutory stay-and-transfer provisions be incorporated directly into the QFC contractually, the proposed requirement would help ensure that a court in a foreign jurisdiction would enforce the effect of those provisions, regardless of whether the court would otherwise have decided to enforce the U.S. statutory provisions themselves.<sup>40</sup> For example, the proposed provisions should prevent a U.K. counterparty of a U.S. GSIB from persuading a U.K. court that it should be permitted to seize and liquidate collateral located in the United Kingdom in response to the U.S. GSIB’s entry into OLA resolution. And the knowledge that a court in a foreign jurisdiction would reject the purported exercise of default rights in violation of the required provisions would deter covered banks’ counterparties from attempting to exercise such rights.

The OCC believes that this proposed rule directly addresses a major QFC-related obstacle to the orderly resolution of covered banks. As discussed previously, restrictions on the exercise of QFC default rights are an important prerequisite for an orderly GSIB resolution. Congress recognized the importance of such restrictions when it enacted the stay-and-transfer provisions of the U.S. special resolution regimes. As demonstrated by the 2007–2009 financial crisis, the modern financial system is global in scope, and covered banks are party to large volumes of

<sup>32</sup> See Proposed Rule § 47.2.

<sup>33</sup> See *id.*

<sup>34</sup> See *id.*

<sup>35</sup> See Proposed Rule §§ 47.2 and 47.5.

<sup>36</sup> See Proposed Rule § 47.4.

<sup>37</sup> 12 U.S.C. 1811–1835a.

<sup>38</sup> 12 U.S.C. 5381–5394.

<sup>39</sup> See Proposed Rule § 47.2.

<sup>40</sup> See generally Financial Stability Board, “Principles for Cross-border Effectiveness of Resolution Actions” (November 3, 2015), available at <http://www.fsb.org/wp-content/uploads/Principles-for-Cross-border-Effectiveness-of-Resolution-Actions.pdf>.

QFCs with connections to foreign jurisdictions. The stay-and-transfer provisions of the U.S. special resolution regimes would not achieve their purpose of facilitating orderly resolution in the context of the failure of a GSIB with large volumes of such QFCs if QFCs could escape the effect of those provisions. As discussed in detail in Section I of this proposed rule, the OCC has a supervisory interest in preventing or mitigating the destabilizing effects of a disorderly GSIB resolution; otherwise, the result will be adverse to safety and soundness of covered banks individually and collectively, as well as the broader Federal banking system. To remove any doubt about the scope of coverage of these provisions, the proposed requirement would ensure that the stay-and-transfer provisions apply as a matter of contract to all covered QFCs, wherever the transaction. This will advance the resolvability goals of the Dodd-Frank Act and the FDIA.<sup>41</sup>

*Question 11: While the direct default requirements are proposed to apply broadly to all covered QFCs of covered banks, the primary focus of this requirements is with QFCs with foreign counterparties not directly subject to the U.S. special resolution regimes. U.S. counterparties are less of a concern because these counterparties would already be subject to the stay-and-transfer requirements under statutory requirements of the U.S. special resolution regimes. With respect to the direct default requirements, the proposed rule does not distinguish between U.S. and foreign counterparties because the OCC believes that the broad application of this proposed rule would be simpler to implement and less burdensome given the standardized nature of QFCs and their associated master netting agreements. Should the direct default requirements of the proposed rule apply only to covered QFCs with foreign counterparties not subject to U.S. special resolution regimes? What would be the costs and regulatory burden associated with identifying and maintaining separate versions of covered QFCs for U.S. and foreign counterparties?*

<sup>41</sup> As noted in the Board's Proposal, this proposed rule is consistent with efforts by regulators in other jurisdictions to address similar risks by requiring that financial firms within their jurisdictions ensure that the effect of the similar provisions under these foreign jurisdictions' respective special resolution regimes would be enforced by courts in other jurisdictions, including the United States. See e.g., PRA Rulebook: CRR Firms and Non-Authorised Persons: Stay in Resolution Instrument 2015, available at <http://www.bankofengland.co.uk/pradocuments/publications/ps/2015/ps2515app1.pdf>; see also Bank of England, Prudential Regulation Authority, "Contractual stays in financial contracts governed by third-country law" (PS25/15).

#### *F. Prohibited Cross-Default Rights (Section 47.5)*

Definitions. Section 47.5 of the proposed rule pertains to cross-default rights in QFCs between covered banks and their counterparties, many of which are subject to credit enhancements (such as guarantees) provided by an affiliate of the covered bank. Because credit enhancements on QFCs are themselves "qualified financial contracts" under the Dodd-Frank Act's definition of that term (which this proposed rule would adopt), the proposed rule includes the following additional definitions in order to precisely describe the relationships to which this section applies.

First, the proposed rule distinguishes between a credit enhancement and a "direct QFC," which is defined as any QFC that is not a credit enhancement. The proposed rule also defines "direct party" to mean a covered bank that itself is a party to the direct QFC, as distinct from an entity that provide a credit enhancement. In addition, the proposed rule defines "affiliate credit enhancement" to mean "a credit enhancement that is provided by an affiliate of the party to the direct QFC that the credit enhancement supports," as distinct from a credit enhancement provided by either the direct party itself or by an unaffiliated party. Moreover, the proposed rule defines "covered affiliate credit enhancement" to mean an affiliate credit enhancement provided by a covered bank, or a covered entity under the Board's proposal, and defines "covered affiliate support provider to mean the covered bank that provides the covered affiliate credit enhancement. Finally, the proposed rule defines the term "supported party" to mean any party that is the beneficiary of a covered affiliate credit enhancement (that is, the QFC counterparty of a direct party, assuming that the direct QFC is subject to a covered affiliate credit enhancement).

General Prohibition. Subject to the substantial exceptions to be discussed, the proposed rule would prohibit a covered bank from being a party to a covered QFC that allows for the exercise of any default right that is related, directly or indirectly, to the entry into resolution of an affiliate of the covered bank. The proposed rule also would generally prohibit a covered bank from being party to a covered QFC that would prohibit the transfer of any credit enhancement applicable to the QFC (such as another entity's guarantee of the covered bank's obligations under the QFC), along with associated obligations or collateral, upon the entry into

resolution of an affiliate of the covered bank.<sup>42</sup>

A primary purpose of the proposed restrictions is to facilitate the resolution of a GSIB outside of Title II, including under the Bankruptcy Code. As discussed in the background section, the potential for the mass exercise of QFC default rights is a major reason why the failure of a global systemically important BHC could have a severe negative impact on financial stability and on the Federal banking system. In the context of an SPOE resolution, if the global systemically important BHC's entry into resolution triggers the mass exercise of cross-default rights by the subsidiaries' QFC counterparties of the covered QFCs against the national bank or FSA subsidiary, then the national bank or FSA could themselves experience financial distress or failure. Moreover, the mass exercise of covered QFC default rights would entail asset fire sales, which could affect other U.S. financial companies and undermine financial stability of the U.S. financial system. Similar disruptive results can occur with an MPOE resolution of an affiliate of an otherwise performing entity triggers default rights on QFCs involving the performing covered bank.

In an SPOE resolution, this damage can be avoided if actions of the following two types are prevented: The exercise of direct default rights against the top-tier holding company that has entered resolution, and the exercise of cross-default rights against the national bank and FSA subsidiaries and other operating subsidiaries based on their parent's entry into resolution. Direct default rights against the national bank or FSA subsidiary would not be exercisable, because that subsidiary would continue normal operations and would not enter resolution. In an MPOE resolution, this damage occurs from the exercise of default rights against a performing entity based on the failure of an affiliate.

Under the OLA, the Dodd-Frank Act's stay-and-transfer provisions would address both direct default rights and cross-default rights. But, as explained in the Background section, no similar

<sup>42</sup> This prohibition would be subject to an exception that would allow supported parties to exercise default rights with respect to a QFC if the supported party would be prohibited from being the beneficiary of a credit enhancement provided by the transferee under any applicable law, including the Employee Retirement Income Security Act of 1974 and the Investment Company Act of 1940. This exception is substantially similar to an exception to the transfer restrictions in section 2(f) of the ISDA 2014 Resolution Stay Protocol (2014 Protocol) and the ISDA 2015 Universal Resolution Stay Protocol, which was added to address the concerns expressed by asset managers during the drafting of the 2014 Protocol.

statutory provisions would apply to a resolution under the Bankruptcy Code. This proposed rule attempts to address these obstacles to orderly resolution under the Bankruptcy Code by extending the stay-and transfer-provisions to any type of resolution. Similarly, the proposed rule would facilitate a transfer of the GSIB parent's interests in its subsidiaries, along with any credit enhancements it provides for those subsidiaries, to a solvent financial company by prohibiting covered banks from having QFCs that would allow the QFC counterparty to prevent such a transfer or to use it as a ground for exercising default rights. Accordingly, the proposed rule would broadly prevent the unanticipated failure of any one GSIB entity from bringing about the disorderly failures of its affiliates by preventing the affiliates' QFC counterparties from using the first entity's failure as a ground for exercising default rights against those affiliates that continue meet to their obligations.<sup>43</sup>

The proposed rule is intended to enhance the potential for orderly resolution of a GSIB under the Bankruptcy Code, the FDIA, or similar resolution proceedings. In doing so, the proposed rule would advance the Dodd-Frank Act's goal of making orderly resolution of a workable covered bank under the Bankruptcy Code.<sup>44</sup>

The proposed rule could also prevent the disorderly failure of the national bank or FSA subsidiary and allow it to continue normal operations. In addition, while it may be in the individual interest of any given counterparty to exercise any available contractual rights to run on the national bank or FSA subsidiary, the mass exercise of such rights could harm the collective interest of all the counterparties by causing the subsidiary to fail. Therefore, like the automatic stay in bankruptcy, which also serves to maximize creditors' ultimate recoveries by preventing a disorderly liquidation of the debtor, the proposed rule would mitigate this collective action problem to the benefit of the creditors and counterparties of covered banks by preventing a disorderly resolution. And because many of these counterparties and creditors are themselves covered banks, or other systemically important financial firms, improving outcomes for these creditors and counterparties would further protect the safety and

soundness of the Federal banking system and financial stability of the United States.

General creditor protections. While the proposed restrictions would facilitate orderly resolution, they would also have the effect of diminishing the ability of the counterparties of the covered banks to include protections for themselves in covered QFCs. In order to reduce this effect, the proposed rule includes several significant exceptions to the proposed restrictions. These permitted creditor protections are intended to allow creditors to exercise cross-default rights outside of an orderly resolution of a GSIB (as described previously and in the Board's Proposal) and therefore would not be expected to undermine such a resolution.

First, to ensure that the proposed prohibitions would apply only to cross-default rights (and not direct default rights), the proposed rule would provide that a covered QFC may permit the exercise of default rights based on the direct party's entry into a resolution proceeding, other than a proceeding under a U.S. or foreign special resolution regime.<sup>45</sup> This provision would help ensure that, if the direct party to a QFC were to enter bankruptcy, its QFC counterparties could exercise any relevant direct default rights. Thus, a covered bank's direct QFC counterparties would not risk the delay and expense associated with becoming involved in a bankruptcy proceeding, and would be able to take advantage of default rights that would fall within the Bankruptcy Code's safe harbor provisions.

The proposed rule would also allow covered QFCs to permit the exercise of default rights based on the failure of (1) the direct party, (2) a covered affiliate support provider, or (3) a transferee that assumes a credit enhancement to satisfy its payment or delivery obligations under the direct QFC or credit enhancement. Moreover, the proposed rule would allow covered QFCs to permit the exercise of a default right in one QFC that is triggered by the direct party's failure to satisfy its payment or delivery obligations under another contract between the same parties. This exception takes appropriate account of the interdependence that exists among

the contracts in effect between the same counterparties.

The proposed exceptions for the creditor protections described are intended to help ensure that the proposed rule permits a covered bank's QFC counterparties to protect themselves from imminent financial loss and does not create a risk of delivery gridlocks or daisy-chain effects, in which a covered bank's failure to make a payment or delivery when due leaves its counterparty unable to meet its own payment and delivery obligations (the daisy-chain effect would be prevented because the covered bank's counterparty would be permitted to exercise its default rights, such as by liquidating collateral). These exceptions are generally consistent with the treatment of payment and delivery obligations under the U.S. special resolution regimes.<sup>46</sup>

These exceptions also help to ensure that a covered entity's QFC counterparty would not risk the delay and expense associated with becoming involved in a bankruptcy proceeding, since, unlike a typical creditor of an entity that enters bankruptcy, the QFC counterparty would retain its ability under the Bankruptcy Code's safe harbors to exercise direct default rights. This should further reduce the counterparty's incentive to run. Reducing incentives to run in the lead up to resolution promotes orderly resolution because a QFC creditor run (such as a mass withdrawal of repo funding) could lead to a disorderly resolution and pose a threat to financial stability.

Additional creditor protections for supported QFCs. The proposed rule would allow additional creditor protections for a non-defaulting counterparty that is the beneficiary of a credit enhancement from an affiliate of the covered bank that is also a covered bank under the proposed rule. The proposed rule would allow these creditor protections in recognition of the supported party's interest in receiving the benefit of its credit enhancement. The Board has concluded that these creditor protections would not undermine an SPOE resolution of a GSIB.<sup>47</sup>

Where a covered QFC is supported by a covered affiliate credit enhancement,<sup>48</sup> the covered QFC and

<sup>43</sup> As noted in the Board's Proposal, this proposed rule will also facilitate many approaches to GSIB resolution, including where the U.S. intermediate holding company of a foreign GSIB enters proceedings as part of a broader MPOE resolution.

<sup>44</sup> See 12 U.S.C. 5365(d).

<sup>45</sup> Special resolution regimes typically stay direct default rights, but may not stay cross-default rights. For example, as discussed previously, the FDIA stays direct default rights, see 12 U.S.C. 1821(e)(10)(B), but does not stay cross-default rights, whereas the Dodd-Frank Act's OLA stays direct default rights and cross-defaults arising from a parent's receivership, see 12 U.S.C. 5390(c)(10)(B), 5390(c)(16).

<sup>46</sup> See 12 U.S.C. 1821(e)(8)(G)(ii), 5390(c)(8)(F)(ii) (suspending payment and delivery obligations for one business day or less).

<sup>47</sup> See 81 FR 29169 (May 11, 2016).

<sup>48</sup> Note that the proposed rule would not apply with respect to credit enhancements that are not covered affiliate credit enhancements. In particular, it would not apply with respect to a credit

the credit enhancement would be permitted to allow the exercise of default rights under the circumstances after the expiration of a stay period. Under the proposed rule, the applicable stay period would begin when the credit support provider enters resolution and would end at the later of 5:00 p.m. (eastern time) on the next business day and 48 hours after the entry into resolution. This portion of the proposed rule is similar to the stay treatment provided in a resolution under the OLA or the FDIA.<sup>49</sup>

Under the proposed rule, default rights could be exercised at the end of the stay period if the covered affiliate credit enhancement has not been transferred away from the covered affiliate support provider and that support provider becomes subject to a resolution proceeding other than a proceeding under Chapter 11 of the Bankruptcy Code.<sup>50</sup> Default rights could also be exercised at the end of the stay period if the transferee (if any) of the credit enhancement enters a resolution proceeding, protecting the supported party from a transfer of the credit enhancement to a transferee that is unable to meet its financial obligations.

Default rights could also be exercised at the end of the stay period if the original credit support provider does not remain, and no transferee becomes, obligated to the same (or substantially similar) extent as the original credit support provider was obligated immediately prior to entering a resolution proceeding (including a Chapter 11 proceeding) with respect to (a) the credit enhancement applicable to the covered QFC, (b) all other credit enhancements provided by the credit support provider on any other QFCs between the same parties, and (c) all credit enhancements provided by the credit support provider between the direct party and affiliates of the direct party's QFC counterparty. Such creditor protections would be permitted to prevent the support provider or the transferee from "cherry picking" by assuming only those QFCs of a given counterparty that are favorable to the

enhancement provided by a non-U.S. entity of a foreign GSIB, which would not be a covered bank under the proposed rule.

<sup>49</sup> See U.S.C. 1821(e)(10)(B)(I), 5390(c)(10)(B)(i), 5390(c)(16)(A). While the proposed stay period is similar to the stay periods that would be imposed by the U.S. special resolution regimes, it could run longer than those stay periods under some circumstances.

<sup>50</sup> Chapter 11 (11 U.S.C. 1101–1174) is the portion of the Bankruptcy Code that provides for the reorganization of the failed company, as opposed to its liquidation, and, relative to special resolution regimes, is generally well-understood by market participants.

support provider or transferee. Title II of the Dodd-Frank Act and the FDIA contain similar provisions to prevent cherry picking.

Finally, if the covered affiliate credit enhancement is transferred to a transferee, then the non-defaulting counterparty could exercise default rights at the end of the stay period unless either (a) all of the support provider's ownership interests in the direct party are also transferred to the transferee or (b) reasonable assurance is provided that substantially all of the support provider's assets (or the net proceeds from the sale of those assets) will be transferred to the transferee in a timely manner. These conditions would help to assure the supported party that the transferee would be at least roughly as financially capable of providing the credit enhancement as the covered affiliate support provider.

Creditor protections related to FDIA proceedings. Moreover, in the case of a covered QFC that is supported by a covered affiliate credit enhancement, both the covered QFC and the credit enhancement would be permitted to allow the exercise of default rights related to the credit support provider's entry into resolution proceedings under the FDIA<sup>51</sup> under the following circumstances: (a) After the FDIA stay period,<sup>52</sup> if the credit enhancement is not transferred under the relevant provisions of the FDIA<sup>53</sup> and associated regulations, and (b) during the FDIA stay period, to the extent that the default right permits the supported party to suspend performance under the covered QFC to the same extent as that party would be entitled to do if the covered QFC were with the credit support provider itself and were treated in the same manner as the credit enhancement. This provision is intended to ensure that a QFC counterparty of a subsidiary of a covered bank that goes into FDIA receivership can receive the same level of protection that the FDIA provides to QFC counterparties of the covered bank itself.

Prohibited terminations. In case of a legal dispute as to a party's right to exercise a default right under a covered QFC, the proposed rule would require that a covered QFC must provide that, after an affiliate of the direct party has

<sup>51</sup> As discussed, the FDIA stays direct default rights against the failed depository institution but does not stay the exercise of cross-default rights against its affiliates.

<sup>52</sup> Under the FDIA, the relevant stay period runs until 5:00 p.m. (eastern time) on the business day following the appointment of the FDIC as receiver. 12 U.S.C. 1821(e)(10)(B)(I).

<sup>53</sup> 12 U.S.C. 1821(e)(9)–(10).

entered a resolution proceeding, (a) the party seeking to exercise the default right shall bear the burden of proof that the exercise of that right is indeed permitted by the covered QFC and (b) the party seeking to exercise the default right must meet a "clear and convincing evidence" standard,<sup>54</sup> a similar standard, or a more demanding standard.

The purpose of this proposed requirement is to prevent QFC counterparties from circumventing the limitations on resolution-related default rights in this proposal by exercising other contractual default rights in instances where such QFC counterparty cannot demonstrate that the exercise of such other contractual default rights is unrelated to the affiliate's entry into resolution.

Agency transactions. In addition to entering into QFCs as principal, GSIBs may engage in QFCs as agent for other principals. For example, a GSIB subsidiary may enter into a master securities lending arrangement with a foreign bank as agent for a U.S.-based pension fund. The GSIB would document its role as agent for the pension fund, often through an annex to the master agreement, and would generally provide to its customer (the principal party) a securities replacement guarantee or indemnification for any shortfall in collateral in the event of the default of the foreign bank.<sup>55</sup> A covered bank may also enter into a QFC as principal where there is an agent acting on its behalf or on behalf of its counterparty.

This proposed rule would apply to a covered QFC regardless of whether the covered bank or the covered bank's direct counterparty is acting as a principal or as an agent. This proposed rule does not distinguish between agents and principals with respect to default rights or transfer restrictions applicable to covered QFCs. The proposed rule would limit default rights and transfer restrictions that the principal and its agent may have against a covered bank consistent with the U.S. special resolution regimes. This proposed rule would ensure that, subject to the enumerated creditor protections, neither the agent nor the

<sup>54</sup> The reference to a "similar" burden of proof is intended to allow covered QFCs to provide for the application of a standard that is analogous to clear and convincing evidence in jurisdictions that do not recognize that particular standard. A covered QFC would not be permitted to provide for a lower standard.

<sup>55</sup> The definition of QFC under Title II of the Dodd-Frank Act includes security agreements and other credit enhancements as well as master agreements (including supplements). 12 U.S.C. 5390(c)(8)(D).

principal could exercise cross-default rights under the covered QFC against the covered bank based on the resolution of an affiliate of the covered bank.<sup>56</sup>

*Question 12: With respect to the proposed restrictions on cross-default rights in covered banks' QFCs, is the proposed rule sufficiently clear, such that parties to a conforming QFC will understand what default rights are, and are not exercisable, in the context of a GSIB resolution? How could the proposed restrictions be further clarified?*

*Question 13: Section 47.5(e)(2) of the proposed rule, addressing general creditor protections, would permit the exercise of default rights based on the failure of the direct party to satisfy its payment or delivery obligations under the covered QFC or "another contract between the same parties" that give rise to a default right in the covered QFC. This exception is not limited to covered QFCs but is intended to reflect the interdependence among all contracts between the same counterparties. Does the scope of the terms "contract" and "same parties" need to be clarified? Should the term "same parties" be clarified to include affiliate credit support providers as well as counterparties?*

*Question 14: Are the proposed restrictions on cross-default rights under-inclusive, such that the proposed terms would permit default rights that would have the same or similar potential to undermine an orderly SPOE resolution and should therefore be subjected to similar restrictions?*

*Question 15: Would it be appropriate for the prohibition to explicitly cover default rights that are based on or related to the "financial condition" of an affiliate of the direct party (for example, rights based on an affiliate's credit rating, stock price, or regulatory capital levels)?*

*Question 16: Should the proposed restrictions be expanded to cover contractual rights that a QFC counterparty may have to exit the termination at will or without cause, including rights that arise on a periodic basis? Could such rights be used to circumvent the proposed restrictions on cross-default rights? If so, how, if at all, should the proposed rule regulate such contractual rights?*

*Question 17: With respect to the proposed provisions permitting specific creditor protections in a covered QFC, does the proposed rule draw an appropriate balance between protecting financial stability from risks associated with QFC unwinds and maintaining important creditor protections? Should the proposed set of permitted creditor protections be expanded to allow for other creditor protections that would fall within the proposed restrictions? Is the proposed set of permitted creditor protections sufficiently clear?*

*Question 18: With respect to the proposed requirement for burden-of-proof provisions in a covered QFC, is the standard clear? Would the proposed requirement advance the goals of this proposed rule? Would those goals be better advanced by alternative or complementary provisions?*

*Question 19: Should the proposed rule require periodic legal review of the legal enforceability of the required provisions in relevant jurisdictions? If periodic legal review is not required, should covered banks be required to monitor the applicable law in the relevant jurisdiction for material changes in law?*

*Question 20: The OCC invites comment on all aspects of the proposed treatment of agency transactions, including whether credit protections should apply to QFCs where the direct party is acting as agent under the QFC.*

#### *G. Process for Approval of Enhanced Creditor Protections (Section 47.6)*

As discussed previously, the proposed restrictions would leave many creditor protections that are commonly included in QFCs unaffected. The proposed rule would also allow any covered bank to submit to the OCC a request to approve as compliant with the proposed rule one or more QFCs that contain additional creditor protections—that is, creditor protections that would be impermissible under the proposed restrictions set forth previously. A covered bank making such a request would be required to explain how its request is consistent with the purposes of this proposed rule, including an analysis of the contractual terms for which approval is requested in light of a range of factors that are laid out by the proposed rule and intended to facilitate the OCC's consideration of whether permitting the contractual terms would be consistent with the proposed restrictions. The OCC expects to consult with the FDIC and Board during its consideration of a request under this section.

The first two factors concern the potential impact of the requested

creditor protections on GSIB resilience and resolvability. The next four concern the potential scope of the covered bank's request: Adoption on an industry-wide basis, coverage of existing and future transactions, coverage of one or multiple QFCs, and coverage of some or all covered banks. Creditor protections that may be applied on an industry-wide basis may help to ensure that impediments to resolution are addressed on a uniform basis, which could increase market certainty, transparency, and equitable treatment. Creditor protections that apply broadly to a range of QFCs and covered banks would increase the chance that all of a GSIB's QFC counterparties would be treated the same way during a resolution of that GSIB and may improve the prospects for an orderly resolution of that GSIB. By contrast, covered bank requests that would expand counterparties' rights beyond those afforded under existing QFCs would conflict with the proposed rule's goal of reducing the risk of mass unwinds of GSIB QFCs. The proposed rule also includes three factors that focus on the creditor protections specific to supported parties. The OCC may weigh the appropriateness of additional protections for supported QFCs against the potential impact of such provisions on the orderly resolution of a GSIB.

In addition to analyzing the request under the enumerated factors, a covered bank requesting that the OCC approve enhanced creditor protections would be required to submit a legal opinion stating that the requested terms would be valid and enforceable under the applicable law of the relevant jurisdictions, along with any additional relevant information requested by the OCC.

Under the proposed rule, the OCC could approve a request for an alternative set of creditor protections if the terms of that QFC, as compared to a covered QFC containing only the limited exceptions discussed previously, would promote the orderly resolution of federally chartered or licensed institutions or their affiliates, prevent or mitigate risks to the financial stability of the United States or the Federal banking system that could arise from the failure of a global systemically important BHC or global systemically important FBO, and protect the safety and soundness of covered banks to at least the same extent. The proposed request-and-approval process would improve flexibility by allowing for an industry-proposed alternative to the set of creditor protections permitted by the proposed rule while ensuring that any

<sup>56</sup> If a covered bank (acting as agent) is a direct party to a covered QFC, then the general prohibitions of section 47.5(d) would only affect the substantive rights of the agent's principal(s) to the extent that the covered QFC provides default rights based directly or indirectly on the entry into resolution of an affiliate of the covered bank (acting as agent).

approved alternative would serve the proposed rule's policy goals to at least the same extent.

Compliance with the International Swaps and Derivatives Association (ISDA) 2015 Universal Resolution Stay Protocol. In lieu of the process for the approval of enhanced creditor protections that are described previously, a covered bank would be permitted to comply with the proposed rule by amending a covered QFC through adherence to the ISDA 2015 Universal Resolution Stay Protocol (including immaterial amendments to the Protocol).<sup>57</sup> The Protocol "enables parties to amend the terms of their financial contracts to contractually recognize the cross-border application of special resolution regimes applicable to certain financial companies and support the resolution of certain financial companies under the U.S. Bankruptcy Code."<sup>58</sup> The Protocol amends ISDA Master Agreements, which are used for derivatives transactions. Market participants also may amend their master agreements for securities financing transactions by adhering to the Securities Financing Transaction Annex<sup>59</sup> to the Protocol and may amend all other QFCs by adhering to the Other Agreements Annex. Thus, a covered bank would be able to comply with the proposed rule with respect to all of its covered QFCs through adherence to the Protocol and the annexes.

The Protocol has the same general objective as the proposed rule, which is to make GSIB entities more resolvable by amending their contracts to, in effect, contractually recognize the applicability of special resolution regimes (including the OLA and the FDIA) and to restrict cross-default provisions to facilitate orderly resolution under the U.S. Bankruptcy Code. The provisions of the Protocol largely track the requirements

of the proposed rule.<sup>60</sup> However, the Protocol does have a narrower scope than the proposed rule,<sup>61</sup> and it allows for somewhat stronger creditor protections than would otherwise be permitted under the proposed rule.<sup>62</sup>

The Protocol also includes a feature, not included in the proposed rule, that compensates for the Protocol's narrower scope and allowance for stronger creditor protections: When an entity (whether or not it is a covered bank) adheres to the Protocol, it necessarily adheres to the Protocol with respect to all covered entities that have also adhered to the Protocol.<sup>63</sup> Thus, if all

<sup>60</sup> For example, sections 2(a) and 2(b) of the Protocol impose general prohibitions on cross-default rights based on the entry of an affiliate of the direct party into the most common U.S. resolution proceedings, including resolution under the Bankruptcy Code. By allowing the exercise of "Performance Default Rights" and "Unrelated Default Rights," as those terms are defined in section 6 of the Protocol, sections 2(a) and 2(b) also generally permit the creditor protections that would be allowed under the proposed rule. Section 2(f) of the Protocol overrides certain contractual provisions that would block the transfer of a credit enhancement to a transferee entity. Section 2(i), complemented by the Protocol's definition of the term "Unrelated Default Rights," provides that a party seeking to exercise permitted default rights must bear the burden of establishing by clear and convincing evidence that those rights may indeed be exercised.

<sup>61</sup> The restrictions on default rights imposed by section 2 of the Protocol apply only when an affiliate of the direct party enters "U.S. Insolvency Proceedings," which is defined to include proceedings under Chapters 7 and 11 of the Bankruptcy Code, the FDIA, and the Securities Investor Protection Act. By contrast, section 47.4 of the proposed rule would apply broadly to default rights related to affiliates of the direct party "becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding," which encompasses proceedings under State and foreign law.

<sup>62</sup> For example, the Protocol allows a non-defaulting party to exercise cross-default rights based on the entry of an affiliate of the direct party into certain resolution proceedings if the direct party's U.S. parent has not gone into resolution. See paragraph (b) of the Protocol's definition of "Unrelated Default Rights"; see also sections 1 and 3(b) of the Protocol. As another example, if the affiliate credit support provider that has entered bankruptcy remains obligated under the credit enhancement, rather than transferring it to a transferee, then the Protocol's restrictions on the exercise of default rights continue to apply beyond the stay period only if the Bankruptcy Court issues a "Creditor Protection Order." Such an order would, among other things, grant administrative expense status to the non-defaulting party's claims under the credit enhancement. See sections 2(b)(i)(B) and 2(b)(iii)(B) of the Protocol and the Protocol's definitions of "Creditor Protection Order" and "DIP Stay Conditions."

<sup>63</sup> Under section 4(a) of the Protocol, the Protocol is generally effective as between any two adhering parties, once the relevant effective date has arrived. Under section 4(b)(ii), an adhering party that is not a covered bank may choose to opt out of section 2 of the Protocol with respect to its contracts with any other adhering party that is also not a covered bank. However, the Protocol will apply to relationships between any covered bank that adheres and any other adhering party.

covered banks adhere to the Protocol, any other entity that chooses to adhere will simultaneously adhere with respect to all covered entities and covered banks. By allowing for all covered QFCs to be modified by the same contractual terms, this "all-or-none" feature would promote transparency, predictability, and equal treatment with respect to counterparties' default rights during the resolution of a GSIB entity and thereby advance the proposed rule's objective of increasing the likelihood that such a resolution could be carried out in an orderly manner.

Like section 47.5 of the proposed rule, section 2 of the Protocol was developed to increase GSIB resolvability under the Bankruptcy Code and other U.S. insolvency regimes. The Protocol does allow for somewhat broader creditor protections than would otherwise be permitted under the proposed rule, but, consistent with the Protocol's purpose, those additional creditor protections would not materially diminish the prospects for the orderly resolution of a GSIB. And the Protocol carries the desirable all-or-none feature, which would further increase a GSIB entity's resolvability and which the proposed rule otherwise lacks. For these reasons, and consistent with the broad policy objective of enhancing the stability of the U.S. financial system by increasing the resolvability of systemically important financial companies in the United States, the proposed rule would allow a covered bank to bring its covered QFCs into compliance by amending them through adherence to the Protocol (and, as relevant, the annexes to the Protocol).

*Question 21: Are the proposed considerations for the approval of enhanced credit protections the appropriate factors for the OCC to take into account in deciding whether to grant a request for approval? What other considerations are potentially relevant to such a decision?*

*Question 22: Should the OCC provide greater specificity for the process and procedures for the submission and approval of requests for alternative enhanced credit protections? If so, what processes and procedures could be adopted without imposing undue regulatory burden?*

*Question 23: The OCC invites comment on its proposal to treat as compliant with section 47.6 of the proposal any covered QFC that has been amended by the Protocol. Does adherence to the Protocol suffice to meet the goals of this proposed rule, appropriately protect the Federal banking system and safeguard U.S. financial stability? Should additional*

<sup>57</sup> International Swaps and Derivatives Association, Inc., "ISDA 2015 Universal Resolution Stay Protocol" (November 4, 2015), available at <http://assets.isda.org/media/ac6b533f-3/5a7c32f8-pdf/>. The Protocol was developed by a working group of member institutions of the ISDA, in coordination with the FRB, the FDIC, the OCC, and foreign financial supervisory agencies. ISDA is expected to supplement the Protocol with ISDA Resolution Stay Jurisdictional Modular Protocols for the United States and other jurisdictions. A U.S. module that is the same in all respects to the Protocol aside from exempting QFCs between adherents that are not covered banks would be consistent with the current proposed rule.

<sup>58</sup> Protocol Press Release at <http://www2.isda.org/functional-areas/protocol-management/protocol/22>.

<sup>59</sup> The Securities Financing Transaction Annex was developed by the International Capital Markets Association, the International Securities Lending Association, and the Securities Industry and Financial Markets Association, in coordination with the ISDA.

*guidance be provided that would clarify the consultation process with the FRB or any other relevant supervisory agency?*

*H. Transition Periods (Sections 47.4 and 47.5)*

Under this proposed rule, the final rule would take effect on the first day of the first calendar quarter that begins at least one year after the issuance of the final rule (effective date).<sup>64</sup> National banks, FSAs, and Federal branches and agencies that are covered banks when the final rule is issued would be required to comply with the proposed requirements beginning on the effective date. Thus, a covered bank would be required to ensure that covered QFCs entered into on or after the effective date comply with the rule's requirements. Moreover, a covered bank would be required to bring preexisting covered QFCs entered into prior to the effective date into compliance with the rule no later than the first date on or after the effective date on which the covered bank enters into a new covered QFC with the counterparty to the preexisting covered QFC or with an affiliate of that counterparty. Thus, a covered bank would not be required to conform a preexisting QFC if that covered bank does not enter into any new QFCs with the same counterparty or an affiliate of that counterparty on or after the effective date. Finally, a national bank, FSA, or Federal branch or agency that becomes a covered bank after the final rule is issued would be required to comply by the first day of the first calendar quarter that begins at least one year after it becomes a covered bank.

By permitting a covered bank to remain party to nonconforming QFCs entered into before the effective date unless the covered bank enters into new QFCs with the same counterparty or its affiliate, the proposed rule draws a balance between ensuring QFC continuity if a global systemically important BHC or FBO were to fail and ensuring that covered banks and their existing counterparties can avoid any compliance costs associated with conforming existing QFCs by refraining from entering into new QFCs and avoiding unnecessary disruption to existing QFCs. The requirement that a covered bank ensure that all existing QFCs are compliant before entering into a new QFC with the same counterparty or its affiliate will provide covered

banks with an incentive to seek the modifications necessary to ensure that their QFCs with the most significant counterparties are compliant.

A covered bank would be required to bring a preexisting covered QFC entered into prior to the effective date into compliance with the rule no later than the first date on or after the effective date on which the covered bank or an affiliate (that is also a covered entity or covered bank) enters into a new covered QFC with the counterparty to the preexisting covered QFC or an affiliate of the counterparty. The OCC believes such an approach is warranted to ensure that adoption of the contractual provisions required by the proposed rule are consistent between a given counterparty, any affiliate of the counterparty, and the covered bank and all of the affiliates of the covered bank (which would essentially be all of the entities under a global systemically important BHC or FBO). The OCC is concerned that to allow counterparties to adopt the required contractual provisions with affiliated covered entities, but not the covered bank, poses a risk to the safety and soundness of the covered bank and would frustrate the goal of facilitating the orderly resolution of the covered bank (and its affiliate covered entities). Furthermore, the OCC expects that, as a practical matter, the decision of how to comply with this proposed rule and the FRB Proposal with respect to a given counterparty, and its affiliates, will be made in close coordination between the covered bank and its affiliated covered entities.

The OCC believes that adoption of the modifications required by the proposed rule should be consistent between a given counterparty and all entities under a global systemically important BHC or FBO, which necessitates allowing a trade by either a covered bank or a covered entity to trigger adoption of the required provisions. Moreover, the volume of nonconforming covered QFCs outstanding can be expected to decrease over time and eventually to reach zero. In light of these considerations, and to avoid creating potentially inappropriate compliance costs with respect to existing QFCs (which a covered bank would generally be unable to modify without its counterparty's consent), it may be appropriate to permit a limited number of nonconforming QFCs to remain outstanding, in keeping with the terms described previously. The OCC will monitor covered banks' levels of nonconforming QFCs and evaluate the risk, if any, that they pose to the safety and soundness of the covered banks or

to the Federal banking system and to U.S. financial stability.

*Question 24: With respect to the proposed transaction periods, would there be a reasonable basis for adopting different compliance deadlines with respect to different classes of QFCs? If so, how should those classes be distinguished, and what would be a reasonable time frame for compliance?*

*Question 25: Is it necessary for a covered bank to bring preexisting covered QFCs entered into prior to the effective date into compliance with the rule based on a covered bank's affiliate's (that is also a covered entity or covered bank) transaction with a counterparty or its affiliates? Is it appropriate to ensure consistent treatment across all affiliated covered banks, covered entities, and affiliated counterparties?*

## **I. Amendments to Capital Rules**

The Basel III Capital Framework, as implemented by the OCC and the other banking agencies, permits a bank to measure exposure from certain types of financial contracts on a net basis and recognize the risk-mitigating effect of financial collateral for other types of exposures, provided that the contracts are subject to a "qualifying master netting agreement," a collateral agreement, eligible margin loan, or repo-style transaction (collectively referred to as netting agreements) that provides for certain rights upon a counterparty default. With limited exception, to qualify for netting treatment, a qualifying netting agreement must permit a bank to terminate, apply close-out netting, and promptly liquidate or set-off collateral upon an event of default of the counterparty (default rights), thereby reducing its counterparty exposure and market risks.<sup>65</sup> Measuring the amount of exposure of these contracts on a net basis, rather than a gross basis, results in a lower measure of exposure, and thus, a lower capital requirement.

An exception to the immediate close-out requirement is made for the stay of default rights if the financial company is in receivership, conservatorship, or resolution under Title II of the Dodd-Frank Act,<sup>66</sup> or the FDIA.<sup>67</sup> Accordingly, transactions conducted under netting agreements where default rights may be stayed under Title II of the

<sup>64</sup> Under section 302(b) of the Riegle Community Development and Regulatory Improvement Act of 1994, new regulations that impose requirements on insured depository institutions generally must "take effect on the first day of a calendar quarter which begins on or after the date on which the regulations are published in final form." 12 U.S.C. 4802(b).

<sup>65</sup> See 12 CFR 3.2 definition of collateral agreement, eligible margin loan, repo-style transaction, and qualifying master netting agreement.

<sup>66</sup> See 12 U.S.C. 5390(c)(8)-(16).

<sup>67</sup> See 12 U.S.C. 1821(e)(8)-(13).

Dodd-Frank Act or the FDIA would not be disqualified from netting treatment.

On December 30, 2014, the OCC and the FRB issued an interim final rule (effective January 1, 2015) that amended the definitions of “qualifying master netting agreement,” “collateral agreement,” “eligible margin loan,” and “repo-style transaction,” in the OCC and FRB regulatory capital rules, and “qualifying master netting agreement” in the OCC and FRB liquidity coverage ratio (LCR) rules to expand the exception to the immediate close-out requirement to ensure that the current netting treatment under the regulatory capital, liquidity, and lending limits rules for over-the-counter (OTC) derivatives, repo-style transactions, eligible margin loans, and other collateralized transactions would be unaffected by the adoption of various foreign special resolution regimes through the ISDA Protocol.<sup>68</sup> In particular, the interim final rule amended these definitions to provide that a relevant netting agreement or collateral agreement may provide for a limited stay or avoidance of rights where the agreement is subject by its terms to, or incorporates, certain resolution regimes applicable to financial companies, including Title II of the Dodd-Frank Act, the FDIA, or any similar foreign resolution regime that provides for limited stays substantially similar to the stay for qualified financial contracts provided in Title II of the Dodd-Frank Act or the FDIA.

Section 47.4 of the proposed rule essentially limits the default rights exercisable against a covered bank to the same stay and transfer restrictions imposed under the U.S. special resolution regime against a direct counterparty. Section 47.4 of the proposed rule mirrors the contractual stay and transfer restrictions reflected in the ISDA Protocol with one notable difference. While adoption of the ISDA Protocol is voluntary, covered banks subject to the proposed rule must conform their covered QFCs to the stay and transfer restrictions in section 47.4.

With respect to limitations on cross-default rights in proposed section 47.5, the OCC is proposing amendments in order to maintain the existing netting treatment for covered QFCs for purposes of the regulatory capital, liquidity, and lending limits rules. Specifically, the OCC is proposing to amend the definition of “qualifying master netting agreement,” as well as to make conforming amendments to “collateral

agreement,” “eligible margin loan,” and “repo-style transaction,” in the regulatory capital rules in part 3, and “qualifying master netting agreement” in the LCR rules in part 50 to ensure that the regulatory capital, liquidity, and lending limits treatment of OTC derivatives, repo-style transactions, eligible margin loans, and other collateralized transactions would be unaffected by the adoption of proposed section 47.5. Without these proposed amendments, covered banks that amend their covered QFCs to comply with this proposed rule would no longer be permitted to recognize covered QFCs as subject to a qualifying master netting agreement or satisfying the criteria necessary for the current regulatory capital, liquidity, and lending limits treatment, and would be required to measure exposure from these contracts on a gross, rather than net, basis. This result would undermine the proposed requirements in section 47.5. The OCC does not believe that the disqualification of covered QFCs from master netting agreements would accurately reflect the risk posed by these OTC derivative transactions.

Although the proposed rule reformats some of the definitions in parts 3 and 50 to include the text from the interim final rule, the proposed amendments do not alter the substance or effect of the prior amendment adopted by the interim final rule.

The rule establishing margin and capital requirements for covered swap entities (swap margin rule) defines the term “eligible master netting agreement” in a manner similar to the definition of “qualifying master netting agreement.”<sup>69</sup> Thus, it may also be appropriate to amend the definition of “eligible master netting agreement” to account for the proposed restrictions on covered entities’ QFCs.

*Question 26: As noted, the requirements of this proposed rule are mandatory for all covered banks with respect to their covered QFCs. Under the proposed rule failure by a covered bank to conform its covered QFCs to the mandatory requirements would be a violation of the rule. In light of the important policy objectives of this proposed rule, should the regulatory capital and LCR rules require that nonconforming covered QFCs that violate the requirements of the proposed rule be disqualified from netting treatment?*

*Question 27. In order to qualify for netting treatment under the regulatory capital rules, eligible margin loans,*

*qualifying master netting agreements, and repo-style transactions require national banks and FSAs to conduct sufficient legal review to ensure that the provisions of these financial contracts would be enforceable in all relevant jurisdictions. Should the scope of the legal review requirement be expanded to explicitly include the enforceability of the direct default and cross-default provisions required by the proposed rule?*

#### IV. Request for Comments

In addition to the specifically enumerated questions in the preamble, the OCC requests comment on all aspects of this proposed rule. The OCC requests that, for the specifically enumerated questions, commenters include the number of the question in their response to make review of the comments more efficient.

#### V. Regulatory Analysis

##### A. Paperwork Reduction Act

In accordance with section 3512 of the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501–3521) (as amended), the OCC may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number.

Certain provisions of the proposed rule contain “collection of information” requirements within the meaning of the PRA. In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently-valid OMB control number. The information collection requirements contained in this proposed rulemaking have been submitted to OMB for review and approval under section 3507(d) of the PRA (44 U.S.C. 3507(d)) and section 1320.11 of the OMB’s implementing regulations (5 CFR 1320).

Comments are invited on:

(a) Whether the collections of information are necessary for the proper performance of the OCC’s functions, including whether the information has practical utility;

(b) The accuracy of the estimates of the burden of the information collections, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the information collections on respondents, including through the use

<sup>68</sup> The FDIC issued a NPRM on January 30, 2015 to propose these conforming amendments. See 80 FR 5063 (January 30, 2015).

<sup>69</sup> 80 FR 74840, 74861–74862 (November 30, 2015).

of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

All comments will become a matter of public record. Comments on aspects of this notice that may affect reporting, recordkeeping, or disclosure requirements and burden estimates should be sent to the addresses listed in the **ADDRESSES** section of this document. A copy of the comments may also be submitted to the OMB desk officer for the agencies: by mail to U.S. Office of Management and Budget, 725 17th Street NW., #10235, Washington, DC 20503; by facsimile to (202) 395-5806; or by email to: [oira\\_submission@omb.eop.gov](mailto:oira_submission@omb.eop.gov), Attention, Federal Banking Agency Desk Officer.

**Title of Information Collection:** Mandatory Contractual Stay Requirements for Qualified Financial Contracts.

**Affected Public:** Businesses or other for-profit.

**Respondents:** Banks or FSAs (including any subsidiary of a bank or FSA) that are subsidiaries of a global systemically important BHC that has been designated pursuant to 252.82(a)(1) of the Federal Reserve Board's Regulation YY; Banks or FSAs (including any subsidiary of a bank or FSA) that are subsidiaries of a global systemically important FBO designated pursuant to section 252.87 of the Federal Reserve Board's Regulation YY; and Federal branches and agencies (including any U.S. subsidiary of a Federal branch or agency), of a global systemically important FBO that has been designated pursuant to section 252.87 of the Federal Reserve Board's Regulation YY.

**Abstract:** Section 47.6 provides that a covered bank may request that the OCC approve as compliant with the requirements of section 47.5, regarding insolvency proceedings, provisions of one or more forms of covered QFCs, or amendments to one or more forms of covered QFCs, with enhanced creditor protection conditions. The request must include: (1) an analysis of the proposal under each consideration of the relevance of creditor protection provisions; (2) 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 (3) any additional information

relevant to its approval that the OCC requests.

**Burden Estimates:**

**Estimated Number of Respondents:** 42.

**Estimated Burden per Respondent:** Reporting (§ 47.7): 40 hours.

**Total Estimated Burden:** 1,680 hours.

#### **B. Regulatory Flexibility Act Analysis**

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* ("RFA"), generally requires that, in connection with a NPRM, an agency prepare and make available for public comment an initial regulatory flexibility analysis that describes the impact of a proposed rule on small entities.<sup>70</sup> The Small Business Administration has defined "small entities" for banking purposes to include a bank or savings association with \$175 million or less in assets.<sup>71</sup>

The OCC currently supervises approximately 1,032 small entities. The scope of the proposal is limited to large banks and their affiliates. Therefore, the proposed rule will not impact any OCC-supervised small entities. Accordingly, the proposal will not have a significant economic impact on a substantial number of small entities.

#### **C. Unfunded Mandates Reform Act of 1995**

The OCC has analyzed the proposed rule under the factors in the Unfunded Mandates Reform Act of 1995 (UMRA).<sup>72</sup> Under this analysis, the OCC considered whether the proposed rule includes a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year (adjusted annually for inflation). The UMRA does not apply to regulations that incorporate requirements specifically set forth in law.

The OCC's estimated UMRA cost is less than \$2 million. Therefore, the OCC finds that the proposed rule does not trigger the UMRA cost threshold. Accordingly, the OCC has not prepared the written statement described in section 202 of the UMRA.

#### **D. Riegle Community Development and Regulatory Improvement Act of 1994**

Pursuant to section 302(a) of the Riegle Community Development and Regulatory Improvement Act of 1994 (RCDDRI Act),<sup>73</sup> in determining the effective date and administrative compliance requirements for new

regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, the OCC will consider, consistent with the principles of safety and soundness and the public interest: (1) Any administrative burdens that the proposed rule would place on depository institutions, including small depository institutions and customers of depository institutions, and (2) the benefits of the proposed rule. The OCC requests comment on any administrative burdens that the proposed rule would place on depository institutions, including small depository institutions, and their customers, and the benefits of the proposed rule that the OCC should consider in determining the effective date and administrative compliance requirements for a final rule.

#### **List of Subjects**

##### **12 CFR Part 3**

Administrative practice and procedure; Capital; Federal savings associations; National banks; Reporting and recordkeeping requirements; Risk.

##### **12 CFR Part 47**

Administrative practice and procedure; Banks and banking; Bank resolution; Default rights; Federal savings associations, National banks, Qualified financial contracts; Reporting and recordkeeping requirements; Securities.

##### **12 CFR Part 50**

Administrative practice and procedure; Banks and banking; Liquidity; Reporting and recordkeeping requirements; Savings associations.

#### **Authority and Issuance**

For the reasons stated in the Supplementary Information, the Office of the Comptroller of the Currency proposes to amend part 3, add a new part 47, and amend part 50 as follows:

#### **PART 3—CAPITAL ADEQUACY STANDARDS**

■ 1. The authority citation for part 3 continues to read as follows:

**Authority:** 12 U.S.C. 93a, 161, 1462, 1462a, 1463, 1464, 1818, 1828(n), 1828 note, 1831n note, 1835, 3907, 3909, and 5412(b)(2)(B).

■ 2. Section 3.2 is amended by:

■ a. Revising the definition of "collateral agreement" by:

■ i. Removing the word "or" at the end of paragraph (1);

■ ii. Removing the period at the end of paragraph (2) and adding in its place "or"; and

■ iii. Adding a new paragraph (3).

<sup>70</sup> See 5 U.S.C. 603(a).

<sup>71</sup> See 13 CFR 121.201.

<sup>72</sup> 2 U.S.C. 1531 *et seq.*

<sup>73</sup> 12 U.S.C. 4802(a).

- b. Revising paragraph (1)(iii) of the definition of “eligible margin loan”; and
- c. Revising the definition of “qualifying master netting agreement” by:
  - i. Removing the word “or” at the end of paragraph (2)(i);
  - ii. Removing the “;” at the end of paragraph (2)(ii) and adding in its place “; or”; and
  - iii. Adding a new paragraph (2)(iii).
- d. Revising paragraph (3)(ii)(A) of the definition of “repo-style transaction”.

The revisions are set forth below:

**§ 3.2 Definitions.**

\* \* \* \* \*

*Collateral agreement* means \* \* \*

\* \* \* \* \*

(3) Where the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty is limited only to the extent necessary to comply with the requirements of part 47 of this title 12 or any similar requirements of another U.S. Federal banking agency, as applicable.

\* \* \* \* \*

*Eligible margin loan* means: (1) \* \* \*

\* \* \* \* \*

(iii) The extension of credit is conducted under an agreement that provides the national bank or Federal savings association the right to accelerate and terminate the extension of credit and to liquidate or set-off collateral promptly upon an event of default, including upon an event of receivership, insolvency, liquidation, conservatorship, or similar proceeding, of the counterparty, provided that, in any such case, any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions, other than:

(A) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act, Title II of the Dodd-Frank Act, or under any similar insolvency law applicable to GSEs,<sup>5</sup> or laws of foreign jurisdictions that are substantially similar<sup>6</sup> to the U.S. laws referenced in this paragraph in order to

<sup>5</sup> This requirement is met where all transactions under the agreement are (i) executed under U.S. law and (ii) constitute “securities contracts” under section 555 of the Bankruptcy Code (11 U.S.C. 555), qualified financial contracts under section 11(e)(8) of the Federal Deposit Insurance Act, or netting contracts between or among financial institutions under sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act or the FRB’s Regulation EE (12 CFR part 231).

<sup>6</sup> The OCC expects to evaluate jointly with the FRB and FDIC whether foreign special resolution regimes meet the requirements of this paragraph.

facilitate the orderly resolution of the defaulting counterparty; or

(B) Where the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty is limited only to the extent necessary to comply with the requirements of part 47 of this title 12 or any similar requirements of another U.S. Federal banking agency, as applicable;

or  
\* \* \* \* \*

*Qualifying master netting agreement* means a written, legally enforceable agreement provided that:

\* \* \* \* \*

(2) \* \* \*

\* \* \* \* \*

(iii) Where the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty is limited only to the extent necessary to comply with the requirements of part 47 of this title 12 or any similar requirements of another U.S. Federal banking agency, as applicable.

\* \* \* \* \*

*Repo-style transaction* means a repurchase or reverse repurchase transaction, or a securities borrowing or securities lending transaction, including a transaction in which the national bank or Federal savings association acts as agent for a customer and indemnifies the customer against loss, provided that:

\* \* \* \* \*

(3) \* \* \*

(ii) \* \* \*

(A) The transaction is executed under an agreement that provides the national bank or Federal savings association the right to accelerate, terminate, and close-out the transaction on a net basis and to liquidate or set-off collateral promptly upon an event of default, including upon an event of receivership, insolvency, liquidation, or similar proceeding, of the counterparty, provided that, in any such case, any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions, other than:

(1) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act, Title II of the Dodd-Frank Act, or under any similar insolvency law applicable to GSEs, or laws of foreign jurisdictions that are

substantially similar<sup>8</sup> to the U.S. laws referenced in this paragraph (3)(ii)(a) in order to facilitate the orderly resolution of the defaulting counterparty; or

(2) Where the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty is limited only to the extent necessary to comply with the requirements of part 47 of this title 12 or any similar requirements of another U.S. Federal banking agency, as applicable; or

\* \* \* \* \*

**PART 47—MANDATORY CONTRACTUAL STAY REQUIREMENTS FOR QUALIFIED FINANCIAL CONTRACTS**

■ 3. The authority citation for Part 47 shall read as follows:

**Authority:** 12 U.S.C. 1, 93a, 481, 1462a, 1463, 1464, 1467a, 1818, 1828, 1831n, 1831o, 1831p–1, 1831w, 1835, 3102(b), 3108(a), 5412(b)(2)(B), (D)–(F).

■ 4. Add new Part 47 to read as follows:

**PART 47—MANDATORY CONTRACTUAL STAY REQUIREMENTS FOR QUALIFIED FINANCIAL CONTRACTS**

Sec.

- 47.1 Authority and Purpose.
- 47.2 Definitions.
- 47.3 Applicability.
- 47.4 U.S. Special Resolution Regimes.
- 47.5 Insolvency Proceedings.
- 47.6 Approval of Enhanced Creditor Protection Conditions.
- 47.7 Exclusion of Certain QFCs.
- 47.8 Foreign Bank Multi-Branch Master Agreements.

**PART 47—MANDATORY CONTRACTUAL STAY REQUIREMENTS FOR QUALIFIED FINANCIAL CONTRACTS**

**§ 47.1 Authority and Purpose.**

(a) *Authority.* 12 U.S.C. 1, 93a, 1462a, 1463, 1464, 1467a, 1818, 1828, 1831n, 1831p–1, 1831w, 1835, 3102(b), 3108(a), 5412(b)(2)(B), (D)–(F).

(b) *Purpose.* The purpose of this part is to promote the safety and soundness of federally chartered or licensed institutions by mitigating the potential destabilizing effects of the resolution of a global significantly important banking entity on an affiliate that is a covered bank (as defined by this part) by requiring covered banks to include in financial contracts covered by this part certain mandatory contractual

<sup>8</sup> The OCC expects to evaluate jointly with the FRB and FDIC whether foreign special resolution regimes meet the requirements of this paragraph.

provisions relating to stays on acceleration and close out rights and transfer rights.

#### § 47.2 Definitions.

*Central counterparty or CCP* has the same meaning as in section 252.81 of the Federal Reserve Board's Regulation YY (12 CFR 252.81).

*Chapter 11 proceeding* means a proceeding under the provisions of Chapter 11 of the bankruptcy laws of the United States at 11 U.S.C. 1101–74 (Chapter 11 of Title 11, United States Code).

*Covered entity* has the same meaning as in section 252.82(a) of the Federal Reserve Board's Regulation YY (12 CFR 252.82).

*Covered QFC* means a QFC as defined in sections 47.4(a) and 47.5(a) of this part.

*Credit enhancement* means a QFC of the type set forth in Title II of the Dodd-Frank Act at section 210(c)(8)(D)(ii)(XII), (iii)(X), (iv)(V), (v)(VI), or (vi)(VI), 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 by regulation is a QFC pursuant to section 210(c)(8)(D)(i), 12 U.S.C.

5390(c)(8)(D)(i), of the Dodd-Frank Act.

*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 section 47.5 of this part, 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.

*Dodd-Frank Act* means the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (July 21, 2010).

*FDIA 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.

*FDIA stay period* means, in connection with an FDIA proceeding, the period of time during which a party to a QFC whose counterparty is subject to an FDIA proceeding may not exercise any right that the counterparty 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.

*Master agreement* means a QFC of the type set forth in Title II of the Dodd-Frank Act at section 210(c)(8)(D)(ii)(XI), (iii)(IX), (iv)(IV), (v)(V), or (vi)(V), 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 the Dodd-Frank Act, 12 U.S.C. 5390(c)(8)(D)(i).

*QFC or qualified financial contract* has the same meaning as in section 210(c)(8)(D) of Title II of the Dodd-Frank Act, 12 U.S.C. 5390(c)(8)(D).

*Subsidiary of covered bank* means any operating subsidiary of a national bank, Federal savings association, or Federal branch or agency as defined in 12 CFR 5.34 (national banks) or 12 CFR 5.38 (FSAs), or any other subsidiary of a covered bank as defined in section 252.82(a)(2) and (3) of the Federal Reserve Board's Regulation YY (12 CFR 252.82(a)(2) and (3)).

*U.S. special resolution regimes* means the Federal Deposit Insurance Act at 12 U.S.C. 1811–1835a and regulations promulgated thereunder and Title II of the Dodd-Frank Act, 12 U.S.C. 5381–

5394, and regulations promulgated thereunder.

#### § 47.3 Applicability.

(a) *Scope of applicability.* This part applies to a “covered bank,” which includes:

(i) A national bank or Federal savings association (including any subsidiary of a national bank or a Federal savings association) that is a subsidiary of a global systemically important bank holding company that has been designated pursuant to section 252.82(a)(1) of the Federal Reserve Board's Regulation YY (12 CFR 252.82(a)(1)); or

(ii) A national bank or Federal savings association (including any subsidiary of a national bank or a Federal savings association) that is a subsidiary of a global systemically important foreign banking organization that has been designated pursuant to section 252.87 of the Federal Reserve Board's Regulation YY (12 CFR 252.87); or

(iii) A Federal branch or agency, as defined in the Subpart B of Part 28 of this Chapter (governing Federal branches and agencies), and any U.S. subsidiary of the Federal branch or agency, of a global systemically important foreign banking organization that has been designated pursuant to section 252.87 of the Federal Reserve Board's Regulation YY (12 CFR 252.87).

(b) *Subsidiary of a covered bank.* This part generally applies to the subsidiary of any national bank, Federal savings association, or Federal branch or agency that is a covered bank under paragraph (a)(1) of this section. Specifically, the covered bank is required to ensure that a covered QFC to which the subsidiary is a party (as a direct counterparty or a support provider) satisfies the requirements of sections 47.4 and 47.5 of this part in the same manner and to the same extent applicable to the covered bank.

(c) *Initial applicability of requirements for covered QFCs.* A covered bank must comply with the requirements of sections 47.4 and 47.5 beginning on the later of

(1) The first day of the calendar quarter immediately following 365 days (1 year) after becoming a covered bank; or

(2) The date this subpart first becomes effective.

(d) *Rule of construction.* For purposes of this subpart, 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.

**§ 47.4 U.S. Special Resolution Regimes.**

(a) *QFCs required to be conformed.* (1) A covered bank must ensure that each of its covered QFCs conforms to the requirements of this section 47.4.

(2) For purposes of this section 47.4, a covered QFC means a QFC that the covered bank:

(i) Enters, executes, or otherwise becomes a party to; or

(ii) Entered, executed, or otherwise became a party to before the date this subpart first becomes effective, if the covered bank or any affiliate that is a covered bank or covered entity also enters, executes, or otherwise becomes a party to a QFC with the same person or affiliate of the same person on or after the date this subpart first becomes effective.

(3) To the extent that the covered bank is acting as agent with respect to a QFC, the requirements of this section apply to the extent the transfer of the QFC relates to the covered bank or the default rights relate to the covered bank or an affiliate of the covered bank.

(b) *Provisions required.* A covered QFC must explicitly provide that:

(1) The transfer of the covered QFC (and any interest and obligation in or under, and any property securing, the covered QFC) from the covered bank will be effective to the same extent as the transfer would be effective under the U.S. special resolution regimes 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 the covered bank were under the U.S. special resolution regime; and

(2) Default rights with respect to the covered QFC that may be exercised against the covered bank are permitted to be exercised to no greater extent than the default rights could be exercised under the U.S. special resolution regimes if the covered QFC was governed by the laws of the United States or a state of the United States and the covered bank were under the U.S. special resolution regime.

(c) *Relevance of creditor protection provisions.* The requirements of this section apply notwithstanding paragraphs (e), (g), and (i) of section 47.5.

**§ 47.5 Insolvency Proceedings.**

(a) *QFCs required to be conformed.* (1) A covered bank must ensure that each covered QFC conforms to the requirements of this section 47.5.

(2) For purposes of this section 47.5, a covered QFC has the same definition as in paragraph (a)(2) of section 47.4.

(3) To the extent that the covered bank is acting as agent with respect to a QFC, the requirements of this section apply to the extent the transfer of the QFC relates to the covered bank or the default rights relate to an affiliate of the covered bank.

(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 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 and this part.* (1) *Direct party.* Direct party means covered bank, or covered entity referenced in section 47.2, 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) *Treatment of agent transactions.* With respect to a QFC that is a covered QFC for a covered bank solely because the covered bank is acting as agent under the QFC, the covered bank is the direct party.

(e) *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 other than a receivership, conservatorship, or resolution under the Federal Deposit Insurance Act, Title II

of the Dodd-Frank Wall Street Reform and Consumer Protection Act, or laws of foreign jurisdictions that are substantially similar to the U.S. laws referenced in this paragraph (e)(1) in order to facilitate the orderly resolution of the direct party;

(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.

(f) *Definitions relevant to the general creditor protections and this part.* (1) *Covered direct QFC.* Covered direct QFC means a direct QFC to which a covered bank, or a covered entity referenced in section 47.2, is a party.

(2) *Covered affiliate credit enhancement.* Covered affiliate credit enhancement means an affiliate credit enhancement in which a covered bank, or a covered entity referenced in section 47.2, 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 under the covered affiliate credit enhancement.

(g) *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 that is related, directly or indirectly, to the covered affiliate support provider after the stay period 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 (i) 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 47.5(g)(3)(i), 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 47.5(g)(3)(ii); 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.

(h) *Definitions relevant to the additional creditor protections for supported QFCs and this part.* (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 restructuring or reorganization involving the covered affiliate support provider.

(i) *Creditor protections related to FDIA proceedings.* 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 FDIA proceedings:

(1) After the FDIA 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 FDIA 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.

(j) *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.

#### **§ 47.6 Approval of Enhanced Creditor Protection Conditions.**

(a) *Protocol compliance.* A covered QFC may permit the exercise of a default right with respect to the covered QFC if the covered QFC has been amended by 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.

(b) *Proposal of enhanced creditor protection conditions.* (1) A covered

bank may request that the OCC approve as compliant with the requirements of section 47.5 of this part provisions of one or more forms of covered QFCs, or 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 section 47.5(b) of this part that are different than that of paragraphs (e), (g), and (i) of section 46.5 of this part.

(3) A covered bank 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 OCC requests.

(c) *OCC approval.* The OCC may approve, subject to any conditions or commitments the OCC may impose, a proposal by a covered bank under paragraph (b) of this section if the proposal, as compared to a covered QFC that contains only the limited exemptions in paragraphs of (e), (g), and (i) of section 47.5 of this part, would promote the safety and soundness of federally chartered or licensed institutions by mitigating the potential destabilizing effects of the resolution of a global significantly important banking entity that is an affiliate of the covered bank, at least to the same extent.

(d) *Considerations.* In reviewing a proposal under this section, the OCC 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 banks during distress or increase the impact of the failure of one or more of the covered banks;

(2) Whether, and the extent to which, the proposal would materially decrease the ability of a covered bank, or an affiliate of a covered bank, 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 pursuant to Section 165(d) of the Dodd-Frank Act, 12 U.S.C. 5635(d), and the implementing regulations in 12 CFR

part 243 (FRB) and 12 CFR part 381 (FDIC);

(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 banks;

(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 banks;

(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.

**§ 47.7 Exclusion of Certain QFCs.**

(a) Exclusion of CCP-cleared QFCs. A covered bank is not required to conform a covered QFC to which a CCP is a party to the requirements of sections 47.4 and 47.5.

(b) Exclusion of covered entity QFCs. A covered bank is not required to conform a covered QFC to the requirements of sections 47.4 and 47.5 to the extent that a covered entity is required to conform the covered QFC to similar requirements of the Federal Reserve Board if the QFC is either a direct QFC to which a covered entity is

a direct party or an affiliate credit enhancement to which a covered entity is the obligor.

**§ 47.8 Foreign Bank Multi-branch Master Agreements.**

(a) *Treatment of foreign bank multi-branch master agreements.* With respect to a Federal branch or agency of a globally significant 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 Federal branches or agencies of the globally significant 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 Federal branches or agencies or for which a payment or delivery may be made at such Federal branches or agencies.

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

**PART 50—LIQUIDITY RISK MEASUREMENT STANDARDS**

■ 5. The authority citation for part 50 continues to read as follows:

**Authority:** 12 U.S.C. 1 *et seq.*, 93a, 481, 1818, and 1462 *et seq.*

■ 6. Section 50.3 is amended by revising the definition of “qualifying master netting agreement” by:

■ i. Removing the word “or” at the end of paragraph (2)(i);

■ ii. Removing the “;” at the end of paragraph (2)(ii) and adding in its place “; or”; and

■ iii. Adding a new paragraph (2)(iii).

The revisions are set forth below:

**§ 50.3 Definitions.**

\* \* \* \* \*

*Qualifying master netting agreement* means a written, legally enforceable agreement provided that:

\* \* \* \* \*

(2) \* \* \*

\* \* \* \* \*

(iii) Where the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty is limited only to the extent necessary to comply with the requirements of part 47 of this title 12 or any similar requirements of another

U.S. Federal banking agency, as applicable.

\* \* \* \* \*

Dated: August 10, 2016.

**Thomas J. Curry,**  
*Comptroller of the Currency.*

[FR Doc. 2016–19671 Filed 8–18–16; 8:45 am]

**BILLING CODE 4810–33–P**

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 52**

[EPA–R09–OAR–2016–0322; FRL–9950–95–Region 9]

**Approval and Limited Approval and Limited Disapproval of California State Implementation Plan Revisions; Butte County Air Quality Management District; Stationary Source Permits**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing a limited approval and limited disapproval of revisions to the Butte County Air Quality Management District (BCAQMD) portion of the California State Implementation Plan (SIP). These revisions concern the District’s New Source Review (NSR) permitting program for new and modified sources of air pollution. We are proposing action on these local rules under the Clean Air Act as amended in 1990 (CAA or the Act). We are taking comments on this proposal and plan to follow with a final action.

**DATES:** Any comments must arrive by September 19, 2016.

**ADDRESSES:** Submit your comments, identified by Docket ID No. [EPA–R09–OAR–2016–0332] at <http://www.regulations.gov>, or via email to [R9AirPermits@epa.gov](mailto:R9AirPermits@epa.gov). For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be removed or edited from *Regulations.gov*. For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not