

February 17, 2015

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Secretary of the Treasury Proposes QFC Recordkeeping Rule

On January 7, 2015, the Secretary of the Treasury (the “Secretary”), as chairperson of the Financial Stability Oversight Council (“FSOC”) released a notice of proposed rulemaking (the “Proposed Rule”)¹ for implementing recordkeeping requirements for qualified financial contracts (“QFCs”) in connection with Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), or Orderly Liquidation Authority (“OLA”). The Proposed Rule would require certain financial institutions to maintain in electronic form, and be capable of making available to regulators within 24 hours of request, specific records related to QFCs in order to assist the Federal Deposit Insurance Corporation (“FDIC”), as receiver, in resolving a financial institution that may be subject to OLA.

Comments on the Proposed Rule must be received by April 7, 2015.

The Proposed Rule is designed to ensure that the FDIC has comprehensive information about a financial institution’s QFC portfolio to enable it to plan for and execute the rapid and orderly resolution of such a financial institution in OLA resolution proceedings (a “Covered Financial Company”). The Proposed Rule generally parallels a similar recordkeeping rule for insured banks promulgated by the FDIC in 2008 (the “IDI Rule”) under the Federal Deposit Insurance Act (“FDIA”). The IDI Rule similarly was designed to assist the FDIC in resolving failing banks, but the Proposed Rule expands the coverage of the requirements to non-bank financial companies and does not require that reporting entities be “troubled.” In addition, the Proposed Rule includes additional “related” entities in its reporting mandates and requires additional information than the IDI Rule.

Under Title II of the Dodd-Frank Act, a counterparty to a QFC with a Covered Financial Company is prohibited from exercising contractual termination rights based solely upon insolvency of the Covered Financial Company or the appointment of the FDIC as receiver until 5 p.m. on the business day following such appointment. During this one-business day stay on termination, the FDIC may repudiate the QFCs and pay the counterparty compensatory damages or transfer the QFCs to another institution or bridge financial company, in which case the counterparty is permanently stayed from

¹ Qualified Financial Contracts Recordkeeping Related to Orderly Liquidation Authority, 80 Fed. Reg. 966 (Jan. 7, 2015). While rulemaking authority for the Proposed Rule initially lay with the primary federal regulatory agencies, that authority shifted to the Secretary, as Chairperson of FSOC, when the agencies failed to propose a QFC recordkeeping rule within 24 months after the Dodd-Frank Act was adopted in July 2010. 12 U.S.C. §5390(c)(8)(H)(iii).

exercising such termination rights. This authority parallels that provided to the FDIC in the FDIA. However, OLA provided additional authority for the FDIC as receiver to enforce QFCs entered into with subsidiaries or affiliates of a Covered Financial Company that are “guaranteed by” or “linked to” the Covered Financial Company notwithstanding contractual rights in such QFCs, e.g., cross-default rights, based on the receivership of the Covered Financial Company.

This alert memorandum begins with a summary of the Proposed Rule and a brief description of its scope. Next, it highlights the key issues and takeaways from the Proposed Rule. Then it provides background on the treatment of QFCs in receivership and concludes with a detailed analysis of the Proposed Rule.

Summary of the Proposed Rule

Consistent with its underlying purpose of assisting the FDIC in a resolution under the OLA, the scope of the Proposed Rule is limited to “financial companies” as defined under the OLA that meet certain additional criteria. A Financial Company is a company that is organized under U.S. federal or state law that is any of the following (a “Financial Company”):

1. A bank holding company;
2. A non-bank financial company designated as systemically important for the financial stability of the United States by the FSOC (a “Non-Bank SIFI”);
3. Predominantly engaged in financial activities; or
4. A subsidiary of the foregoing and is predominantly engaged in financial activities.

The definition of Financial Company excludes Farm Credit System institutions, government entities and government sponsored entities such as Fannie Mae and Freddie Mac.

Under the Proposed Rule, a Financial Company is subject to the recordkeeping requirements if it is a party to an open QFC or guarantees, supports or is linked to an open QFC and meets one of the following conditions (a “Records Entity”):

1. Has been designated as a Non-Bank SIFI;
2. Has been designated as a financial market utility that is systemically important for the financial stability of the United States by the FSOC (“Designated FMU”);
3. Has total assets equal to or greater than \$50 billion; or

4. Is a member of a corporate group in which at least one entity meets one of the preceding conditions.

The Proposed Rule would not apply to certain exempt entities consisting of FDIC-insured banks (which may be subject to their own reporting requirements) and certain of their subsidiaries and Financial Companies that are not parties to open QFCs. Importantly, under the Proposed Rule, a clearing organization that is a Designated FMU can be a Records Entity with respect to QFCs cleared for its members. The Proposed Rule does provide the Secretary with the power to grant exemptions from the recordkeeping requirements to types of entities or individual entities based on factors such as size, risk, complexity, leverage, frequency and dollar amount of QFCs and interconnectedness to the financial system as well as other undefined factors.

The Proposed Rule sets forth in appendices the specific data fields that a Records Entity must maintain with respect to its QFC portfolio, and requires the Records Entity to be able to update these fields daily and be able to provide them to its primary financial regulatory agency (“PFRA”) in electronic format within 24 hours of request by its PFRA. In general, the recordkeeping fields relate to position-level data, counterparty collateral data, legal agreement information and collateral details and any other information not identified in the appendices that the Records Entity is required to provide a swaps data repository or its U.S. or foreign regulator. These records must be maintained and made available upon request for the Records Entity’s QFCs, any inter-affiliate QFCs and all QFCs that are guaranteed or supported by such Records Entity.²

Additionally, the Proposed Rule requires the Records Entity to maintain certain information with respect to its QFC counterparties, including such parties’ unique counterparty identifier and the organizational structure of its counterparties and certain of their affiliates.

Although the Proposed Rule generally provides that all data must be kept in the same format, the Secretary does have the authority to grant exemptions to this requirement, conditioned on the Records Entity keeping records in an alternate format that would still allow the FDIC to manipulate and analyze the data to make determinations under the OLA.

² Proposed Rule Section 148.3(a)(2) and 80 Fed. Reg. 978.

Summary of Key Issues and Takeaways

Scope

- The Proposed Rule does not apply to entities that are not incorporated or organized under U.S. federal or state law³
 - This seems to have the effect of excluding U.S. branches of non-U.S. banks because while licensed under U.S. law, they are not organized under U.S. law
- The definition of Records Entity includes any member of a corporate group in which at least one entity meets the conditions to be a Records Entity⁴
 - The result is that Financial Company affiliates of Records Entities are themselves Records Entities subject to the QFC recordkeeping requirements if they have open QFCs or guarantee, support or are linked to an open QFC of any of their affiliates
 - This has the effect of imposing the recordkeeping requirements on entities that may not be material for purposes of resolving a Covered Financial Company under the OLA or who may not have material QFC exposure
 - For example, affiliates that have not been designated as “Material Entities” for purposes of a financial group’s resolution plan are nonetheless Records Entities, even though not relevant to the FDIC’s resolution of the group for U.S. financial stability
- Although the Proposed Rule is analogous to the IDI Rule, that rule imposes recordkeeping requirements only on banks that are in a “troubled condition,” whereas the Proposed Rule applies to all Records Entities without such a trigger

Designated FMUs

- Clearing organizations that are Designated FMUs, and therefore Records Entities, will have to maintain data with respect to QFCs that they clear for their members
 - The Secretary is specifically seeking comment about whether a different set of data requirements should apply to clearing organizations and other Designated FMUs and whether they should be exempted from certain requirements

³ 80 Fed. Reg. 971 and 973 (noting the distinction applies to a U.K. incorporated affiliate of a financial company incorporated in the United States).

⁴ 80 Fed. Reg. 973-974.

QFCs of Subsidiaries Guaranteed, Supported by or Linked to the Records Entity

- The Proposed Rule applies to open QFCs that the Records Entity is a party to as well as QFCs that are guaranteed, supported by or linked to the Records Entity
 - This mirrors Section 210(c)(16) of the OLA, as described more fully below
- This expands significantly the scope of QFCs covered by the recordkeeping requirements, including QFCs of non-U.S. entities, which may have the effect of imposing recordkeeping requirements on entities that are otherwise exempt from the Proposed Rule

Exemptions

- The Proposed Rule allows the Secretary to issue two types of exemptions from QFC recordkeeping requirements:
 - Specific exemptions for individual Records Entities; and
 - General exemptions for types of entities
- Specific Exemptions:
 - A Records Entity must submit a written request, and the FDIC, in consultation with the PFRAs, can recommend that the Secretary grant the exemption
 - Specific exemptions can apply to the format requirements of the Proposed Rule, conditioned upon the Records Entity keeping records in an “alternate format” that still enables the FDIC to meet its requirements under the OLA⁵
- General Exemptions:
 - The FDIC, in consultation with the PFRAs, can submit a recommendation by itself to the Secretary with respect to certain entity types
- A consideration for the Secretary may be whether a potential Records Entity should be exempt from recordkeeping requirements because it does not have a material volume of QFCs or material exposure to QFCs to justify the costs of compliance, particularly when it is subject to the rule by simply having QFCs and being a member of a corporate group subject to the recordkeeping requirements

Effective Date

- The Proposed Rule provides that compliance will be required 270 days after effectiveness of the rules (or after a Records Entity becomes subject to the final rule)

⁵ See 80 Fed. Reg. at 994.

- Considering the scope of information to be gathered and the entities that the Proposed Rule applies to, compliance could require substantial technological and legal efforts

Extent and Required Format for Information

- The Proposed Rule imposes additional requirements on Records Entities beyond those imposed under the IDI Rule
 - The Proposed Rule requires a corporate group to maintain all of its data in a single format, which may impose a significant compliance burden on global Financial Companies
 - It could also raise issues with respect to overlapping or conflicting recordkeeping requirements applicable to Records Entities by regulatory regimes in non-U.S. jurisdictions
- The Proposed Rule may require Records Entities to seek information from their counterparties and keep it updated on an ongoing basis, including:
 - For each counterparty, a list specifying all other counterparties that are members of the same corporate group as the counterparty and that are parties to open QFCs with the Records Entity or guarantee, support or are linked to such QFCs;
 - An organizational chart explaining the affiliate relationship of such counterparties
- The Proposed Rule uses the definition of “affiliate” from the Bank Holding Company Act (“BHCA”) but is applied to entities that are not necessarily part of a banking group
 - Applying the BHCA test for affiliates to non-banking groups could be challenging, considering the complexity of “control” analysis under the BHCA

Delivering Data to PFRA and FDIC

- Although the Proposed Rule is designed to facilitate the FDIC’s role as receiver under the OLA, the Proposed Rule only requires transmission of QFC data to the PFRA
 - How that information is transmitted to the FDIC or whether the FDIC is also able to request data from a Records Entity is not discussed

Background on Treatment of QFCs in Receivership

The purpose of the Proposed Rule is to facilitate the FDIC’s role as a receiver in an OLA resolution. The OLA was created by Title II of the Dodd-Frank Act as a special resolution regime to address the failure of Financial Companies whose failure under ordinary insolvency laws would have serious and adverse effects on the financial

stability of the United States. Under the OLA, the FDIC would administer the resolution of a Financial Company as receiver.

With respect to QFCs,⁶ the FDIC has authority to impose a one-business day stay on the exercise by counterparties of termination rights for QFCs with the failed Covered Financial Company that is functionally identical to its power under the FDIA. Just like under the FDIA, under the OLA, the counterparty to a QFC with the Covered Financial Company is stayed from exercising any contractual right under the QFC to terminate, accelerate or liquidate that arises in connection with the appointment of the FDIC as receiver until 5 p.m. (Eastern Time) on the business day following the day that the FDIC is appointed receiver. This includes the ability to terminate such QFC, offset or net any amounts due and apply any pledged collateral to the resulting exposure. During the one-business day stay, the FDIC can transfer those QFCs to another financial institution, retain the QFCs in the receivership and allow the counterparty to terminate or repudiate the QFC and pay the counterparty compensatory damages. If the FDIC chooses to transfer the QFCs, it is not allowed to “cherry-pick” between QFCs with a counterparty. Rather, it must transfer all QFCs between the Covered Financial Company and the counterparty together with any QFCs between the Covered Financial Company and any affiliate of such counterparty. If a counterparty's QFCs are transferred by the FDIC, the termination rights are permanently overridden.

In addition, under Section 210(c)(16) of the OLA, the FDIC can suspend the ability of counterparties to QFCs with the subsidiaries and affiliates of a Covered Financial Company that are guaranteed or otherwise supported by⁷ or linked to⁸ the Covered Financial Company to exercise contractual rights that arise in connection with the Covered Financial Company being placed into receivership (there is no analogous provision in the FDIA that applies to QFCs with subsidiaries and affiliates of an institution in FDIA proceedings). With respect to QFCs that are guaranteed or supported by the Covered Financial Company, the FDIC must transfer the guarantee or

⁶ The definition of QFCs under the OLA is the same as under the FDIA and includes certain securities contracts, commodities contracts, forward contracts, repurchase agreements, swap agreements or any similar agreements that the FDIC determines be regulation, resolution or order to be a qualified financial contract.

⁷ The FDIC's final rule implementing Section 210(c)(16) defines “support” in respect of a QFC as doing any of the following with respect to a QFC of a subsidiary or affiliate: guaranteeing, indemnifying or undertaking to make any loan or advance to or on behalf of the subsidiary or affiliate; undertaking to make capital contributions to the subsidiary or affiliate; or being contractually obligated to provide any other financial assistance to the subsidiary or affiliate.

⁸ The FDIC's final rule implementing Section 210(c)(16) states that a financial company is “linked to” a QFC if the QFC contains a “specified financial condition clause,” which is a provision that permits a contract counterparty to terminate, accelerate, liquidate or exercise any other remedy under any contract to which the subsidiary or affiliate is a party, or to obtain possession of or exercise control over any property of the subsidiary or affiliate or affect any contractual rights of the subsidiary or affiliate based on enumerated conditions related to the insolvency or financial condition of the Covered Financial Company.

other support, or otherwise provide adequate protection to the counterparty within one business day in order to permanently override such cross-default rights.

The Proposed Rule requires certain financial companies to maintain and be able to provide detailed information about their QFC portfolios in order to facilitate the FDIC's decision making in the event of an OLA resolution.

Detailed Analysis of the Proposed Rule

Entities Subject to Recordkeeping Requirements

As described in the preamble to the Proposed Rule, the purpose of the Proposed Rule is to assist the FDIC in carrying out its potential role as receiver under the OLA.⁹ Accordingly, the Proposed Rule applies to Financial Companies that are eligible for resolution under the OLA.

Under the Proposed Rule, a Records Entity must maintain records not only with respect to open QFCs but with respect to QFCs that it guarantees or supports or to which it is linked, including QFCs with affiliates. This requirement matches the scope of Section 210(c)(16) and is intended to provide the FDIC with information with respect to QFCs with the subsidiary or affiliate of a Covered Financial Company. For QFCs that the Records Entity is "linked to," the Records Entity is required to maintain records of any specified financial condition clause in such QFC.

The definition of Financial Company under the OLA does not include an asset threshold, but the preamble to the Proposed Rule states that the Secretary "believes that the \$50 billion threshold [included in the definition of Records Entity] is a useful means for identifying entities that are of a sufficient size that they could potentially be considered for orderly liquidation under [OLA]."¹⁰ It also notes that this threshold is consistent with the FSOC's threshold for evaluating whether to designate an entity as systemically important.

The Proposed Rule also defines certain types of entities as "Exempt Entities" that do not have to comply with the QFC recordkeeping requirements:

1. Insured depository institutions (which are subject to their own QFC recordkeeping requirements);

⁹ See 80 Fed. Reg. at 975.

¹⁰ See 80 Fed. Reg. at 992.

2. Subsidiaries of an insured depository institution that are not functionally regulated subsidiaries, security-based swap dealers or major security-based swap participants;
3. Financial Companies that are not a party to a QFC and that control only exempt entities (under clauses 1 and 2 above);
4. Companies not organized under U.S. federal or state law; and
5. Entities that obtain an exemption from the Secretary for compliance with all or certain aspects of the recordkeeping requirements under the Proposed Rule.

Form, Availability and Maintenance of Records

Format

The Proposed Rule requires that Records Entities maintain all records in electronic format. Additionally, the Proposed Rule includes appendices that identify the exact fields for which data is required and the form in which such data should be kept. The Proposed Rule requires that all entities within a corporate group have to be able to generate data in the same format and use the same identifiers for counterparties to facilitate aggregation of positions among a corporate group.

Although the Proposed Rule prescribes the format for the data, the Secretary can use his exemptive authority to allow a Records Entity to maintain records in an alternative format. However, the Proposed Rule requires that a Records Entity be able to transmit the data to the entity's PFRAs and the FDIC, so the alternative format must meet this standard.

Availability and Contact

The Proposed Rule requires that Records Entities be capable of providing all QFC records required to be maintained by the Proposed Rule within 24 hours of request by the PFRAs. The preamble to the Proposed Rule notes that entities may not currently be able to provide records in a single format within 24 hours but highlighted that the timing constraints were a function of the one-business day stay under the OLA, within which time the FDIC would have to make a decision regarding a Covered Financial Company's QFC portfolio.¹¹

In addition, the Proposed Rule requires that each Records Entity appoint a contact with respect to the recordkeeping requirements and update its PFRAs and the

¹¹ See 80 Fed. Reg. at 978.

FDIC within 30 days of appointing a new contact person. The preamble to the Proposed Rule notes that the FDIC must work cooperatively with personnel at Records Entities who could provide greater context to records, including to understand the booking practices, governing law and organizational structure of that entity's QFCs.¹²

Maintenance

The Proposed Rule requires Record Entities to have the capacity to produce records about QFCs on a daily basis, based on the end-of-day values and positions of the day preceding the request. The preamble to the Proposed Rule notes that the Records Entity does not necessarily have to maintain and update records on a daily basis but should only be capable of producing such updated records upon request.¹³ The Records Entity also has to be able to produce historic end-of-day records of open QFC positions for a period of at least the preceding five business days of the request, which would seem, as a practical matter, to in fact require Records Entities to record data on a daily basis in order to generate this historical data.

If the Records Entity uses a third party or affiliate to maintain its QFC records, it would be responsible for making sure that such third party or affiliate is capable of complying with the requirements of the Proposed Rule.

Content of Records

Appendices

The Proposed Rule includes four appendices that set forth the fields and format of the data for which a Records Entity is responsible, all of which are summarized below.

Position Level Data: Data fields regarding individual transactions:

These data fields relate to information about a particular QFC, including:

- Economic terms, e.g., currency, payment and termination dates, market value of position;
- Categorization information, e.g., asset class, contract type, accounting classification;
- The purpose for the position, i.e., description of hedging strategy.

¹² See 80 Fed. Reg. at 978.

¹³ See 80 Fed. Reg. at 978.

Counterparty Collateral Data: Data fields regarding every counterparty of a Records Entity, including information with respect to:

- Counterparty information, e.g., counterparty identifier, counterparty and collateral safekeeping contact information;
- Collateral information, e.g., total excess or deficiency, market value;
- Contract information, e.g., related master agreements and netting agreements.

Legal Agreements: In addition to the requirements with respect to legal agreements described below, data fields relating to:

- Terms in agreement, e.g., additional events of default or termination events, cross-defaults, governing law;
- Related guarantees or credit support arrangements;
- Counterparty contact information.

Collateral Detail Data: Data fields relating to collateral, including:

- Economic information, e.g., original and current market value;
- Collateral rights, e.g., credit support documentation, segregation, rehypothecation;
- Additional information, e.g., location of collateral, currency.

Legal Entity Identifier

The Proposed Rule also requires a Records Entity to use a unique counterparty identifier for each legal entity and each non-U.S. branch or office of a legal entity that transacts business as a separate branch or division. This is intended to facilitate the FDIC's ability to understand cross-border exposure of the Covered Financial Company. The Proposed Rule specifically requires the use of legal entity identifiers ("LEIs") issued by a Local Operating Unit governed by the Global LEI Foundation or endorsed by the Regulatory Oversight Committee.

Legal Agreements

In addition to being able to generate the data fields with respect to all QFCs, the Proposed Rule also requires the Records Entity to keep electronic copies of all legal agreements that govern QFCs as well as credit support documents with respect to those QFCs. These agreements need to be maintained in full-text searchable electronic form and would need to include:

- master agreements and annexes;

- confirmations;
- master netting agreements;
- credit support annexes;
- guarantees;
- net worth maintenance agreements;
- security interest agreements;
- novation agreements; and
- other related agreements, if any.

Effectiveness

Records Entities will be required to comply with the Proposed Rule 270 days after effectiveness or after an entity becomes a Records Entity and is subject to the rule. However, the Proposed Rule notes that within 60 days of becoming subject to the rules, a Records Entity will have to provide up-to-date contact information to the FDIC and each of its PFRAs.

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If you have any questions, please feel free to contact

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