VII. Approach to Quantifying Cyber Risk

The agencies are seeking to develop a consistent, repeatable methodology to support the ongoing measurement of cyber risk within covered entities. Such a methodology could be a valuable tool for covered entities and their regulators to assess how well an entity is managing its aggregate cyber risk and mitigating the residual cyber risk of its sector-critical systems. At this time the agencies are not aware of any consistent methodologies to measure cyber risk across the financial sector using specific cyber risk management objectives. The agencies are interested in receiving comments on potential methodologies to quantify inherent and residual cyber risk and compare entities across the financial sector.

The agencies are familiar with different methodologies to measure cyber risk for the financial sector. Among others, these include existing methodologies like the FAIR Institute's Factor Analysis of Information Risk standard and Carnegie Mellon's Goal-Question-Indicator-Metric process. Building upon these and other methodologies, the agencies are considering how best to measure cyber risk in a consistent, repeatable manner.

Questions on Approach to Quantifying Cyber Risk Section

34. What current tools and practices, if any, do covered entities use to assess the cyber risks that their activities, systems and operations pose to other entities within the financial sector, and to assess the cyber risks that other entities' activities, systems and operations pose to them? How is such risk currently identified, measured, and monitored?

35. What other models, frameworks, or reference materials should the agencies review in considering how best to measure and monitor cyber risk?

36. What methodologies should the agencies consider for the purpose of measuring inherent and residual cyber risk quantitatively and qualitatively? What risk factors should agencies consider incorporating into the measurement of inherent risk? How should the risk factors be consistently measured and weighted?

VIII. Considerations for Implementation of the Enhanced Standards

The agencies are considering various regulatory approaches to establishing enhanced standards for covered entities. The approaches range from establishing the standards through a policy statement or guidance to imposing the standards through a detailed regulation. Under one approach, the agencies could propose the standards as a combination of a regulatory requirement to maintain a risk management framework for cyber risks along with a policy statement or guidance that describes minimum expectations for the framework, such as policies, procedures, and practices commensurate with the inherent cyber risk level of the covered entity. This approach would be similar to the approach that the agencies have taken in other areas of prudential supervision, such as the *Interagency Guidelines Establishing Standards for Safety and Soundness* and the *Interagency Guidelines Establishing Information Security Standards.*[21]

Under a second approach, the agencies could propose regulations that impose specific cyber risk management standards. For example, the standards could require covered entities to establish a cybersecurity framework commensurate with the covered entity's structure, risk profile, complexity, activities, and size. Such standards would address the five categories of cyber risk management, discussed above, that the agencies consider key to a comprehensive cyber risk management program: (1) Cyber risk governance; (2) cyber risk management; (3) internal dependency management; (4) external dependency management; and (5) incident response, cyber resilience, and situational awareness. Within each category, a covered entity would be expected to establish and maintain policies, procedures, practices, controls, personnel and systems that address the applicable category, and to establish and maintain a corporate governance structure that implements the cyber risk management program on an enterprise-wide basis and along business line levels, monitors compliance with the program, and adjusts corporate practices to address the changes in risk presented by the firm's operations.

Under a third approach, the agencies could propose a regulatory framework that is more detailed than the second approach. As with the second approach, the regulation could contain standards for the five categories of cyber risk management. However, in contrast to the second approach, the regulation would include details on the specific objectives and practices a firm would be required to achieve in each area of concern in order to demonstrate that its cyber risk management program can adapt to changes in a firm's operations and to the evolving cyber environment.

In considering which option, or combination of options, to pursue to implement the standards, the agencies will consider whether the approach adopted ensures that the enhanced standards are clear, the additional effort required to implement the standards, whether the standards are sufficiently adaptable to address the changing cyber environment, and the potential costs and other burdens associated with implementing the standards.

Questions on Considerations for Implementation of the Enhanced Standards

37. What are the potential benefits or drawbacks associated with each of the options for implementing the standards discussed above?

38. What are the trade-offs, in terms of the potential costs and other burdens, among the three options discussed above? The agencies invite commenters to submit data about the trade-offs among the three options discussed above.

39. Which approach has the potential to most effectively implement the agencies' expectations for enhanced cyber risk management?

Dated: October 19, 2016.

Thomas J. Curry,

Comptroller of the Currency.

By order of the Board of Governors of the Federal Reserve System, October 19, 2016.

Robert deV. Frierson,

Secretary of the Board.

Dated at Washington, DC, this 19th day of October, 2016.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Federal Deposit Insurance Corporation by

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2016–25871 Filed 10–25–16; 8:45 am]

BILLING CODE 4810–33–P; 6210–01–P; 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Parts 324, 329, and 382

RIN 3064–AE46

Restrictions on Qualified Financial Contracts of Certain FDIC-Supervised Institutions; Revisions to the Definition of Qualifying Master Netting Agreement and Related Definitions

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of proposed rulemaking.

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[21] *See* 12 CFR part 208, App. D–1, D–2; 12 CFR part 225, App. F (Board); 12 CFR part 364, App. A, B (FDIC); 12 CFR part 30, App. A, B, and D (OCC).

SUMMARY: The FDIC is proposing to add a new part to its rules to improve the resolvability of systemically important U.S. banking organizations and systemically important foreign banking organizations and enhance the resilience and the safety and soundness of certain state savings associations and state-chartered banks that are not members of the Federal Reserve System (''state non-member banks'' or ''SNMBs'') for which the FDIC is the primary federal regulator (together, ''FSIs'' or ''FDIC-supervised institutions''). Under this proposed rule, covered FSIs would be required to ensure that covered qualified financial contracts (QFCs) to which they are a party provide that any default rights and restrictions on the transfer of the QFCs are limited to the same extent as they would be under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) and the Federal Deposit Insurance Act (FDI Act). In addition, covered FSIs would generally be prohibited from being party to QFCs that would allow a QFC counterparty to exercise default rights against the covered FSI based on the entry into a resolution proceeding under the FDI Act, or any other resolution proceeding of an affiliate of the covered FSI.

The proposal would also amend the definition of ''qualifying master netting agreement'' in the FDIC's capital and liquidity rules, and certain related terms in the FDIC's capital rules. These proposed amendments are intended to ensure that the regulatory capital and liquidity treatment of QFCs to which a covered FSI is party would not be affected by the proposed restrictions on such QFCs. The requirements of this proposed rule are substantively identical to those contained in the notice of proposed rulemaking issued by the Board of Governors of the Federal Reserve System (FRB) on May 3, 2016 (FRB NPRM) regarding ''covered entities'', and the notice of proposed rulemaking issued by the Office of the Comptroller of the Currency (OCC) on August 19, 2016 (OCC NPRM), regarding ''covered banks''.

DATES: Comments must be received by December 12, 2016, except that comments on the Paperwork Reduction Act analysis in part VI of the **SUPPLEMENTARY INFORMATION** must be received on or before December 27, 2016.

ADDRESSES: You may submit comments by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Agency Web site: http://www.FDIC.gov/regulations/laws/federal/.

Mail: Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

Hand Delivered/Courier: The guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7:00 a.m. and 5:00 p.m.

Email: comments@FDIC.gov.

Instructions: Comments submitted must include ''FDIC'' and ''RIN 3064–AE46'' in the subject matter line. Comments received will be posted without change to: *http://www.FDIC.gov/regulations/laws/federal/,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Ryan Billingsley, Acting Associate Director, *rbillingsley@fdic.gov,* Capital Markets Branch, Division of Risk Management and Supervision; Alexandra Steinberg Barrage, Senior Resolution Policy Specialist, Office of Complex Financial Institutions, *abarrage@fdic.gov;* David N. Wall, Assistant General Counsel, *dwall@fdic.gov,* Cristina Regojo, Counsel, *cregojo@fdic.gov,* Phillip Sloan, Counsel, *psloan@fdic.gov,* Greg Feder, Counsel, *gfeder@fdic.gov,* or Michael Phillips, Counsel, *mphillips@fdic.gov,* Legal Division, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

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I. Introduction

A. Background

This proposed rule addresses one of the ways the failure of a major financial firm could destabilize the financial system. The disorderly failure of a large, interconnected financial company could cause severe damage to the U.S. financial system and, ultimately, to the economy as a whole, as illustrated by the failure of Lehman Brothers in September 2008. Protecting the financial stability of the United States is a core objective of the Dodd-Frank Act,[1] which Congress passed in response to the 2007–2009 financial crisis and the ensuing recession. One way the Dodd-Frank Act helps to protect the financial stability of the United States is by reducing the damage that such a company's failure would cause to the financial system if it were to occur. This strategy centers on measures designed to help ensure that a failed company's resolution proceeding—such as bankruptcy or the special resolution process created by the Dodd-Frank Act—would be more orderly, thereby helping to mitigate destabilizing effects on the rest of the financial system.[2]

On May 3, 2016, the FRB issued a Notice of Proposed Rulemaking, the FRB NPRM, pursuant to section 165 of the Dodd-Frank Act.[3] The FRB's proposed rule stated that it is intended as a further step to increase the resolvability of U.S. global systemically important banking organizations (GSIBs)[4] and global systemically important foreign banking organizations (foreign GSIBs) that operate in the United States (collectively, ''covered

[1] The Dodd-Frank Act was enacted on July 21, 2010 (Pub. L. 111–203). According to its preamble, the Dodd-Frank Act is intended ''[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail', [and] to protect the American taxpayer by ending bailouts.''

[2] The Dodd-Frank Act itself pursues this goal through numerous provisions, including by requiring systemically important financial companies to develop resolution plans (also known as ''living wills'') that lay out how they could be resolved in an orderly manner under bankruptcy if they were to fail and by creating a new back-up resolution regime, the Orderly Liquidation Authority, applicable to systemically important financial companies. 12 U.S.C. 5365(d), 5381–5394.

[3] The FRB received seventeen comment letters on the FRB NPRM during the comment period, which ended on August 5, 2016.

[4] Under the GSIB surcharge rule's methodology, there are currently eight U.S. GSIBs: Bank of America Corporation, The Bank of New York Mellon Corporation, Citigroup Inc., Goldman Sachs Group, Inc., JPMorgan Chase & Co., Morgan Stanley Inc., State Street Corporation, and Wells Fargo & Company. *See* FRB NPRM, 81 FR 29169, 29175 (May 11, 2016). This list may change in the future in light of changes to the relevant attributes of the current U.S. GSIBs and of other large U.S. bank holding companies.

entities'').[5] Subsequent to the FRB NPRM, the OCC issued the OCC NPRM, which applies the same QFC requirements to ''covered banks'' within the OCC's jurisdiction.

The FDIC is issuing this parallel proposed rule applicable to FSIs that are subsidiaries of a ''covered entity'' as defined in the FRB NPRM and to subsidiaries of such FSIs (collectively, ''covered FSIs''). The policy objective of this proposal focuses on improving the orderly resolution of a GSIB by limiting disruptions to a failed GSIB through its FSI subsidiaries' financial contracts with other companies. The FRB NPRM, the OCC NPRM, and this proposal complement the ongoing work of the FRB and the FDIC on resolution planning requirements for GSIBs, and the FDIC intends this proposed rule to work in tandem with the FRB NPRM and the OCC NPRM.[6]

As discussed in Part I.D. below, the FDIC has a strong interest in preventing a disorderly termination of covered FSIs' QFCs upon a GSIB's entry into resolution proceedings. In fulfilling the FDIC's responsibilities as (i) the primary federal supervisor for SNMBs and state savings associations;[7] (ii) the insurer of deposits and manager of the Deposit Insurance Fund (DIF); and (iii) the resolution authority for all FDIC-insured institutions under the FDI Act and, if appointed by the Secretary of the Treasury, for large complex financial institutions under Title II of the Dodd-Frank Act, the FDIC's interests include ensuring that large complex financial institutions are resolvable in an orderly manner, and that FDIC-insured institutions operate safely and soundly.[8]

The proposed rule specifically addresses QFCs, which are typically entered into by various operating entities in a GSIB group, including covered FSIs. These covered FSIs are affiliates of U.S. GSIBs or foreign GSIBs that have OTC derivatives exposure, making these entities interconnected with other large financial firms. The exercise of default rights against an otherwise healthy covered FSI resulting from the failure of its affiliate—*e.g.,* its top-tier U.S. holding company—may cause it to weaken or fail. Accordingly, FDIC-supervised affiliates 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 FSI itself or its GSIB affiliate.

These potentially destabilizing effects are best addressed by requiring all GSIB entities to amend their QFCs to include contractual provisions aimed at avoiding such destabilization. It is imperative that all entities within the GSIB group amend their QFCs in a similar way, thereby eliminating an incentive for counterparties to concentrate QFCs in entities subject to fewer restrictions. Therefore, the application of this proposed rule to the QFCs of covered FSIs is not only necessary for the safety and soundness of covered FSIs individually and collectively, but also to avoid potential destabilization of the overall banking system.

This proposed rule imposes substantively identical requirements contained in the FRB NPRM on covered FSIs. The FDIC consulted with the FRB and the OCC in developing this proposed rule, and intends to continue coordinating with the FRB and the OCC in developing the final rule.

Qualified financial contracts, default rights, and financial stability. Like the FRB NPRM, this proposal pertains to several important classes of financial transactions that are collectively known as QFCs.[9] QFCs include swaps, other derivatives contracts, repurchase agreements (also known as ''repos'') and reverse repos, and securities lending and borrowing agreements.[10] GSIBs enter into QFCs for a variety of purposes, including to borrow money to finance their investments, to lend money, to manage risk, and to enable their clients and counterparties to hedge risks, make markets in securities and derivatives, and take positions in financial investments.

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 can pose a threat to financial stability in times of market stress. This proposal—along with the FRB NPRM and OCC NPRM—focuses on a context in which that threat is especially great: The failure of a GSIB that is party to large volumes of QFCs, likely including QFCs with counterparties that are themselves systemically important.

QFC continuity is important for the orderly resolution of a GSIB because it helps to ensure that the GSIB entities remain viable and to avoid instability caused by asset fire sales. Together, the FRB and FDIC have identified the exercise of certain 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,[11] and have instructed 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.''[12] More recently, in April 2016,[13] the FRB and FDIC noted the important changes that have been made to the structure and operations of the largest financial firms, including the adherence by all U.S. GSIBs and their affiliates to the ISDA 2015 Universal Resolution Stay Protocol.[14]

Direct defaults and cross-defaults. Like the FRB NPRM and the OCC NPRM, this proposal focuses on two

[5] *See* FRB NPRM at § 252.83(a) (defining ''covered entity'' to include: (1) A bank holding company that is identified as a global systemically important [bank holding company] pursuant to 12 CFR 217.402; (2) A subsidiary of a company identified in paragraph (a)(1) of [section 252.83(a)] (other than a subsidiary that is a covered bank); or (3) A U.S. subsidiary, U.S. branch, or U.S. agency of a global systemically important foreign banking organization (other than a U.S. subsidiary, U.S. branch, or U.S. agency that is a covered bank, section 2(h)(2) company or a DPC branch subsidiary)). In addition to excluding a ''covered bank'' from the definition of a ''covered entity,'' the FDIC expects that in its final rule, the FRB would also exclude ''covered FSIs'' from the NPRM's definition of a ''covered entity.'' 81 FR 29169 (May 11, 2016)

[6] For additional background regarding the interconnectivity of the largest financial firms, *see* FRB NPRM, 81 FR 29175–29176 (May 11, 2016).

[7] Although the FDIC is the insurer for all insured depository institutions in the United States, it is the primary federal supervisor only for state-chartered banks that are not members of the Federal Reserve System, state-chartered savings associations, and insured state-licensed branches of foreign banks. As of March 31, 2016, the FDIC had primary supervisory responsibility for 3,911 SNMBs and state-chartered savings associations.

[8] *See https://www.fdic.gov/about/strategic/strategic/supervision.html.*

[9] The proposal would adopt 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* proposed rule § 382.1.

[10] The definition of ''qualified financial contract'' is broader than this list of examples, and the default rights discussed are not common to all types of QFCs.

[11] 12 U.S.C. 5365(d).

[12] FRB and FDIC, ''Agencies Provide Feedback on Second Round Resolution Plans of 'First-Wave' Filers'' (August 5, 2014), available at *https://www.fdic.gov/news/news/press/2014/pr14067.html. See also* FRB and FDIC, ''Agencies Provide Feedback on Resolution Plans of Three Foreign Banking Organizations'' (March 23, 2015), available at *https://www.fdic.gov/news/news/press/2015/pr15027.html;* 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 *https://www.fdic.gov/news/news/press/2013/pr13027.html.*

[13] *See https://www.fdic.gov/news/news/press/2016/pr16031a.pdf,* at 13.

[14] 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.*

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 GSIB entity that is a direct party [15] to the QFC or an affiliate of that entity enters a resolution proceeding.[16] The first scenario occurs when a GSIB entity that is itself a direct party to the QFC enters a resolution proceeding; this preamble refers to such a scenario as a ''direct default'' and refers to the default rights that arise from a direct default as ''direct default rights.'' The second scenario occurs when an affiliate of the GSIB entity that is a direct party to the QFC (such as the direct party's parent holding company) enters a resolution proceeding; this preamble refers to such a scenario as a ''cross-default'' and refers to default rights that arise from a cross-default as ''cross-default rights.'' A GSIB parent entity will often 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.

Importantly, like the FRB NPRM and the OCC NPRM, this proposal does not affect all types of default rights, and, where it affects a default right, the proposal does so only temporarily for the purpose of allowing the relevant resolution authority to take action to continue to provide for continued performance on the QFC. Moreover, the proposal is concerned only with default rights that run *against* a GSIB entity—that is, direct default rights and cross-default rights that arise from the entry into resolution of a GSIB entity. The proposal would not affect default rights that a GSIB entity (or any other entity) may have against a counterparty that is not a GSIB entity. This limited scope is appropriate because, as described above, the risk posed to financial stability by the exercise of QFC default rights is greatest when the defaulting counterparty is a GSIB entity.

Resolution Strategies

Single-point-of-entry resolution. Cross-default rights are especially significant in the context of a GSIB failure because GSIBs typically enter into large volumes of QFCs through different entities controlled by the GSIB. For example, a U.S. GSIB is made up of a U.S. bank holding company and numerous operating subsidiaries that are owned, directly or indirectly, by the bank holding company. As stated in the FRB NPRM, 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, or similar entities organized in other countries.

Many complex GSIBs have developed resolution strategies that rely on the single-point-of-entry (SPOE) resolution strategy. In an SPOE resolution of a GSIB, only a single legal entity—the GSIB's top-tier bank holding company—would enter a resolution proceeding. The effect of losses that led to the GSIB's failure would pass 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 subsidiaries remain adequately capitalized, and that operating subsidiaries of the GSIB are able to stabilize and continue meeting their financial obligations without immediately defaulting or entering resolution themselves. 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 their QFC counterparties), reducing their incentive to engage in potentially destabilizing funding runs or margin calls and thus lowering the risk of asset fire sales. A successful SPOE resolution would also avoid the need for separate resolution proceedings for separate legal entities run by separate authorities across multiple jurisdictions, which would be more complex and could therefore destabilize the resolution. An SPOE resolution can also avoid the need for insured bank subsidiaries, including covered FSIs, to be placed into receivership or similar proceedings as the likelihood of their continuing to operate as going concerns will be significantly enhanced 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, assists in stabilizing both the covered FSIs and the larger banking system.

Multiple-Point-of-Entry Resolution. This proposal would also yield benefits for other approaches to resolution. For example, preventing early terminations of QFCs would increase the prospects for an orderly resolution under a multiple-point-of-entry (MPOE) strategy involving a foreign GSIB's U.S. intermediate holding company going into resolution or a resolution plan that calls for a GSIB's U.S. insured depository institution to enter resolution under the FDI Act. As discussed above, this proposal would help support the continued operation of affiliates of an entity experiencing resolution to the extent the affiliate continues to perform on its QFCs.

U.S. Bankruptcy Code. While insured depository institutions are not subject to resolution under the Bankruptcy Code, if a bank holding company were to fail, it would likely be resolved under the Bankruptcy Code. When an entity goes into resolution under the Bankruptcy Code, attempts by the debtor's creditors 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.[17] 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. The automatic stay thus solves a collective action problem in which the creditors' individual incentives to become the first 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.[18]

[15] In general, a ''direct party'' refers to a party to a financial contract other than a credit enhancement (such as a guarantee). The definition of ''direct party'' and related definitions are discussed in more detail below on page 38.

[16] This preamble uses phrases such as ''entering a resolution proceeding'' and ''going into resolution'' to encompass 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 systemically important banking organization, the most relevant types of resolution proceeding include the following: For most U.S.-based legal entities, the bankruptcy process established by the U.S. Bankruptcy Code (Title 11, United States Code); for U.S. insured depository institutions, a receivership administered by the Federal Deposit Insurance Corporation (FDIC) under the FDI Act (12 U.S.C. 1821); 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, for entities based outside the United States, resolution proceedings created by foreign law.

[17] *See* 11 U.S.C. 362.

[18] *See, e.g., Aiello* v. *Providian Financial Corp.*, 239 F.3d 876, 879 (7th Cir. 2001).

However, the Bankruptcy Code largely exempts QFC [19] counterparties from the automatic stay through special ''safe harbor'' provisions.[20] Under these provisions, any rights that a QFC counterparty has to terminate the contract, set off obligations, and liquidate collateral in response to a direct default are not subject to the stay and may be exercised against the debtor immediately upon default. (The Bankruptcy Code does not itself confer default rights upon QFC counterparties; it merely permits QFC counterparties to exercise certain rights created by other sources, such as contractual rights created by the terms of the QFC.)

The Bankruptcy Code's automatic stay also does not prevent the exercise of cross-default rights against an affiliate of the party entering resolution. The stay generally applies only to actions taken against the party entering resolution or the bankruptcy estate,[21] whereas a QFC counterparty exercising a cross-default right is instead acting against a distinct legal entity that is not itself in resolution: The debtor's affiliate.

Title II of the Dodd-Frank Act and the Orderly Liquidation Authority. Title II of the Dodd-Frank Act (Title II) imposes somewhat broader stay requirements on QFCs of companies that enter resolution under that back-up resolution authority. In general, a U.S. bank holding company (such as the top-tier holding company of a U.S. GSIB) that fails would be resolved under the Bankruptcy Code. With Title II, Congress recognized, however, that a 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 of the Dodd-Frank Act establishes the Orderly Liquidation Authority, an alternative resolution framework intended to be used rarely to manage the failure of a firm that poses a significant risk to the financial stability of the United States in a manner that mitigates such risk and minimizes moral hazard.[22] Title II authorizes the Secretary of the Treasury, upon the recommendation of other government agencies and a determination that several preconditions are met, to place a financial company into a receivership conducted by the FDIC as an alternative to bankruptcy.[23]

Title II empowers the FDIC to transfer QFCs to a bridge financial company or some other financial company that is not in a resolution proceeding and should therefore be capable of performing under the QFCs.[24] 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 Title II resolution, its insolvency, or its financial condition.[25] Once the QFCs are transferred in accordance with the statute, Title II permanently stays the exercise of default rights for those reasons.[26]

Title II addresses cross-default rights through a similar procedure. It empowers the FDIC to enforce contracts of subsidiaries or affiliates of the failed covered financial 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, in the case of guaranteed or supported QFCs, the FDIC takes certain steps to protect the QFC counterparties' interests by the end of the business day following the company's entry into Title II resolution.[27]

These stay-and-transfer provisions of the Dodd-Frank Act are intended to mitigate the threat posed by QFC default rights. At the same time, the provisions allow for appropriate protections for QFC counterparties of the failed financial company. The provisions 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 temporary, 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) or, in the case of cross-default rights relating to guaranteed or supported QFCs, the FDIC takes the action required in order to continue to enforce those contracts.[28]

The Federal Deposit Insurance Act. Under the FDI Act, a failing insured depository institution would generally enter a receivership administered by the FDIC.[29] The FDI Act 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 discussed above.[30] However, the FDI Act 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. Moreover, as with Title II, there is a possibility that a court of a foreign jurisdiction might decline to enforce the FDI Act's stay-and-transfer provisions under certain circumstances.

B. Overview of the Proposal

The FDIC invites comment on all aspects of this proposed rulemaking, which is intended to increase GSIB resolvability by addressing two QFC-related issues and thereby enhance resiliency of FSIs and the overall banking system. First, the proposal seeks to address the risk that a court in a foreign jurisdiction may decline to enforce the QFC stay-and-transfer provisions of Title II and the FDI Act discussed above. The proposed rule directly enhances the prospects of orderly resolution by establishing 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 Title II and the FDI Act, 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 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. This proposed rule would reduce the risk of these adverse consequences by requiring

[19] The Bankruptcy Code does not use the term ''qualified financial contract,'' but the set of transactions covered by its safe harbor provisions closely tracks the set of transactions that fall within the definition of ''qualified financial contract'' used in Title II of the Dodd-Frank Act and in this proposal.

[20] 11 U.S.C. 362(b)(6), (7), (17), (27), 362(o), 555, 556, 559, 560, 561. The Bankruptcy Code specifies the types of parties to which the safe harbor provisions apply, such as financial institutions and financial participants. *Id.*

[21] *See* 11 U.S.C. 362(a).

[22] Section 204(a) of the Dodd-Frank Act, 12 U.S.C. 5384(a).

[23] *See* section 203 of the Dodd-Frank Act, 12 U.S.C. 5383.

[24] *See* 12 U.S.C. 5390(c)(9).

[25] 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.

[26] 12 U.S.C. 5390(c)(10)(B)(i)(II).

[27] 12 U.S.C. 5390(c)(16); 12 CFR 380.12.

[28] *See id.*

[29] 12 U.S.C. 1821(c).

[30] *See* 12 U.S.C. 1821(e)(8)–(10).

covered FSIs to condition the exercise of default rights in covered contracts on the stay provisions of Title II and the FDI Act.

Second, the proposal seeks to address the potential disruption that may occur if a counterparty to a QFC with an affiliate of a GSIB entity that goes into resolution under the Bankruptcy Code or the FDI Act is allowed to exercise cross-default rights. Affiliates of a GSIB 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 FSI whose parent bank holding company entered resolution proceedings could fail due to its counterparties exercising cross-default rights. This proposed rule would address this issue by generally restricting the exercise of cross-default rights by counterparties against a covered FSI.

Scope of application. The proposal's requirements would apply to all ''covered FSIs.'' ''Covered FSIs'' include: Any state savings associations (as defined in 12 U.S.C. 1813(b)(3)) or state non-member bank (as defined in 12 U.S.C. 1813(e)(2)) that is a direct or indirect subsidiary of (i) a global systemically important bank holding company that has been designated pursuant to section 252.82(a)(1) of the FRB's Regulation YY (12 CFR 252.82); or (ii) a global systemically important foreign banking organization [31] that has been designated pursuant to section 252.87 of the FRB's Regulation YY (12 CFR 252.87). This proposed rule also makes clear that the mandatory contractual stay requirements apply to the subsidiaries of any covered FSI. Under the proposed rule, the term ''covered FSI'' *also* includes ''any subsidiary of a covered FSI.'' For the reasons noted above, all subsidiaries of covered FSIs should also be subject to mandatory contractual stay requirements—*e.g.,* to avoid concentrating QFCs in entities subject to fewer restrictions.

''Qualified financial contract'' or ''QFC'' would be defined to have the same meaning as in section 210(c)(8)(D) of the Dodd-Frank Act,[32] and would include, among other things, derivatives, repos, and securities lending agreements. Subject to the exceptions discussed below, the proposal's requirements would apply to any QFC to which a covered FSI is party (covered QFC).[33]

Required contractual provisions related to the U.S. special resolution regimes. Covered FSIs would be required to ensure that covered QFCs include contractual terms explicitly providing that any default rights or restrictions on the transfer of the QFC are limited to the same extent as they would be pursuant to the U.S. special resolution regimes—that is, Title II and the FDI Act.[34] The proposed requirements are not intended to imply that the statutory stay-and-transfer provisions would not in fact apply to a given QFC, but rather to help ensure that all covered QFCs—including QFCs that are governed by foreign law, entered into with a foreign party, or for which collateral is held outside the United States—would be treated the same way in the context of an FDIC receivership under the Dodd-Frank Act or the FDI Act. This provision would address the first issue listed above and would decrease the QFC-related threat to financial stability posed by the failure and resolution of an internationally active GSIB. This section of the proposal is also consistent with analogous legal requirements that have been imposed in other national jurisdictions [35] and with the Financial Stability Board's ''Principles for Cross-border Effectiveness of Resolution Actions.'' [36]

Prohibited cross-default rights. A covered FSI would be prohibited from entering into covered QFCs that would allow the exercise of cross-default rights—that is, default rights related, directly or indirectly, to the entry into resolution of an affiliate of the direct party—against it.[37] Covered FSIs would similarly be prohibited from entering into covered QFCs that would provide for a restriction on the transfer of a credit enhancement supporting the QFC from the covered FSI's affiliate to a transferee upon or following the entry into resolution of the affiliate.

The FDIC does not propose to prohibit covered FSIs from entering into QFCs that contain direct default rights. Under the proposal, a counterparty to a direct QFC with a covered FSI also could, to the extent not inconsistent with Title II or the FDI Act, be granted and could exercise the right to terminate the QFC if the covered FSI fails to perform its obligations under the QFC.

As an alternative to bringing their covered QFCs into compliance with the requirements set out in this section of the proposed rule, covered FSIs would be permitted to comply by adhering to the ISDA 2015 Resolution Stay Protocol.[38] The FDIC views the ISDA 2015 Resolution Stay Protocol as consistent with the requirements of the proposed rule.

The purpose of this section of the proposal is to help ensure that, when a GSIB entity enters resolution under the Bankruptcy Code or the FDI Act,[39] its affiliates' covered QFCs will be protected from disruption to a similar extent as if the failed entity had entered resolution under Title II. In particular, this section would facilitate resolution under the Bankruptcy Code by preventing the QFC counterparties of a GSIB's subsidiary from exercising default rights on the basis of the entry into bankruptcy by the GSIB's top-tier

[31] The definition of covered FSI does not include insured state-licensed branches of FBOs. Any insured state-licensed branches of global systemically important FBOs would be covered by the Board NPRM. Therefore, unlike the FRB NPRM, the FDIC is not including in this proposal any exclusion for certain QFCs subject to a multi-branch netting arrangement.

[32] 12 U.S.C. 5390(c)(8)(D). *See* proposed rule § 382.1.

[33] In addition, the proposed rule states at § 382.2(d) that it does not modify or limit, in any manner, the rights and powers of the FDIC as receiver under the FDI Act or Title II of the Dodd-Frank Act, including, without limitation, the rights of the receiver to enforce provisions of the FDI Act or Title II of the Dodd-Frank Act that limit the enforceability of certain contractual provisions. For example, the suspension of payment and delivery obligations to QFC counterparties during the stay period as provided under the FDI Act and Title II when an entity is in receivership under the FDI Act or Title II remains valid and unchanged irrespective of any contrary contractual provision and may continue to be enforced by the FDIC as receiver. Similarly, the use by a counterparty to a QFC of a contractual provision that allows the party to terminate a QFC on demand, or at its option at a specified time, or from time to time, for any reason, to terminate a QFC on account of the appointment of the FDIC as receiver (or the insolvency or financial condition of the company) remains unenforceable, and the QFC may be enforced by the FDIC as receiver notwithstanding any such purported termination.

[34] *See* proposed rule § 382.3.

[35] *See, e.g.,* Bank of England Prudential Regulation Authority, Policy Statement, ''Contractual stays in financial contracts governed by third-country law'' (November 2015), available at *http://www.bankofengland.co.uk/pra/Documents/publications/ps/2015/ps2515.pdf.*

[36] 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.*

The Financial Stability Board (FSB) was established in 2009 to coordinate the work of national financial authorities and international standard-setting bodies and to develop and promote the implementation of effective regulatory, supervisory, and other financial sector policies to advance financial stability. The FSB brings together national authorities responsible for financial stability in 24 countries and jurisdictions, as well as international financial institutions, sector-specific international groupings of regulators and supervisors, and committees of central bank experts. *See generally* Financial Stability Board, available at *http://www.fsb.org.*

[37] *See* proposed rule § 382.3(b) and § 382.4(b).

[38] *See* proposed rule § 382.5(a).

[39] The FDI Act does not stay cross-default rights against affiliates of an insured depository institution based on the entry of the insured depository institution into resolution proceedings under the FDI Act.

holding company or any other affiliate of the subsidiary. This section generally would not prevent covered QFCs from allowing the exercise of default rights upon a failure by the direct party to satisfy a payment or delivery obligation under the QFC, the direct party's entry into bankruptcy, or the occurrence of any other default event that is not related to the entry into a resolution proceeding or the financial condition of an affiliate of the direct party.

Process for approval of enhanced creditor protection conditions. As noted above, in the context of addressing the potential disruption that may occur if a counterparty to a QFC with an affiliate of a GSIB entity that goes into resolution under the Bankruptcy Code or the FDI Act is allowed to exercise cross-default rights, the proposed rule generally restricts the exercise of cross-default rights by counterparties against a covered FSI. The proposal would allow the FDIC, at the request of a covered FSI, to approve as compliant with the requirements of 382.5 proposed creditor protection provisions for covered QFCs.[40]

The FDIC could approve such a request if, in light of several enumerated considerations,[41] the alternative approach would mitigate risks to the financial stability of the United States presented by a GSIB's failure to at least the same extent as the proposed requirements. The FDIC expects to consult with the FRB and OCC during its consideration of a request under this section.

Amendments to certain definitions in the FDIC 's capital and liquidity rules. The proposal would also amend certain definitions in the FDIC's capital and liquidity rules to help ensure that the regulatory capital and liquidity treatment of QFCs to which a covered FSI is party is not affected by the proposed restrictions on such QFCs. Specifically, the proposal would amend the definition of ''qualifying master netting agreement'' in the FDIC's regulatory capital and liquidity rules and would similarly amend the definitions of the terms ''collateral agreement,'' ''eligible margin loan,'' and ''repo-style transaction'' in the FDIC's regulatory capital rules.[42]

C. Consultation With U.S Financial Regulators

In developing this proposal, the FDIC consulted with the FRB and the OCC as a means of promoting alignment across regulations and avoiding redundancy. The proposal reflects input that the FDIC received during this consultation process. Furthermore, the FDIC expects to consult with foreign financial regulatory authorities regarding this proposal and the establishment of other standards that would maximize the prospects for the cooperative and orderly cross-border resolution of a failed GSIB on an international basis.

D. Overview of Statutory Authority and Purpose

The FDIC is issuing this proposed rule under its authorities under the FDI Act (12 U.S.C. 1811 *et seq.*), including its general rulemaking authorities.[43] The FDIC views the proposed rule as consistent with its overall statutory mandate.[44] An overarching purpose of this proposed rule is to limit disruptions to an orderly resolution of a GSIB and its subsidiaries, thereby furthering financial stability generally. Another purpose is to enhance the safety and soundness of covered FSIs by addressing the two main issues raised by covered QFCs (noted above): Cross-border recognition and cross-default rights.

As discussed above and in the FRB NPRM, the exercise of default rights by counterparties of a failed GSIB can have significant impacts on financial stability. These financial stability concerns are necessarily intertwined with the safety and soundness of covered FSIs and the banking system—the disorderly exercise of default rights can produce a sudden, contemporaneous threat to the safety and soundness of individual institutions, including insured depository institutions, throughout the system, which in turn threatens the system as a whole.F Furthermore, the failure of multiple insured depository institutions in the same time period can stress the DIF, which is managed by the FDIC. Covered FSIs could themselves be a contributing factor to financial destabilization due to the interconnectedness of these institutions to each other and to other entities within the financial system.

While the covered FSI may not itself be considered systemically important, as part of a GSIB, the disorderly resolution of the covered FSI could result in a significant negative impact on the financial system. Additionally, the application of this proposed rule to the QFCs of covered FSIs should avoid creating what may otherwise be an incentive for GSIBs and their counterparties to concentrate QFCs in entities that are subject to fewer counterparty restrictions.

Question 1: The FDIC invites comment on all aspects of this notice of proposed rulemaking.

II. Proposed Restrictions on QFCs of Covered FSIs

A. Covered FSIs (Section 382.2(a) of the Proposed Rule)

The proposed rule would apply to ''covered FSIs.'' The term ''covered FSI'' would be defined to include: Any state savings associations (as defined in 12 U.S.C. 1813(b)(3)) or state non-member bank (as defined in 12 U.S.C. 1813(e)(2)) that is a direct or indirect subsidiary of (i) a global systemically important bank holding company that has been designated pursuant to section 252.82(a)(1) of the FRB's Regulation YY (12 CFR 252.82); or (ii) a global systemically important foreign banking organization that has been designated pursuant to section 252.87 of the FRB's Regulation YY (12 CFR 252.87). The mandatory contractual stay requirements would also apply to the subsidiaries of any covered FSI. Under the proposed rule, the term ''covered FSI'' also includes any ''subsidiary of covered FSI.''

Question 2: The FDIC invites comment on the proposed definition of the term ''covered FSI.''

B. Covered QFCs

General definition. The proposal would apply to any ''covered QFC,'' generally defined as any QFC that a covered FSI enters into, executes, or otherwise becomes party to.[45] ''Qualified financial contract'' or ''QFC'' would be defined as in section 210(c)(8)(D) of Title II of the Dodd-Frank Act and would include swaps, repo and reverse repo transactions, securities lending and borrowing transactions, commodity contracts, securities contracts, and forward agreements.[46]

The proposed definition of ''covered QFC'' is intended to limit the proposed restrictions to those financial transactions whose disorderly unwind has substantial potential to frustrate the

[40] *See* proposed rule § 382.5(c).

[41] *See id.*

[42] *See* proposed rule §§ 324.2 and 329.3.

[43] *See* 12 U.S.C. 1819.

[44] The FDIC is (i) the primary federal supervisor for SNMBs and state savings associations; (ii) insurer of deposits and manager of the deposit insurance fund (DIF); and (iii) the resolution authority for all FDIC-insured institutions under the Federal Deposit Insurance Act and for large complex financial institutions under Title II of the Dodd-Frank Act. *See* 12 U.S.C. 1811, 1816, 1818, 1819, 1820(g), 1828, 1828m, 1831p–1, 1831–u, 5301 *et seq.*

[45] *See* proposed rule § 382.3(a). For convenience, this preamble generally refers to ''a covered FSI's QFCs'' or ''QFCs to which a covered FSI is party'' as shorthand to encompass this definition.

[46] *See* proposed rule § 382.1; 12 U.S.C. 5390(c)(8)(D).

orderly resolution of a GSIB and its affiliates, as discussed above. By adopting the Dodd-Frank Act's definition, the proposed rule would extend the benefits of the stay-and-transfer protections to the same types of transactions in the event a GSIB enters bankruptcy. In this way, the proposal enhances the prospects for an orderly resolution in bankruptcy (as opposed to resolution under Title II of the Dodd-Frank Act) of a GSIB.

Question 3: The FDIC invites comment on the proposed definitions of ''QFC'' and ''covered QFC.''

Exclusion of cleared QFCs. The proposal would exclude from the definition of ''covered QFC'' all QFCs that are cleared through a central counterparty.[47] The FDIC, in consultation with the FRB and OCC, will continue to consider the appropriate treatment of centrally cleared QFCs, in light of differences between cleared and non-cleared QFCs with respect to contractual arrangements, counterparty credit risk, default management, and supervision.

Question 4: The FDIC invites comment on the proposed exclusion of cleared QFCs, including the potential effects on the financial stability of the United States of excluding cleared QFCs as well as the potential effects on U.S. financial stability of subjecting covered entities' relationships with central counterparties to restrictions analogous to this proposal's restrictions on covered entities' non-cleared QFCs. In addition, the FDIC invites comment on whether the proposed exclusion of covered entity QFCs in § 382.7 is sufficiently clear. Where a credit enhancement supports a covered QFC, and where a direct party to a covered QFC is a covered FSI, covered entity, or covered bank, would an alternative process better facilitate compliance with this proposal?

C. Definition of ''Default Right''

As discussed above, 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: 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 is broadly defined to include these common rights as well as ''any similar rights.''[48] Additionally, the definition includes all 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.''[49] 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.[50] The function of these exclusions is to leave such rights unaffected by the proposed rule.

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 entity could be similar to the impact of the liquidation and acceleration rights discussed above. 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).[51]

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 382.4 of the proposed rule).[52] This is consistent with the proposal's objective of restricting only default rights that are related, directly or indirectly, to the entry into resolution of an affiliate of the covered entity, while leaving other default rights unrestricted.[53]

Question 5: The FDIC invites comment on all aspects of the proposed definition of ''default right.''

D. Required Contractual Provisions Related to the U.S. Special Resolution Regimes (Section 382.3 of the Proposed Rule)

Under the proposal, 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 securing it) from the covered entity to a transferee will 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 entity 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.[54] The proposal would define the term ''U.S. special resolution regimes'' to mean the FDI Act[55] and Title II of the Dodd-Frank Act,[56] along with regulations issued under those statutes.[57]

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. Rather, the requirements are intended to provide certainty that all covered QFCs would be treated the same way in the context of a receivership under the Dodd-Frank Act or the FDI Act. 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

[47] *See* proposed rule § 382.7(a).

[48] *See* proposed rule § 382.1.

[49] *See id.*

[50] *See id.*

[51] *See id.*

[52] *See* proposed rule §§ 382.1, 382.4.

[53] The definition of ''default right'' in this proposal parallels the definition contained in the ISDA Protocol. The proposed rule does not modify or limit the FDIC's powers in its capacity as receiver under the FDI Act or the Dodd-Frank Act with respect to a counterparties' contractual or other rights.

[54] *See* proposed rule § 382.3.

[55] 12 U.S.C. 1811–1835a.

[56] 12 U.S.C. 5381–5394.

[57] *See* proposed rule § 382.1.

regarding a covered QFC between a covered FSI 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.[58] 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 Title II 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 counterparties from attempting to exercise such rights.

This requirement would advance the proposal's goal of removing QFC-related obstacles to the orderly resolution of a GSIB. As discussed above, restrictions on the exercise of QFC default rights are an important prerequisite for an orderly GSIB resolution.[59]

Question 6: The FDIC invites comment on all aspects of this section of the proposal.

E. Prohibited Cross-Default Rights (Section 382.4 of the Proposed Rule)

Definitions. Section 382.4 of the proposal applies in the context of insolvency proceedings[60] and pertains to cross-default rights in QFCs between covered FSIs and their counterparties, many of which are subject to credit enhancements (such as a guarantee) provided by an affiliate of the covered FSI. Because credit enhancements on QFCs are themselves ''qualified financial contracts'' under the Dodd-Frank Act's definition of that term (which this proposal would adopt), the proposal includes the following additional definitions in order to facilitate a precise description of the relationships to which it would apply.

First, the proposal distinguishes between a credit enhancement and a ''direct QFC,'' defined as any QFC that is not a credit enhancement.[61] The proposal also defines ''direct party'' to mean a covered FSI that is itself a party to the direct QFC, as distinct from an entity that provides a credit enhancement.[62] In addition, the proposal 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.[63] Moreover, the proposal defines ''covered affiliate credit enhancement'' to mean an affiliate credit enhancement provided by a covered entity, covered bank, or covered FSI, and defines ''covered affiliate support provider'' to mean the covered entity, covered bank, or covered FSI that provides the covered affiliate credit enhancement.[64] Finally, the proposal 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).[65]

General prohibitions. Subject to the substantial exceptions discussed below, the proposal would prohibit a covered FSI from being 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 FSI.[66] The proposal also would generally prohibit a covered FSI 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 FSI's obligations under the QFC), along with associated obligations or collateral, upon the entry into resolution of an affiliate of the covered FSI.[67]

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 above, the potential for mass exercises of QFC default rights is one reason why a GSIB's failure could do severe damage to financial stability. In the context of an SPOE resolution, if the GSIB parent's entry into resolution led to the mass exercise of cross-default rights by the subsidiaries' QFC counterparties, then the subsidiaries could themselves fail or experience financial distress. Moreover, the mass exercise of QFC default rights could entail asset fire sales, which likely would affect other financial companies and undermine financial stability. 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 entity.

In an SPOE resolution, this damage could 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 operating subsidiaries based on their parent's entry into resolution. (Direct default rights against the subsidiaries would not be exercisable because the subsidiaries would not enter resolution.) In an MPOE resolution, this damage could occur from exercise of default rights against a performing entity based on the failure of an affiliate.

Under Title II, the stay-and-transfer provisions would address both direct default rights and cross-default rights. But, as explained above, no similar statutory provisions would apply to a resolution under the Bankruptcy Code. This proposal attempts to address these obstacles to orderly resolution under the Bankruptcy Code by extending the stay-and-transfer provisions to any type of resolution of an affiliate of a covered FSI that is not an insured depository institution. Similarly, the proposal 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 FSIs 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.[68]

[58] *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.*

[59] *See* FRB NPRM, 81 FR 29178 (May 11, 2016) for additional discussion regarding consistency of this proposal with similar regulatory efforts in foreign jurisdictions.

[60] *See* proposed rule § 382.4 (noting that section does not apply to proceedings under Title II of the Dodd-Frank Act).

[61] *See* proposed rule § 382.4(c)(2).

[62] *See* proposed rule § 382.4(c)(1).

[63] *See* proposed rule § 382.4(c)(3).

[64] *See* proposed rule § 382.4(f)(2).

[65] *See* proposed rule § 382.4(f)(4).

[66] *See* proposed rule § 382.4(b)(1).

[67] *See* proposed rule § 382.4(b)(2). 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 concerns expressed by asset managers during the drafting of the 2014 Protocol.

[68] *See* proposed rule § 382.4(b).

The proposal also is intended to facilitate other approaches to GSIB resolution. For example, it would facilitate a similar resolution strategy in which a U.S. depository institution subsidiary of a GSIB enters resolution under the FDI Act while its subsidiaries continue to meet their financial obligations outside of resolution.[69] Similarly, the proposal would facilitate the orderly resolution of a foreign GSIB under its home jurisdiction resolution regime by preventing the exercise of cross-default rights against the foreign GSIB's U.S. operations. The proposal would also facilitate the resolution of the U.S. intermediate holding company of a foreign GSIB, and the recapitalization of its U.S. operating subsidiaries, as part of a broader MPOE resolution strategy under which the foreign GSIB's operations in other regions would enter separate resolution proceedings. Finally, the proposal 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.

The proposal is intended to enhance the potential for orderly resolution of a GSIB under the Bankruptcy Code, the FDI Act, or a similar resolution regime. By doing so, the proposal would advance the Dodd-Frank Act's goal of making orderly GSIB resolution under the Bankruptcy Code workable.[70]

The proposal could also benefit the counterparties of a subsidiary of a failed GSIB, by preventing the disorderly failure of an otherwise-solvent subsidiary and allowing it to continue to meet its obligations. While it may be in the individual interest of any given counterparty to exercise any available rights against a subsidiary of a failed GSIB, the mass exercise of such rights could harm the counterparties' collective interest by causing an otherwise-solvent subsidiary to fail. Therefore, like the automatic stay in bankruptcy, which serves to maximize creditors' ultimate recoveries by preventing a disorderly liquidation of the debtor, the proposal would mitigate this collective action problem to the benefit of the failed firm's creditors and counterparties by preventing a disorderly resolution. And because many creditors and counterparties of GSIBs are themselves systemically important financial firms, improving outcomes for those creditors and counterparties would further protect the financial stability of the United States.

General creditor protections. While the proposed restrictions would facilitate orderly resolution, they would also diminish the ability of covered FSI's QFC counterparties to include certain protections for themselves in covered QFCs. In order to reduce this effect, the proposal includes several substantial exceptions to the proposed restrictions.[71] These permitted creditor protections are intended to allow creditors to exercise cross-default rights outside of an orderly resolution of a GSIB (as described above) and therefore would not be expected to undermine such a resolution.

First, in order to ensure that the proposed prohibitions would apply only to cross-default rights (and not direct default rights), the proposal 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.[72] 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 FSI'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 proposal would also allow, in the context of an insolvency proceeding, and subject to the statutory requirements and restrictions thereunder, covered QFCs to permit the exercise of default rights based on (i) the failure of the direct party; (ii) the direct party not satisfying a payment or delivery obligation; or (iii) a covered affiliate support provider or transferee not satisfying its payment or delivery obligations under the direct QFC or credit enhancement.[73] Moreover, the proposal 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.

The proposed exceptions for the creditor protections described above are intended to help ensure that the proposal permits a covered FSI'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 entity'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 entity'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, following the applicable stay period, under the U.S. special resolution regimes.

Additional creditor protections for supported QFCs. The proposal would allow additional creditor protections for a non-defaulting counterparty that is the beneficiary of a credit enhancement from an affiliate of the covered FSI that is a covered entity, covered bank, or covered FSI under the proposal.[74] The proposal would allow these creditor protections in recognition of the supported party's interest in receiving the benefit of its credit enhancement.

Where a covered QFC is supported by a covered affiliate credit enhancement,[75] the covered QFC and the credit enhancement would be permitted to allow the exercise of default rights[76] under the circumstances discussed below after the expiration of a stay period. Under the proposal, the applicable stay period would begin when the receiver is appointed 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.[77] This portion of

[69] As discussed above, the FDI Act would prevent the exercise of direct default rights against the depository institution, but it does not address the threat posed to orderly resolution by cross-default rights in the QFCs of the depository institution's subsidiaries. This proposal would facilitate orderly resolution under the FDI Act by filling that gap.

[70] *See* 12 U.S.C. 5365(d).

[71] *See* proposed rule § 382.4(e).

[72] *See* proposed rule § 382.4(e)(1). Special resolution regimes typically stay direct default rights, but may not stay cross-default rights. For example, as discussed above, the FDI Act stays direct default rights, see 12 U.S.C. 1821(e)(10)(B), but does not stay cross-default rights, whereas Title II 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).

[73] *See* proposed rule § 382.4(e).

[74] *See* proposed rule § 382.4(g).

[75] Note that the exception in § 382.4(g) of 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 enhancement provided by a non-U.S. entity of a foreign GSIB, which would not be a covered entity under the proposal.

[76] *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).

[77] *See* proposed rule § 382.4(h)(1).

the proposal is similar to the stay treatment provided in a resolution under Title II or the FDI Act.[78]

Under the proposal, 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 or the FDI Act.[79] Default rights could also be exercised at the end of the stay period if the transferee (if any) of the credit enhancement enters an insolvency 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.[80] Such creditor protections would be permitted in order 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 support provider or transferee. Title II and the FDI Act 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 providing substantively the same credit enhancement as the covered affiliate support provider.[81]

Creditor protections related to FDI Act 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 FDI Act[82] under the following circumstances: (a) After the FDI Act stay period,[83] if the credit enhancement is not transferred under the relevant provisions of the FDI Act[84] and associated regulations, and (b) during the FDI Act 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.[85] This provision is intended to ensure that a QFC counterparty of a subsidiary of a covered FSI that goes into FDI Act receivership can receive the equivalent level of protection that the FDI Act provides to QFC counterparties of the covered FSI itself.[86]

Prohibited terminations. In case of a legal dispute as to a party's right to exercise a default right under a covered QFC, the proposal would require that a covered QFC must provide that, after an affiliate of the direct party has entered a resolution proceeding, (a) the party seeking to exercise the default right bears 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, a similar standard,[87] or a more demanding standard.

The purpose of this proposed requirement is to deter the QFC counterparty of a covered entity from thwarting the purpose of this proposal by exercising a default right because of an affiliate's entry into resolution under the guise of other default rights that are unrelated to the affiliate's entry into resolution.

Agency transactions. In addition to entering into QFCs as principals, GSIBs may engage in QFCs as agents 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 subsidiary 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.[88] Similarly, a covered FSI may also enter into a QFC as agent acting on behalf of a principal.

This proposal would apply to a covered QFC regardless of whether the covered FSI is acting as a principal or as an agent. Section 382.3 and section 382.4 do not distinguish between agents and principals with respect to default rights or transfer restrictions applicable to covered QFCs. Section 382.3 would limit default rights and transfer restrictions that a counterparty may have against a covered FSI consistent with the U.S. special resolution regimes.[89] Section 382.4 would ensure that, subject to the enumerated creditor protections, counterparties could not exercise cross-default rights under the covered QFC against the covered FSI, acting as agent or principal, based on the resolution of an affiliate of the covered FSI.[90]

[78] *See* 12 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.

[79] *See* proposed rule § 382.4(g)(1). 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.

[80] *See* proposed rule § 382.4(g)(3).

[81] 12 U.S.C. 5390(c)(16)(A).

[82] As discussed above, the FDI Act stays direct default rights against the failed depository institution but does not stay the exercise of cross-default rights against its affiliates.

[83] Under the FDI Act, 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).

[84] 12 U.S.C. 1821(e)(9)–(10).

[85] *See* proposed rule § 382.4(i).

[86] *See id.* (noting that the general creditor protections in section 382.4(e), and the additional creditor protections for supported QFCs in section 382.4(g), are inapplicable to FDI Act proceedings).

[87] 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.

[88] 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).

[89] *See* proposed rule § 382.3(a)(3).

[90] *See* proposed rule § 382.4(d). If a covered FSI (acting as agent) is a direct party to a covered QFC, then the general prohibitions of section 382.4(b) 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 FSI (acting as agent). *See also* proposed rule § 382.4(a)(3).

Compliance with the ISDA 2015 Resolution Stay Protocol. As an alternative to compliance with the requirements of section 382.4 that are described above, a covered FSI could comply with the proposed rule to the extent its QFCs are amended by adherence to the current ISDA 2015 Universal Resolution Stay Protocol, including the Securities Financing Transaction Annex and the Other Agreements Annex, as well as subsequent, immaterial amendments to the Protocol.[91]

The Protocol has the same general objective as the proposed rule: to make GSIBs more resolvable by amending their contracts to, in effect, contractually recognize the applicability of U.S. special resolution regimes[92] and to restrict cross-default provisions to facilitate orderly resolution under the U.S. Bankruptcy Code. Moreover, the provisions of the Protocol largely track the requirements of the proposed rule.[93] Consistent with the FDIC's objective of increasing GSIB resolvability, the proposed rule would allow a covered entity to bring its covered QFCs into compliance by amending them through adherence to the Protocol.

Question 7: The FDIC invites comment on the proposed restrictions on cross-default rights in covered FSI's QFCs. Is the proposal 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 made clearer?

Question 8: The FDIC invites comment on its proposal to treat as compliant with section 382.4 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 proposal and appropriately safeguard U.S. financial stability?

F. Process for Approval of Enhanced Creditor Protections (Section 382.5 of the Proposed Rule)

As discussed above, the proposed restrictions would leave many creditor protections that are commonly included in QFCs unaffected. The proposal would also allow any covered FSI to submit to the FDIC a request to approve as compliant with the rule one or more QFCs that contain additional creditor protections—that is, creditor protections that would be impermissible under the restrictions set forth above. A covered FSI making such a request would be required to provide an analysis of the contractual terms for which approval is requested in light of a range of factors that are set forth in the proposed rule and intended to facilitate the FDIC's consideration of whether permitting the contractual terms would be consistent with the proposed restrictions.[94] The FDIC also expects to consult with the FRB and OCC during its consideration of such a request—in particular, when the covered QFC is between a covered FSI and either a covered bank or a covered entity.

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 proposal: 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 entities, covered banks, and covered FSIs. 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 entities, covered banks and covered FSIs 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, proposals that would expand counterparties' rights beyond those afforded under existing QFCs would conflict with the proposal's goal of reducing the risk of mass unwinds of GSIB QFCs. The proposal also includes three factors that focus on the creditor protections specific to supported parties. The FDIC 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 FSI requesting that the FDIC 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 FDIC.

Question 9: The FDIC invites comment on all aspects of the proposed process for approval of enhanced creditor protections. Should the FDIC provide greater specificity on this process? If so, what processes and procedures could be adopted without imposing undue regulatory burden?

III. Transition Periods

Under the proposal, 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

[91] 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 ISDA 2015 Universal Resolution Stay Protocol (ISDA Protocol) expanded the 2014 ISDA Resolution Stay Protocol to cover securities financing transactions in addition to over-the-counter derivatives documented under ISDA Master Agreements. As between adhering parties, the ISDA Protocol replaces the 2014 ISDA Protocol (which does not cover securities financing transactions). Securities financing transactions (which generally include repurchase agreements and securities lending transactions) are documented under non-ISDA master agreements.

The Protocol was developed by a working group of member institutions of the International Swaps and Derivatives Association, Inc. (ISDA), in coordination with the FRB, the FDIC, the OCC, and foreign regulatory agencies. 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 ISDA. ISDA is expected to continue supplementing the Protocol with ISDA Resolution Stay Jurisdictional Modular Protocols for the United States and other jurisdictions. A jurisdictional module for the United States that is substantively identical to the Protocol in all respects (aside from exempting QFCs between adherents that are not covered entities, covered FSIs, or covered banks) would be consistent with the current proposal. For additional detail on the development of the 2014 and 2015 ISDA Resolution Stay Protocols, *see* FRB NPRM, 81 FR at 29181–29182 (May 11, 2016).

[92] The Protocol also includes other special resolution regimes. Currently, the Protocol includes special resolution regimes in place in France, Germany, Japan, Switzerland, and the United Kingdom. Other special resolution regimes that meet the definition of ''Protocol-eligible Regime'' may be added to the Protocol.

[93] Sections 2(a) and (b) of the Protocol provide the stays required under paragraph (b)(1) of proposed rule § 382.4 for the most common U.S. insolvency regimes. Section 2(f) of the Protocol overrides transfer restrictions as required under paragraph (b)(2) of proposed rule § 382.4 for transfers that are consistent with the Protocol. The Protocol's exemptions from the stay for ''Performance Default Rights'' and the ''Unrelated Default Rights'' described in paragraph (a) of the definition are consistent with the proposal's general creditor protections permitted under paragraph (b) of proposed rule § 382.4. The Protocol's burden of proof provisions (see section 2(i) of the Protocol and the definition of Unrelated Default Rights) and creditor protections for credit enhancement providers in FDI Act proceedings (see Section 2(d) of the Protocol) are also consistent with the paragraphs (j) and (i), respectively, of proposed rule § 382.4. Note also that, although exercise of Performance Default Rights under the Protocol does not require a showing of clear and convincing evidence while these same rights under the proposal (proposed rule § 252.84(e)) would require such a showing, this difference between the Protocol and the proposal does not appear to be meaningful because clearly documented evidence for such default rights (*i.e.,* payment and performance failures, entry into resolution proceedings) should exist.

[94] Proposed rule § 382.5(d)(1)–(10).

rule (effective date).[95] Entities that are covered FSIs when the final rule is issued would be required to comply with the proposed requirements beginning on the effective date. Thus, a covered FSI would be required to ensure that covered QFCs entered into on or after the effective date comply with the rule's requirements.[96] Moreover, a covered FSI 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 FSI or an affiliate (that is also a covered entity, covered bank, or covered FSI) enters into a new covered QFC with the counterparty to the preexisting covered QFC or an affiliate of the counterparty.[97] (Thus, a covered FSI would not be required to conform a preexisting QFC if that covered FSI and its affiliates do not enter into any new QFCs with the same counterparty or its affiliates on or after the effective date.) Finally, an entity that becomes a covered FSI 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 the entity becomes a covered FSI.[98]

By permitting a covered FSI to remain party to noncompliant QFCs entered into before the effective date unless the covered FSI or any affiliate (that is also a covered entity, covered bank, or covered FSI) enters into new QFCs with the same counterparty or its affiliates, the proposal strikes a balance between ensuring QFC continuity if the GSIB were to fail and ensuring that covered FSIs and their existing counterparties can avoid any compliance costs and disruptions associated with conforming existing QFCs by refraining from entering into new QFCs. The requirement that a covered FSI ensure that all existing QFCs with a particular counterparty and its affiliates are compliant before it or any affiliate of the covered FSI (that is also a covered entity, covered bank, or covered FSI) enters into a new QFC with the same counterparty or its affiliates after the effective date will provide covered FSIs with an incentive to seek the modifications necessary to ensure that their QFCs with their most important counterparties are compliant. Moreover, the volume of preexisting, noncompliant 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 with counterparties that, together with their affiliates, do not enter new covered QFCs with the GSIB on or after the effective date, it would be appropriate to permit a limited number of noncompliant QFCs to remain outstanding, in keeping with the terms described above. The FDIC will monitor covered FSIs' levels of noncompliant QFCs and evaluate the risk, if any, that they pose to the safety and soundness of the covered FSIs, the banking system, or to U.S. financial stability.

Question 10: The FDIC invites comment on the proposed transition periods and the proposed treatment of preexisting QFCs.

IV. Expected Effects

The proposed rule is intended to promote the financial stability of the United States by reducing the potential that resolution of a GSIB, particularly through bankruptcy, will be disorderly. The proposed rule will help meet this policy objective by more effectively and efficiently managing the exercise of default rights and restrictions contained in QFCs. It would therefore help mitigate the risk of future financial crises and imposition of substantial costs on the U.S. economy.[99] The proposed rule furthers the FDIC's mission and responsibilities, which include resolving failed institutions in the least costly manner and ensuring that FDIC-insured institutions operate safely and soundly. It also furthers the fulfillment of the FDIC's role as the (i) primary federal supervisor for SNMBs and state savings associations; (ii) resolution authority for all FDIC-insured institutions under the FDI Act; and (iii) resolution authority for large complex financial institutions under Title II of the Dodd-Frank Act.

The proposal would likely benefit the counterparties of a subsidiary of a failed GSIB by preventing the disorderly failure of the subsidiary and enabling it to continue to meet its obligations. Preventing the mass exercise of QFC default rights at the time the parent or other affiliate enters resolution proceedings makes it more likely that the subsidiaries or other affiliates will be able to meet their obligations to QFC counterparties. Moreover, the creditor protections permitted under the proposal would allow any counterparty that does not continue to receive payment under the QFC to exercise its default rights, after any applicable stay period.

Because financial crises impose enormous costs on the economy, even small reductions in the probability or severity future financial crises create substantial economic benefits.[100] The proposal would materially reduce the risk to the financial stability of the United States that could arise from the failure of a GSIB by enhancing the prospects for the orderly resolution of such a firm, and would thereby materially reduce the probability and severity of financial crises in the future.

The costs of the proposed rule are likely to be relatively small and only affect twelve covered FSIs. Covered FSIs and their counterparties are likely to incur administrative costs associated with drafting and negotiating compliant QFCs, but to the extent such parties adhere to the ISDA Protocol, these administrative costs would likely be reduced. While potential administrative costs are difficult to accurately predict, these costs are likely to be small relative to the revenue of the organizations affected by the proposed rule, and to the costs of doing business in the financial sector generally.

In addition, the FDIC anticipates that covered FSIs would likely share resources with its parent GSIB and/or GSIB affiliates—which are subject to parallel requirements—to help cover compliance costs. The stay-and-transfer provisions of the Dodd-Frank Act and the FDI Act are already in force, and the ISDA Protocol is already partially effective for the 23 existing GSIB adherents. The partial effectiveness of the ISDA Protocol (regarding Section 1, which addresses recognition of stays on the exercise of default rights and remedies in financial contracts under special resolution regimes, including in the United States, the United Kingdom, Germany, France, Switzerland and Japan) suggests that to the extent covered FSIs already adhere to the ISDA Protocol, some implementation costs will likely be reduced.

The proposal could also impose costs on covered FSIs to the extent that they may need to provide their QFC

[95] Under section 302(b) of the Riegle Community Development and Regulatory Improvement Act of 1994, new FRB 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).

[96] *See* proposed rule §§ 382.3(a)(2)(i); 382.4(a)(2).

[97] *See* proposed rule §§ 382.3(a)(2)(ii), 382.4(a)(2).

[98] *See* proposed rule § 382.2(b).

[99] A recent estimate of the unrealized economic output that resulted from 2007–09 financial crisis in the United States amounted to between $6 and $14 trillion. *See* ''How Bad Was It? The Costs and Consequences of the 2007–09 Financial Crisis,'' Staff Paper No. 20, Federal Reserve Bank of Dallas, July 2013. *https://dallasfed.org/assets/documents/research/staff/staff1301.pdf.*

[100] *See id.*

counterparties with better contractual terms in order to compensate those parties for the loss of their ability to exercise default rights that would be restricted by the proposal. These costs may be higher than drafting and negotiating costs. However, they are also expected to be relatively small because of the limited reduction in the rights of counterparties and the availability of other forms of protection for counterparties.

The proposal could also create economic costs by causing a marginal reduction in QFC-related economic activity. For example, a covered FSI may not enter into a QFC that it would have otherwise entered into in the absence of the proposed rule. Therefore, economic activity that would have been associated with that QFC absent the proposed rule (such as economic activity that would have otherwise been hedged with a derivatives contract or funded through a repo transaction) might not occur.

While uncertainty surrounding the future negotiations of economic actors makes an accurate quantification of any such costs difficult, costs from reduced QFC activity are likely to be very low. The proposed restrictions on default rights in covered QFCs are relatively narrow and would not change a counterparty's rights in response to its direct counterparty's entry into a bankruptcy proceeding (that is, the default rights covered by the Bankruptcy Code's ''safe harbor'' provisions). Counterparties are also able to prudently manage risk through other means, including entering into QFCs with entities that are not GSIB entities and therefore would not be subject to the proposed rule.

Question 11: The FDIC invites comment on all aspects of this evaluation of costs and benefits; in particular, whether covered FSIs expect to be able to share the costs of complying with this rulemaking with affiliated entities.

V. Revisions to Certain Definitions in the FDIC's Capital and Liquidity Rules

This proposal would also amend several definitions in the FDIC's capital and liquidity rules to help ensure that the proposal would not have unintended effects for the treatment of covered FSIs' netting agreements under those rules, consistent with the proposed amendments contained in the FRB NPRM and the OCC NPRM.[101]

The FDIC's regulatory capital rules permit a banking organization 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'' or agreement that provides for certain rights upon the default of a counterparty.[102] The FDIC has defined ''qualifying master netting agreement'' to mean a netting agreement that permits a banking organization to terminate, apply close-out netting, and promptly liquidate or set-off collateral upon an event of default of the counterparty, thereby reducing its counterparty exposure and market risks.[103] On the whole, measuring the amount of exposure of these contracts on a net basis, rather than on a gross basis, results in a lower measure of exposure and thus a lower capital requirement.

The current definition of ''qualifying master netting agreement'' recognizes that default rights may be stayed if the financial company is in resolution under the Dodd-Frank Act, the FDI Act, a substantially similar law applicable to government-sponsored enterprises, or a substantially similar foreign law, or where the agreement is subject by its terms to any of those laws. Accordingly, transactions conducted under netting agreements where default rights may be stayed in those circumstances may qualify for the favorable capital treatment described above. However, the current definition of ''qualifying master netting agreement'' does not recognize the restrictions that the proposal would impose on the QFCs of covered FSIs. Thus, a master netting agreement that is compliant with this proposal would not qualify as a qualifying master netting agreement. This would result in considerably higher capital and liquidity requirements for QFC counterparties of covered FSIs, which is not an intended effect of this proposal.

Accordingly, the proposal would amend the definition of ''qualifying master netting agreement'' so that a master netting agreement could qualify 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 to the extent necessary to comply with the requirements of this proposal. This revision would maintain the existing treatment for these contracts under the FDIC's capital and liquidity rules by accounting for the restrictions that the proposal would place on default rights related to covered FSIs' QFCs. The FDIC does not believe that the disqualification of master netting agreements that would result in this proposed amendment to the definition of ''qualifying master netting agreement'' in this proposal would accurately reflect the risk posed by the affected QFCs. As discussed above, the implementation of consistent restrictions on default rights in GSIB QFCs would increase the prospects for the orderly resolution of a failed GSIB and thereby protect the financial stability of the United States.

The proposal would similarly revise certain other definitions in the regulatory capital rules to make analogous conforming changes designed to account for this proposal's restrictions and ensure that a banking organization may continue to recognize the risk-mitigating effects of financial collateral received in a secured lending transaction, repo-style transaction, or eligible margin loan for purposes of the FDIC's capital rules. Specifically, the proposal would revise the definitions of ''collateral agreement,'' ''eligible margin loan,'' and ''repo-style transaction'' to provide that a counterparty's default rights may be limited as required by this proposal without unintended adverse impacts under the FDIC's capital rules.

The interagency 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.''[104] Thus, it may also be appropriate to amend the definition of ''eligible master netting agreement'' to account for the proposed restrictions on covered FSIs' QFCs. Because the FDIC

[101] On September 20, 2016, the FDIC adopted a separate final rule (the Final QMNA Rule), following the earlier notice of proposed rulemaking issued in January 2015, *see* 80 FR 5063 (Jan. 30, 2015), covering amendments to the definition of ''qualifying master netting agreement'' in the FDIC's capital and liquidity rules and related definitions in its capital rules. The Final QMNA Rule is designed to prevent similar unintended effects from implementation of special resolution regimes in non-U.S. jurisdictions, or by parties' adherence to the ISDA Protocol. The amendments contained in the Final QMNA Rule also are similar to revisions that the FRB and the OCC made in their joint 2014 interim final rule to ensure that the regulatory capital and liquidity rules' treatment of certain financial contracts is not affected by the implementation of special resolution regimes in foreign jurisdictions. *See* 79 FR 78287 (Dec. 30, 2014).

[102] *See* 12 CFR 324.34(a)(2).

[103] *See* the definition of ''qualifying master netting agreement'' in 12 CFR 324.2 (capital rules) and 329.3 (liquidity rules).

[104] 80 FR 74840, 74861–74862 (November 30, 2015). The FDIC's definition of ''eligible master netting agreement'' for purposes of the swap margin rule is codified at 12 CFR 349.2.

issued the swap margin rule jointly with other U.S. regulatory agencies, however, the FDIC would consult with the other agencies before proposing amendments to that rule's definition of ''eligible master netting agreement.''

Question 12: The FDIC invites comment on all aspects of the proposed amendments to the definitions of ''qualifying master netting agreement'' in the regulatory capital and liquidity rules and ''collateral agreement,'' ''eligible margin loan,'' and ''repo-style transaction'' in the capital rules, including whether the definitions recognize the stay of termination rights under the appropriate resolution regimes.

VI. Regulatory Analysis

A. Paperwork Reduction Act

The FDIC is proposing to add a new Part 382 to its rules to require certain FDIC-supervised institutions to ensure that covered QFCs to which they are a party provide that any default rights and restrictions on the transfer of the QFCs are limited to the same extent as they would be under the Dodd-Frank Act and the FDI Act. In addition, covered FSIs would generally be prohibited from being party to QFCs that would allow a QFC counterparty to exercise default rights against the covered FSI based on the entry into a resolution proceeding under the Dodd-Frank Act, FDI Act, or any other resolution proceeding of an affiliate of the covered FSI.

In accordance with the requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 through 3521, (PRA), the FDIC 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. Section 382.5 of the proposed rule contains ''collection of information'' requirements within the meaning of the PRA. Accordingly, the FDIC will obtain an OMB control number relating to the information collection associated with that section.

This information collection consists of amendments to covered QFCs and, in some cases, approval requests prepared and submitted to the FDIC regarding modifications to enhanced creditor protection provisions (in lieu of adherence to the ISDA Protocol). Section 382.5(b) of the proposed rule would require a covered banking entity to request the FDIC to approve as compliant with the requirements of section 382.4 of this subpart provisions of one or more forms of covered QFCs or amendments to one or more forms of covered QFCs, with enhanced creditor protection conditions. A covered FSI making a request must provide (1) an analysis of the proposal under each consideration of paragraph 382.5(d); (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 FDIC requests.

Covered FSIs would also have recordkeeping associated with proposed amendments to their covered QFCs. However, much of the recordkeeping associated with amending the covered QFCs is already expected from a covered FSI. Therefore, the FDIC would expect minimal additional burden to accompany the initial efforts to bring all covered QFCs into compliance. The existing burden estimates for the information collection associated with section 382.5 are as follows:

Title	Times/year	Respondents	Hours per response	Total burden hours
Paperwork for proposed revisions	On occasion	6	40	240
Total Burden				240

Question 13: The FDIC invites comments on:

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

(b) The accuracy of the FDIC's 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 information collections on respondents, including through the use 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. A copy of the comments may also be submitted to the OMB desk officer for the FDIC by mail to U.S. Office of Management and Budget, 725 17th Street NW., #10235, Washington, DC 20503, or by facsimile to 202–395–5806, or by email to *oira_submission@omb.eop.gov,* Attention, Federal Banking Agency Desk Officer.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.,* requires that each federal agency either certify that a proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities or prepare and make available for public comment an initial regulatory flexibility analysis of the proposal.[105] For the reasons provided below, the FDIC certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. Nevertheless, the FDIC is publishing and inviting comment on this initial regulatory flexibility analysis.

The proposed rule would only apply to FSIs that form part of GSIB organizations, which include the largest, most systemically important banking organizations and certain of their subsidiaries. More specifically, the proposed rule would apply to any covered FSI that is a subsidiary of a U.S. GSIB or foreign GSIB—regardless of size—because an exemption for small entities would significantly impair the effectiveness of the proposed stay-and-transfer provisions and thereby undermine a key objective of the proposal: To reduce the execution risk of an orderly GSIB resolution.

The FDIC estimates that the proposed rule would apply to approximately twelve FSIs. As of March 31, 2016, only six of the twelve covered FSIs have derivatives portfolios that could be affected. None of these six banking organizations would qualify as a small entity for the purposes of the RFA.[106] In

[105] See 5 U.S.C. 603, 605.

[106] Under regulations issued by the Small Business Administration, small entities include

addition, the FDIC anticipates that any small subsidiary of a GSIB that could be affected by this proposed rule would not bear significant additional costs as it is likely to rely on its parent GSIB, or a large affiliate, that will be subject to similar reporting, recordkeeping, and compliance requirements.[107] The proposed rule complements the FRB NPRM and OCC NPRM. It is not designed to duplicate, overlap with, or conflict with any other federal regulation.

This initial regulatory flexibility analysis demonstrates that the proposed rule would not, if promulgated, have a significant economic impact on a substantial number of small entities, and the FDIC so certifies.[108]

Question 14: The FDIC welcomes written comments regarding this initial regulatory flexibility analysis, and requests that commenters describe the nature of any impact on small entities and provide empirical data to illustrate and support the extent of the impact. A final regulatory flexibility analysis will be conducted after consideration of comment received during the public comment period.

C. Riegle Community Development and Regulatory Improvement Act of 1994

The Riegle Community Development and Regulatory Improvement Act of 1994 (RCDRIA), 12 U.S.C. 4701, requires that each Federal banking agency, in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, consider, consistent with principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, new regulations that impose additional reporting, disclosures, or other new requirements on insured depository institutions generally must take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form.

The FDIC has invited comment on these matters in other sections of this proposal and will continue to consider them as part of the overall rulemaking process.

banking organizations with total assets of $550 million or less.

[107] *See* FRB NPRM, 81 FR 29169 (May 11, 2016) and OCC NPRM, 81 FR 55381 (August 19, 2016).

[108] 5 U.S.C. 605.

Question 15: The FDIC invites comment on this section, including any additional comments that will inform the FDIC's consideration of the requirements of RCDRIA.

D. Solicitation of Comments on the Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act, 12 U.S.C. 4809, requires the FDIC to use plain language in all proposed and final rules published after January 1, 2000. The FDIC invites comment on how to make this proposed rule easier to understand.

Question 16: Has the FDIC organized the material to inform your needs? If not, how could the FDIC present the rule more clearly?

Question 17: Are the requirements of the proposed rule clearly stated? If not, how could they be stated more clearly?

Question 18: Does the proposal contain unclear technical language or jargon? If so, which language requires clarification?

Question 19: Would a different format (such as a different grouping and ordering of sections, a different use of section headings, or a different organization of paragraphs) make the regulation easier to understand? If so, what changes would make the proposal clearer?

Question 20: What else could the FDIC do to make the proposal clearer and easier to understand?

List of Subjects

12 CFR Part 324

Administrative practice and procedure, Banks, banking, Capital adequacy, Reporting and recordkeeping requirements, Securities, State savings associations, State non-member banks.

12 CFR Part 329

Administrative practice and procedure, Banks, banking, Federal Deposit Insurance Corporation, FDIC, Liquidity, Reporting and recordkeeping requirements.

12 CFR Part 382

Administrative practice and procedure, Banks, banking, Federal Deposit Insurance Corporation, FDIC, Qualified financial contracts, Reporting and recordkeeping requirements, State savings associations, State non-member banks.

For the reasons stated in the supplementary information, the Federal Deposit Insurance Corporation proposes to amend 12 CFR Chapter III, parts 324, 329 and 382 as follows:

PART 324—CAPITAL ADEQUACY OF FDIC-SUPERVISED INSTITUTIONS

■ 1. The authority citation for part 324 continues to read as follows:

Authority: 12 U.S.C. 1815(a), 1815(b), 1816, 1818(a), 1818(b), 1818(c), 1818(t), 1819(Tenth), 1828(c), 1828(d), 1828(i), 1828(n), 1828(o), 1831o, 1835, 3907, 3909, 4808; 5371; 5412; Pub. L. 102–233, 105 Stat. 1761, 1789, 1790 (12 U.S.C. 1831n note); Pub. L. 102–242, 105 Stat. 2236, 2355, as amended by Pub. L. 103–325, 108 Stat. 2160, 2233 (12 U.S.C. 1828 note); Pub. L. 102–242, 105 Stat. 2236, 2386, as amended by Pub. L. 102–550, 106 Stat. 3672, 4089 (12 U.S.C. 1828 note); Pub. L. 111–203, 124 Stat. 1376, 1887 (15 U.S.C. 78o–7 note).

■ 2. Section 324.2 is amended by revising the definitions of ''Collateral agreement,'' ''Eligible margin loan,'' ''Qualifying master netting agreement,'' and ''Repo-style transaction'' to read as follows:

§ 324.2 Definitions.

* * * * *

Collateral agreement means a legal contract that specifies the time when, and circumstances under which, a counterparty is required to pledge collateral to an FDIC-supervised institution for a single financial contract or for all financial contracts in a netting set and confers upon the FDIC-supervised institution a perfected, first-priority security interest (notwithstanding the prior security interest of any custodial agent), or the legal equivalent thereof, in the collateral posted by the counterparty under the agreement. This security interest must provide the FDIC-supervised institution with a right to close-out the financial positions and liquidate the collateral upon an event of default of, or failure to perform by, the counterparty under the collateral agreement. A contract would not satisfy this requirement if the FDIC-supervised institution's exercise of rights under the agreement may 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[4] to the U.S. laws referenced in this paragraph (1) in order to facilitate the orderly resolution of the defaulting counterparty; or

[4] The FDIC expects to evaluate jointly with the Federal Reserve and the OCC whether foreign special resolution regimes meet the requirements of this paragraph.

(2) Where the agreement is subject by its terms to any of the laws referenced in paragraph (1) of this definition; or

(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 382 of this title or any similar requirements of another U.S. federal banking agency, as applicable.

* * * * *

Eligible margin loan means:

(1) An extension of credit where:

(i) The extension of credit is collateralized exclusively by liquid and readily marketable debt or equity securities, or gold;

(ii) The collateral is marked to fair value daily, and the transaction is subject to daily margin maintenance requirements; and

(iii) The extension of credit is conducted under an agreement that provides the FDIC-supervised institution 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,[5] or laws of foreign jurisdictions that are substantially similar[6] to the U.S. laws referenced in this paragraph in order to 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 382 of this title or any similar requirements of another U.S. federal banking agency, as applicable.

(2) In order to recognize an exposure as an eligible margin loan for purposes of this subpart, an FDIC-supervised institution must comply with the requirements of § 324.3(b) with respect to that exposure.

* * * * *

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

(1) The agreement creates a single legal obligation for all individual transactions covered by the agreement upon an event of default following any stay permitted by paragraph (2) of this definition, including upon an event of receivership, insolvency, conservatorship, liquidation, or similar proceeding, of the counterparty;

(2) The agreement provides the FDIC-supervised institution 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, including upon an event of receivership, conservatorship, 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:

(i) 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[7] to the U.S. laws referenced in this paragraph (2)(i) in order to facilitate the orderly resolution of the defaulting counterparty;

(ii) Where the agreement is subject by its terms to, or incorporates, any of the laws referenced in paragraph (2)(i) of this definition; or

(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 382 of this title or any similar requirements of another U.S. federal banking agency, as applicable;

(3) The agreement does not contain a walkaway clause (that is, a provision that permits a non-defaulting counterparty to make a lower payment than it otherwise would make under the agreement, or no payment at all, to a defaulter or the estate of a defaulter, even if the defaulter or the estate of the defaulter is a net creditor under the agreement); and

(4) In order to recognize an agreement as a qualifying master netting agreement for purposes of this subpart, an FDIC-supervised institution must comply with the requirements of § 324.3(d) of this chapter with respect to that agreement.

* * * * *

Repo-style transaction means a repurchase or reverse repurchase transaction, or a securities borrowing or securities lending transaction, including a transaction in which the FDIC-supervised institution acts as agent for a customer and indemnifies the customer against loss, provided that:

(1) The transaction is based solely on liquid and readily marketable securities, cash, or gold;

(2) The transaction is marked-to-fair value daily and subject to daily margin maintenance requirements;

(3)(i) The transaction is a ''securities contract'' or ''repurchase agreement'' under section 555 or 559, respectively, of the Bankruptcy Code (11 U.S.C. 555 or 559), a qualified financial contract under section 11(e)(8) of the Federal Deposit Insurance Act, or a netting contract between or among financial institutions under sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act or the Federal Reserve's Regulation EE (12 CFR part 231); or

(ii) If the transaction does not meet the criteria set forth in paragraph (3)(i) of this definition, then either:

(A) The transaction is executed under an agreement that provides the FDIC-supervised institution 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 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

[5] 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 Federal Reserve Board's Regulation EE (12 CFR part 231).

[6] The FDIC expects to evaluate jointly with the Federal Reserve and the OCC whether foreign special resolution regimes meet the requirements of this paragraph.

[7] The FDIC expects to evaluate jointly with the Federal Reserve and the OCC whether foreign special resolution regimes meet the requirements of this paragraph.

that are substantially similar [8] to the U.S. laws referenced in this paragraph (3)(ii)(A) in order to facilitate the orderly resolution of the defaulting counterparty; or 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 382 of this title or any similar requirements of another U.S. federal banking agency, as applicable; or

(B) The transaction is:

(1) Either overnight or unconditionally cancelable at any time by the FDIC-supervised institution; and

(2) Executed under an agreement that provides the FDIC-supervised institution 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 counterparty default; and

(4) In order to recognize an exposure as a repo-style transaction for purposes of this subpart, an FDIC-supervised institution must comply with the requirements of § 324.3(e) with respect to that exposure.

* * * * *

PART 329—LIQUIDITY RISK MEASUREMENT STANDARDS

■ 3. The authority citation for part 329 continues to read as follows:

Authority: 12 U.S.C. 1815, 1816, 1818, 1819, 1828, 1831p–1, 5412.

■ 4. Section 329.3 is amended by revising the definition of ''Qualifying master netting agreement'' to read as follows:

§ 329.3 Definitions.

* * * * *

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

(1) The agreement creates a single legal obligation for all individual transactions covered by the agreement upon an event of default following any stay permitted by paragraph (2) of this definition, including upon an event of receivership, conservatorship, insolvency, liquidation, or similar proceeding, of the counterparty;

(2) The agreement provides the FDIC-supervised institution 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, including upon an event of receivership, conservatorship, 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:

(i) 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 [109] to the U.S. laws referenced in this paragraph (2)(i) in order to facilitate the orderly resolution of the defaulting counterparty;

(ii) Where the agreement is subject by its terms to, or incorporates, any of the laws referenced in paragraph (2)(i) of this definition; or

(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 382 of this title or any similar requirements of another U.S. federal banking agency, as applicable;

(3) The agreement does not contain a walkaway clause (that is, a provision that permits a non-defaulting counterparty to make a lower payment than it otherwise would make under the agreement, or no payment at all, to a defaulter or the estate of a defaulter, even if the defaulter or the estate of the defaulter is a net creditor under the agreement); and

(4) In order to recognize an agreement as a qualifying master netting agreement for purposes of this subpart, an FDIC-supervised institution must comply with the requirements of § 329.4(a) with respect to that agreement.

* * * * *

12 CFR Chapter III

Authority and Issuance

For the reasons set forth in the supplementary information, the Federal Deposit Insurance Corporation proposes to amend 12 CFR Chapter III of the Code of Federal Regulations as follows:

■ 8. Add part 382 to read as follows:

PART 382—RESTRICTIONS ON QUALIFIED FINANCIAL CONTRACTS

Authority: 12 U.S.C. 1816, 1818, 1819, 1820(g) 1828, 1828(m), 1831n, 1831o, 1831p–l, 1831(u), 1831w.

PART 382—RESTRICTIONS ON QUALIFIED FINANCIAL CONTRACTS

§ 382.1 Definitions.

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

Central counterparty (CCP) has the same meaning as in Part 324.2 of the FDIC's Regulations (12 CFR 324.2).

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

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

Covered bank has the same meaning as in Part 47.3 of the Office of the Comptroller's Regulations (12 CFR 47.3).

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 382.3 and 382.4 of this part.

Covered FSI means any state savings association or state non-member bank (as defined in the Federal Deposit Insurance Act, 12 U.S.C. 1813(e)(2)) that is a direct or indirect subsidiary of (i) a global systemically important bank holding company that has been designated pursuant to section 252.82(a)(1) of the Federal Reserve Board's Regulation YY (12 CFR part 252.82); or (ii) a global systemically important foreign banking organization that has been designated pursuant to Subpart I of 12 CFR part 252 (FRB Regulation YY), and any subsidiary of a covered FSI.

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

[8] The FDIC expects to evaluate jointly with the Federal Reserve and the OCC whether foreign special resolution regimes meet the requirements of this paragraph.

[109] The FDIC expects to evaluate jointly with the Federal Reserve and the OCC whether foreign special resolution regimes meet the requirements of this paragraph.

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 382.4, does not include any right under a contract that allows a party to terminate the contract on demand or at its option at a specified time, or from time to time, without the need to show cause.

FDI Act means the Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.).*

FDI Act proceeding means a proceeding that commences upon the Federal Deposit Insurance Corporation being appointed as conservator or receiver under section 11 of the Federal Deposit Insurance Act (12 U.S.C. 1821).

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

Global systemically important foreign banking organization means a global systemically important foreign banking organization that has been designated pursuant to Subpart I of 12 CFR part 252 (FRB Regulation YY).

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

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

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

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

§ 382.2 Applicability.

(a) *Scope of applicability.* This part applies to a ''covered FSI,'' which means any state savings association or state non-member bank (as defined in the Federal Deposit Insurance Act, 12 U.S.C. 1813(e)(2)) that is a direct or indirect subsidiary of (i) a global systemically important bank holding company that has been designated pursuant to section 252.82(a)(1) of the Federal Reserve Board's Regulation YY (12 CFR part 252.82); or (ii) a global systemically important foreign banking organization that has been designated pursuant to Subpart I of 12 CFR part 252 (FRB Regulation YY), and any subsidiary of a covered FSI.

(b) *Initial applicability of requirements for covered QFCs.* A covered FSI must comply with the requirements of §§ 382.3 and 382.4 beginning on the later of

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

(2) The date this subpart first becomes effective.

(c) *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.

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

§ 382.3 U.S. Special resolution regimes.

(a) *QFCs required to be conformed.* (1) A covered FSI must ensure that each covered QFC conforms to the requirements of this section 382.3.

(2) For purposes of this § 382.3, a covered QFC means a QFC that the covered FSI:

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

(3) To the extent that the covered FSI 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 FSI or the default rights relate to the covered FSI or an affiliate of the covered FSI.

(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 FSI 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 FSI 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 FSI 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 (A) the covered FSI were under the U.S. special resolution regime; or (B) an affiliate of the covered FSI is subject to a U.S. special resolution regime.

(c) *Relevance of creditor protection provisions.* The requirements of this section apply notwithstanding paragraphs §§ 382.4 and 382.5.

§ 382.4 Insolvency proceedings.

This section 382.4 does not apply to proceedings under Title II of the Dodd-Frank Act. For purposes of this section:

(a) *QFCs required to be conformed.* (1) A covered FSI must ensure that each covered QFC conforms to the requirements of this § 382.4.

(2) For purposes of this § 382.4, a covered QFC has the same definition as in paragraph (a)(2) of § 382.3.

(3) To the extent that the covered FSI 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 FSI or the default rights relate to an affiliate of the covered FSI.

(b) *General Prohibitions.*

(1) A covered QFC may not permit the exercise of any default right with respect to the covered QFC that is related, directly or indirectly, to an affiliate of the direct party becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding.

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

(c) *Definitions relevant to the general prohibitions.*

(1) *Direct party.* Direct party means a covered entity, covered bank, or covered FSI referenced in paragraph (a) of § 382.2, 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 FSI solely because the covered FSI is acting as agent under the QFC, the covered FSI 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 FDI 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.*

(1) *Covered direct QFC.* Covered direct QFC means a direct QFC to which a covered entity, covered bank, or covered FSI referenced in paragraph (a) of 382.2, is a party.

(2) *Covered affiliate credit enhancement.* Covered affiliate credit enhancement means an affiliate credit enhancement in which a covered entity, covered bank, or covered FSI referenced in paragraph (a) of § 382.2, 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(s) 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 (g)(3)(i) of this section; and

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

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

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

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

(h) *Definitions relevant to the additional creditor protections for supported QFCs.*

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

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

(3) *Transferee.* Transferee means a person to whom a covered affiliate credit enhancement is transferred upon or following 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 FDI Act proceedings.* Notwithstanding paragraphs (e) and (g) of this section, which are inapplicable to FDI Act proceedings, and notwithstanding paragraph (b) of this section, with respect to a covered direct QFC that is supported by a covered affiliate credit enhancement, the covered direct QFC and the covered affiliate credit enhancement may permit the exercise of a default right that is related, directly or indirectly, to the covered affiliate support provider becoming subject to FDI Act proceedings

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

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

(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.

§ 382.5 Approval of enhanced creditor protection conditions.

(a) *Protocol compliance.* Notwithstanding paragraph (b) of section 382.4, 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 FSI may request that the FDIC approve as compliant with the requirements of § 382.4 proposed provisions of one or more forms of covered QFCs, or proposed amendments to one or more forms of covered QFCs, with enhanced creditor protection conditions.

(2) Enhanced creditor protection conditions means a set of limited exemptions to the requirements of § 382.4(b) of this subpart that are different than that of paragraphs (e), (g), and (i) of § 382.4.

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

(i) An analysis of the proposal that addresses each consideration in 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 FDIC requests.

(c) *FDIC approval.* The FDIC may approve, subject to any conditions or commitments the FDIC may set, a proposal by a covered FSI 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 § 382.4 or that is amended as provided under paragraph (a) of this section, would promote the safety and soundness of covered FSIs by mitigating the potential destabilizing effects of the resolution of a global significantly important banking entity that is an affiliate of the covered FSI to at least the same extent.

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

(1) Whether, and the extent to which, the proposal would reduce the resiliency of such covered FSIs during distress or increase the impact on U.S. financial stability were one or more of the covered FSIs to fail;

(2) Whether, and the extent to which, the proposal would materially decrease the ability of a covered FSI, or an affiliate of a covered FSI, to be resolved in a rapid and orderly manner in the event of the financial distress or failure of the entity that is required to submit a resolution plan;

(3) Whether, and the extent to which, the set of conditions or the mechanism in which they are applied facilitates, on an industry-wide basis, contractual modifications to remove impediments to resolution and increase market certainty, transparency, and equitable treatment with respect to the default rights of non-defaulting parties to a covered QFC;

(4) Whether, and the extent to which, the proposal applies to existing and future transactions;

(5) Whether, and the extent to which, the proposal would apply to multiple forms of QFCs or multiple covered FSIs;

(6) Whether the proposal would permit a party to a covered QFC that is within the scope of the proposal to adhere to the proposal with respect to only one or a subset of covered FSIs;

(7) With respect to a supported party, the degree of assurance the proposal provides to the supported party that the material payment and delivery obligations of the covered affiliate credit enhancement and the covered direct QFC it supports will continue to be performed after the covered affiliate support provider enters a receivership, insolvency, liquidation, resolution, or similar proceeding;

(8) The presence, nature, and extent of any provisions that require a covered affiliate support provider or transferee to meet conditions other than material payment or delivery obligations to its creditors;

(9) The extent to which the supported party's overall credit risk to the direct party may increase if the enhanced creditor protection conditions are not met and the likelihood that the supported party's credit risk to the direct party would decrease or remain the same if the enhanced creditor protection conditions are met; and

(10) Whether the proposal provides the counterparty with additional default rights or other rights.

§ 382.6 [Reserved.]

§ 382.7 Exclusion of certain QFCs.

(a) *Exclusion of CCP-cleared QFCs.* A covered FSI is not required to conform a covered QFC to which a CCP is party to the requirements of §§ 382.3 or 382.4.

(b) *Exclusion of covered entity or covered bank QFCs.* A covered FSI is not required to conform a covered QFC to the requirements of §§ 382.3 or 382.4 to the extent that a covered entity or covered bank is required to conform the covered QFC to similar requirements of the Federal Reserve Board or Office of the Comptroller of the Currency if the QFC is either (A) a direct QFC to which a covered entity or a covered bank is a direct party or (B) an affiliate credit enhancement to which a covered entity or a covered bank is the obligor.

Dated at Washington, DC, this 20th day of September, 2016.

By order of the Board of Directors.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2016–25605 Filed 10–25–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2015–2393; Notice No. 25–16–07–SC]

Special Conditions: Bombardier Inc. Models BD–700–2A12 and BD–700–2A13 Airplanes; Fuselage Post-Crash Fire Survivability

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed special conditions.

SUMMARY: This action proposes special conditions for the Bombardier Inc. (Bombardier) Model BD–700–2A12 and BD–700–2A13 airplanes. These airplanes will have novel or unusual design features when compared to the state of technology envisioned in the airworthiness standards for transport category airplanes. These features are associated with an aluminum-lithium fuselage construction that may provide different levels of protection from post-crash fire threats than similar aircraft constructed from traditional aluminum structure. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These proposed special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: Send your comments on or before December 12, 2016.

ADDRESSES: Send comments identified by docket number FAA–2015–2393 using any of the following methods:

- *Federal eRegulations Portal:* Go to *http://www.regulations.gov/* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 8 a.m. and 5 p.m., Monday through Friday, except federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: The FAA will post all comments it receives, without change, to *http://www.regulations.gov/,* including any personal information the commenter provides. Using the search function of the docket Web site, anyone can find and read the electronic form of all comments received into any FAA docket, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478), as well as at *http://DocketsInfo.dot.gov/*.

Docket: Background documents or comments received may be read at *http://www.regulations.gov/* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays.

FOR FURTHER INFORMATION CONTACT: Alan Sinclair, FAA, Airframe and Cabin Safety Branch, ANM–115, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone 425–227–2195; facsimile 425–227–1232.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data.

We will consider all comments we receive by the closing date for comments. We may change these special conditions based on the comments we receive.

Background

On May 30, 2012, Bombardier applied for an amendment to type certificate no. T00003NY to include the new Model BD–700–2A12 and BD–700–2A13 airplanes. These airplanes are derivatives of the Model BD–700 series of airplanes and are marketed as the Bombardier Global 7000 (Model BD–700–2A12) and Global 8000 (Model BD–700–2A13). These airplanes are twin-engine, transport-category, executive-interior business jets. The maximum passenger capacity is 19 and the maximum takeoff weights are 106,250 lbs. (Model BD–700–2A12) and 104,800 lbs. (Model BD–700–2A13).

Type Certification Basis

Under the provisions of Title 14, Code of Federal Regulations (14 CFR) 21.101, Bombardier must show that the Model BD–700–2A12 and BD–700–2A13 airplanes meet the applicable provisions of the regulations listed in Type Certificate no. T00003NY, or the applicable regulations in effect on the date of application for the change, except for earlier amendments as agreed upon by the FAA.

In addition, the certification basis includes other regulations, special conditions, and exemptions that are not relevant to these proposed special conditions. Type Certificate no. T00003NY will be updated to include a complete description of the certification basis for these airplane models.

If the Administrator finds that the applicable airworthiness regulations (*i.e.,* 14 CFR part 25) do not contain adequate or appropriate safety standards for the Model BD–700–2A12 and BD–700–2A13 airplanes because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual