April 7, 2015

The Treasury Department
Attn: Qualified Financial Contracts Recordkeeping Comments
1500 Pennsylvania Ave N.W.
Washington, DC 20220

Re: Notice of Proposed Rulemaking Regarding Qualified Financial Contracts Recordkeeping Related to Orderly Liquidation Authority

Ladies and Gentlemen:

The Clearing House Association L.L.C. ("**The Clearing House**"), the Securities Industry and Financial Markets Association ("**SIFMA**"), the American Bankers Association ("**ABA**"), the Financial Services Roundtable ("**FSR**") and the International Swaps and Derivatives Association, Inc. ("**ISDA**" and together with The Clearing House, SIFMA, ABA and the FSR, the "**Associations**")[1] welcome this opportunity to comment on the Notice of Proposed Rulemaking regarding Qualified Financial Contracts Recordkeeping Related to Orderly Liquidation Authority (the "**Proposed Rule**")[2] published by the secretary of the Treasury (the "**Secretary**"), as Chairperson of the Financial Stability Oversight Council ("**FSOC**") pursuant to his authority under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("**Dodd-Frank Act**"). The Proposed Rule creates recordkeeping requirements for so-called "**Records Entities**" with respect to certain "**qualified financial contracts**" ("**QFCs**"). In general, such records must be maintained in electronic format and a Records Entity must be capable of producing all required information within 24-hours of a request from its primary financial regulatory agency ("**PFRA**"). While the Associations are supportive of the aims of the Proposed Rule and the need to provide the Federal Deposit Insurance Corporation ("**FDIC**"), as receiver, with the information it needs to successfully resolve a failing financial group under the Orderly Liquidation Authority provisions of the Dodd-Frank Act

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1 *See* Annex A for a description of each of the Associations.

2 Qualified Financial Contracts Recordkeeping Related to Orderly Liquidation Authority, 80 Fed. Reg. 966 (Jan. 7, 2015).

("**OLA**"), the Associations believe that certain aspects of the Proposed Rule are overly broad and would include within the requirements entities and, for some entities and QFCs, information that will not advance the expressed goals of the Proposed Rule. As currently drafted, aspects of the Proposed Rule may actually undermine the efficient application of OLA and will impose unduly burdensome requirements on reporting entities without providing a benefit to the FDIC as receiver under OLA.

## I. Executive Summary

The Associations support the work that has been done to develop credible strategies for resolution under OLA and believe that effective QFC recordkeeping can support the FDIC in making critical decisions about the resolution of a SIFI before and during resolution. However, while the Proposed Rule is a necessary step in the implementation of effective OLA resolution strategies, the Associations believe that certain aspects of the Proposed Rule are inconsistent with its purpose and statutory authority and may actually impede the FDIC's decision making during a resolution scenario.

- **The final rule should differentiate among financial companies to conform to the statutory purpose identified for the Proposed Rule.** This requires differentiation among financial companies, including among those that are affiliated within a financial group, to apply the final rule only to those companies that will potentially be resolved under OLA. Very few of the financial groups statutorily eligible for resolution under OLA are in fact likely candidates for OLA resolution. OLA may only be invoked in those rare circumstances where the failure of a financial company under ordinary insolvency regimes would pose a risk to U.S. financial stability. Because of their size, structure and mix of business, very few financial groups—and very few of the entities that satisfy the definition of "Records Entity" under the Proposed Rule—could ever plausibly be placed into resolution under OLA. As a result, the final rule should be applied to financial companies based on the statutory criteria and not, as in the Proposed Rule, on a simple asset threshold.

- **Within financial groups, the final rule should only apply to subsidiaries that could potentially require an OLA resolution or be material to an OLA resolution.** Even where OLA resolution may be appropriate for a financial group, very few entities within that group are potentially systemically important or material to any possible OLA resolution. The statutory authority for the Proposed Rule is tailored to the express purpose of assisting the FDIC in its decision-making under OLA and, consequently, the Proposed Rule should not apply to many of the affiliates even of the largest financial companies because those affiliates are exceedingly unlikely to be resolved under OLA. The statutory requirement for differentiation among financial companies applies both between financial groups and among affiliated companies.

- **The final rule should take into consideration the FDIC's resolution strategies and apply only to financial companies material to those strategies.** The FDIC and other regulators have made great strides in developing the "single point of entry" resolution strategy ("**SPOE**"), under which only the topmost U.S. holding company would be placed into OLA proceedings. In an SPOE resolution, the financial holding company's subsidiaries would continue operating and, consequently, counterparties to their QFCs would have no direct termination rights. The FDIC's primary focus would be on preventing the exercise of cross-default rights in contracts of material operating subsidiaries of the holding company. While, at most, some information may be necessary about the QFCs of the most significant subsidiaries, only those subsidiaries of a financial group should be subject to the final rule. The guiding principle underlying the statutory authority, and the purpose of the Proposed Rule, requires that entities that would not be resolved under OLA, or whose QFCs would not be relevant to entities in OLA resolution, should be outside the scope of the rule.

- **To comply with the statutory requirements, the Associations recommend that the final rule apply a multi-factor analysis to tailor application of the record-keeping requirements.** The proposed $50 billion asset threshold is a poor proxy for the importance of a financial company to financial stability and does not conform either to the purpose for the Proposed Rule or to the statutory criteria in the rule-making authority. The Associations instead recommend that the Secretary use a multi-factor analysis, as required by the statute, such as that used in a number of analyses applied by the regulators. Further, for those groups that are subject to the recordkeeping requirement, the Associations believe that only those entities whose QFCs would be material to the resolution of group entities under OLA (whether or not under an SPOE strategy) should be Records Entities. In this regard, the Associations note that in the context of developing resolution plans under Title I of the Dodd-Frank Act, regulators and industry have already spent considerable effort identifying which entities would be material during a resolution scenario and recommend that the recordkeeping requirement apply only to those entities determined to be "material entities" under the resolution planning process.

- **The final rule should apply only to those QFCs that would be relevant to the FDIC's decision-making as receiver.** For those entities that are plausible candidates for resolution under OLA, not all financial contracts that fall within the QFC definition are relevant to the FDIC's role as receiver. Many QFCs are cash-market or overnight transactions which are not relevant to the FDIC's decision-making in a resolution and due to their structure and term would not pose a risk to the broader market. In the unlikely circumstance that an operating company is placed into OLA proceedings, the primary focus of the FDIC with respect to QFCs will be on ensuring the continuity of over-the-counter swaps, derivatives and securities finance transactions. Only those QFCs that are relevant to the FDIC during resolution should be within the scope of the rule.

- **The final rule should require only information on QFCs that is relevant to the FDIC's decision-making in a crisis.** The data requirements included within the Proposed Rule are overbroad and will yield an enormous quantity of immaterial data likely to impede, rather than assist, the FDIC in making decisions in a crisis, while imposing significant costs on entities subject to the rule. The Proposed Rule defines the purpose of the information as assisting the FDIC in making its required decisions on treatment of the QFCs on resolution. However, the Proposed Rule requires data that is not relevant to those decisions from entities that will not be resolved, or materially affect a resolution, under OLA. As a result, there is no benefit to the FDIC to justify the burden of complying with the Proposed Rule.

- **The time required to comply with the Proposed Rule varies across the industry, but the Secretary's estimate of the industry-wide compliance effort greatly understates the costs and burdens.** Even complying with a more narrowly tailored rule will require a significant amount of time and financial expenditure by many Records Entities. Some financial groups already maintain much, if not all, of the data requested, albeit in a variety of different systems. Significant effort will be required to integrate these systems and develop the capability to provide all of the required data in a uniform format within the time required. For others, systems will need to be expanded or developed from scratch. Likewise, significant effort will be required to gather, validate and input data required under the rule but not currently tracked. The cost of such work for most financial groups subject to the rule will, on an individual basis, far exceed the Secretary's estimation of the total industry-wide compliance cost of $8 million. Accordingly, the Associations request that the initial compliance period be extended to two years, and that compliance be phased in over a period of years based on the potential criticality of QFCs to the FDIC during resolution.

The Associations believe that, with the modifications requested in this letter, a recordkeeping requirement can be created that supports the FDIC's needs during resolution, conforms to the statutory mandate for the rule and the Secretary's articulation of its purpose, and is not unduly burdensome on industry.

## II. Background and Purpose of the Proposed Rule

### A. Overview of Recordkeeping Requirements under the Proposed Rule

The Proposed Rule requires certain "Records Entities" (as defined below) to maintain detailed information about certain QFC positions, information about its QFC counterparties and information regarding the QFC activities of such Records Entity and its affiliates. Each Records Entity must be capable of providing all such information, in a uniform electronic format, to its PFRA and the FDIC within 24 hours of a request for such information. An entity can qualify as a Records Entity (and therefore be obligated to comply with the recordkeeping rule) if it is a party to a QFC itself ("**open QFCs**"), guarantees or otherwise supports a QFC or is "linked to" a QFC.

The Proposed Rule imposes extensive recordkeeping and reporting requirements on a Records Entity, requiring the Records Entity to be capable of producing, among other things, the following information:

- The position-level data, counterparty collateral data, legal agreements information and collateral detail data specified in Tables A-1 through A-4 of the Proposed Rule;

- Full-text searchable copies of all agreements governing the QFC, including master agreements, annexes, supplements, and other modifications; Full-text searchable copies of all credit support documents relevant to one or more QFCs;

- Copies of the active or "open" confirmations or trade acknowledgments with respect to any QFC, as applicable;

- With respect to each counterparty of the Records Entity:

    - If the counterparty is not an affiliate of the Records Entity, a list of all affiliates of the counterparty that are parties to open QFCs with the Records Entity or that guarantee, support or are linked to such QFCs;

    - An organizational chart explaining the affiliate relationship of all such counterparties;

- Any written data or information (not already listed in the Proposed Rule) that the Records Entity is required to provide to a Swap Data Repository ("**SDR**"), the Commodity Futures Trading

Commission ("**CFTC**"), the Securities Exchange Commission ("**SEC**") or any non-U.S. regulator with respect to any QFC;

- A list of vendors directly supporting QFC-related activities of the Records Entity and the vendors' contact information;

- Risk metrics used to monitor the QFC portfolio, including without limitation, credit risk, market risk and liquidity risk measures; and

- Risk manager contact information for each portfolio that includes QFCs.

The Proposed Rule requires Records Entities within the same corporate group to be capable of producing this information, across all affiliated entities, in a single format, to the PFRA and the FDIC, within 24 hours of a request.

### B. Authority for and Purpose of the Proposed Rule

The stated purpose of the Proposed Rule is to assist the FDIC "to assess the options that would be available following its appointment as receiver" for a financial company (a "**Covered Financial Company**") under OLA.[3] Under the statute, the FDIC has three options for QFCs of a Covered Financial Company: (i) it may transfer them to another financial company or a bridge financial company; (ii) retain the QFCs within the receivership and allow the counterparty to terminate; (iii) or retain the QFCs within the receivership and repudiate them and pay compensatory damages. As a result, the Proposed Rule sets out record-keeping standards to provide the FDIC with information to make the judgment about which option to choose.[4]

Proceedings under OLA may only be commenced with respect to a company if it is a "financial company"[5] and certain conditions are met, including, among other things, that the Secretary determines, in consultation with the President and on the recommendations of applicable regulators, that the failure of the financial company under otherwise applicable insolvency laws would have "serious adverse effects on financial stability in the United States" and actions taken under OLA would mitigate such adverse effects.[6] Affiliates of the Covered Financial Company may be placed into receivership, but only if the affiliate's resolution under otherwise applicable insolvency laws would also have such "serious adverse effects."[7]

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3 80 Fed. Reg. at 967.

4 80 Fed. Reg. at 968-69.

5 A "**financial company**" under OLA includes any company that is organized under U.S. federal or state law and is any of the following: (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; (3) predominantly engaged in financial activities; or (4) a subsidiary of the foregoing and is predominantly engaged in financial activities. Farm Credit System institutions, government entities and government sponsored entities are excluded from the definition of financial company. 12 U.S.C. § 5381(a)(11).

6 12 U.S.C. § 5383(b).

7 12 U.S.C. § 5390(a)(1)(E).

The Proposed Rule is authorized by Section 210(c)(8)(H)(i) of OLA which states that the regulators shall prescribe regulations requiring QFC recordkeeping that the regulators determine are "necessary or appropriate in order to assist the [FDIC] as receiver for a covered financial company in being able to exercise its rights and fulfill its obligations under [210(c)(8)] (9) or (10)" of OLA. In adopting regulations under this authorization, the agencies "shall, as appropriate, differentiate among financial companies by taking into consideration their size, risk, complexity, leverage, frequency and dollar amount of qualified financial contracts, interconnectedness to the financial system, and any other factors deemed appropriate."[8] Consequently, the Dodd-Frank Act specifies that the record-keeping requirements adopted in a final rule must conform to this defined purpose, while making appropriate distinctions among financial companies.

Since OLA is only intended to be applied when the financial company or prevailing market conditions give rise to the possibility of systemic risk, most companies that meet the broad definition of "financial company" would never be resolved under OLA. This is consistent with the FDIC's statement that the U.S. Bankruptcy Code, and not OLA, is the "preferred resolution framework in the event of the failure of a SIFI."[9] In fact, many of the prudential supervisory standards imposed under Title I of the Dodd-Frank Act are designed to make use of OLA less likely. Title I applies a threshold of total assets of $50 billion or more for application of certain of those supervisory standards to bank holding companies.[10] The Proposed Rule adopts this $50 billion threshold effectively as the controlling criteria (since most subject financial companies would be swept into the rule under that threshold) for the application of the record-keeping rule authorized by Title II, and goes even further to require all affiliates of any such company to comply with the requirements as well. As a consequence, the scope of the Proposed Rule would extend to financial companies that are exceedingly unlikely to ever be reasonable candidates for resolution under OLA.

## III. Scope of Records Entities Subject to the Proposed Rule

### A. The definition of Records Entity is overly broad and, as a result, applies the recordkeeping requirement of the Proposed Rule to financial groups, and to entities within financial groups, in a manner that is inconsistent with the authority for the Proposed Rule and its stated purpose

The Proposed Rule defines "**Records Entity**" as any financial company (as that term is defined in the Section 201(a)(11) of OLA)[11] that has open QFCs, or that guarantees, supports or is linked to open QFCs, and:

(1) Is a non-bank systemically important financial institution, as designated by the FSOC ("**Non-Bank SIFI**");

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8 12 U.S.C. § 5390(c)(8)(H).

9 Resolution of Systemically Important Financial Institutions: The Single Point of Entry Strategy; Notice, 78 Fed. Reg. 76614, 76615 (Dec. 18, 2013) ("**FDIC SPOE Notice**").

10 *See, e.g.*, 12 U.S.C. §§ 5325(a), 5326(a), and 5327(a). Please note that Section 5325(a) specifically notes that the FSOC may set a higher threshold than $50 billion for application of prudential standards, including resolution planning.

11 *See* footnote 5 above.

(2) Is a systemically important financial market utility, as designated by the FSOC;

(3) Has total assets equal to or greater than $50 billion; or

(4) Is a party to an open QFC or guarantees, supports or is linked to an open QFC of an affiliate and is a member of a corporate group in which at least one financial company meets the conditions in any of clauses (1) to (3) above.

The defined scope of a Records Entity in the Proposed Rule is overbroad in a number of ways, as described below.

**1. An asset threshold of $50 billion would extend the Proposed Rule far beyond its purpose and authority—assisting the FDIC in resolving Covered Financial Companies**

Since OLA is designed to be only rarely applied, and the Dodd-Frank Act itself defines the purpose of the Proposed Rule as facilitating the FDIC's ability to exercise its rights in an OLA resolution, the Associations recommend that the final standards for QFC record-keeping be tailored more closely to the subset of financial companies that potentially could be subject to resolution under OLA upon their failure. The use of a simple $50 billion asset threshold would require any company with total assets equal to or greater than this threshold to comply and then, by virtue of that fact, require all of its affiliates to comply as well, without any test of their systemic significance. This approach mixes "apples and oranges" by applying an asset-based standard derived from prudential supervisory standards under Title I of the Dodd-Frank Act to a record-keeping requirements designed to facilitate the FDIC's resolution under OLA of particular financial companies whose resolution under otherwise applicable insolvency frameworks would create systemic instability.

An asset threshold that automatically applies the Proposed Rule to any "financial company" with total assets equal to or greater than $50 billion (and each of its affiliates) is extremely overbroad. First, it does not tailor the record-keeping requirement to financial groups that are potentially subject to resolution under OLA. Second, the Proposed Rule requires all affiliates in a group to comply with the record-keeping requirements without any attempt to determine whether those affiliates would be candidates for OLA resolution themselves or material to the OLA resolution of an affiliate. Applying this simple threshold test and expanding the coverage of the Proposed Rule to all affiliates within a corporate group divorces the Proposed Rule from the authorized purpose defined in OLA and in the preamble to the Proposed Rule, and fails to "differentiate among financial companies" based on criteria that conform to that purpose.

The statutory provision authorizing the Proposed Rule requires the regulators, to "as appropriate," [12] differentiate among financial companies by taking into consideration their size, risk, complexity, leverage, frequency and dollar amount of qualified financial contracts, interconnectedness to the financial system, and any other factors deemed appropriate. The standard in the Proposed Rule simplistically relies only on size, ignoring the rest of the factors that the statute requires the Secretary to take into consideration when promulgating this rule. In the preamble to the Proposed Rule, the Secretary explains that the Proposed Rules allow the Secretary to issue general and specific exemptions

[12] 12 U.S.C. § 5390(c)(8)(H)(iv).

from the rule requirements based on factors consistent with those outlined in Section 210(c)(8)(H)(iv).[13] However, OLA requires that regulators apply these factors in the first instance when designing the scope of regulations and not only in consideration of exemptions from regulations that are overbroad.

In the preamble, the Secretary explains that the $50 billion prong of the Proposed Rule is a "useful means for identifying entities that are of a sufficient size that they could potentially be considered for [OLA]."[14] The Secretary asserts that "the stand-alone test of assets equal to or greater than $50 billion is used because that size threshold, by itself, together with other aspects of the definition of records entity is sufficient to differentiate financial companies or their corporate groups that might be subject to orderly liquidation under Title II."[15] The Associations disagree and believe that this view is inconsistent with the statutory text of OLA because it reduces a required multivariable process for differentiating between financial companies to a simple test of asset size. The Proposed Rule provides no justification linking simple asset size to the probability of resolution under OLA. It also relies on an unreliable indicator of firm-specific or systemic risk where a more nuanced assessment of riskiness is warranted.

**(a) Asset size alone is not sufficient to determine if a financial group is a likely candidate for OLA**

Many financial groups with total assets in excess of $50 billion, because of their business mix or organization, are unlikely to be resolved under OLA. Most bank holding companies captured by this threshold are composed principally of a holding company, a large bank subsidiary and limited ancillary companies. Those insured banks are already subject to the resolution process defined in the Federal Deposit Insurance Act, which incorporates powers parallel to those in OLA, and the resolution of the bank holding company and its ancillary non-bank operations will never require the use of OLA. Similarly, application of the $50 billion threshold would sweep into the Proposed Rule financial companies that are not bank holding companies and that have not been designated as potentially systemically significant by the FSOC and, therefore, are not subject to the Title I prudential supervisory standards.

**(b) The OLA standard applies on an individual entity basis, meaning not all entities within a corporate group are likely candidates for OLA resolution**

The Proposed Rule does not differentiate among financial companies in the same corporate group. The Proposed Rule requires all affiliates within a corporate group to comply with the full suite of record-keeping requirements with respect to their own QFCs and QFCs that they guarantee, support or are linked to solely on the basis that one of its affiliates satisfies the criteria in (1)(iii)(A), (B) or (C) of Section 148.2 of the Proposed Rule. This approach is overbroad and inconsistent with the authority for the Proposed Rule under OLA in two respects.

First, in order to place any financial company into OLA resolution, including an affiliate of a financial company that is already a Covered Financial Company, the Secretary has to make the

13 80 Fed. Reg. at 967.

14 80 Fed. Reg. at 972.

15 80 Fed. Reg. at 972, fn. 59.

systemic risk determination described above with respect to that financial company. This means that an affiliate of a Covered Financial Company is only likely to be a candidate for resolution proceedings under OLA if its own insolvency under otherwise applicable regimes would pose "serious adverse effects" to financial stability, which OLA could be expected to mitigate. However, the Proposed Rule does not differentiate between affiliates that are likely OLA candidates and those that are immaterial from the perspective of the FDIC's role as receiver of a Covered Financial Company.

Second, as discussed above, Section 210(c)(8)(H)(iv) requires regulators to differentiate among "financial companies" on the basis of certain factors to determine which "financial companies" should be subject to record-keeping regulations under Section 210(c)(8)(H)(i). Unfortunately, the Proposed Rule makes no attempt to differentiate among financial groups or among the affiliated financial companies within a financial group that would have to comply with all of the record-keeping requirements. The Proposed Rule does not provide any support for requiring financial companies that are only affiliated with Records Entities (even those based on the overbroad $50 billion threshold) to comply with the full scope of record-keeping requirements and therefore fails to satisfy the statutory obligation to "differentiate among financial companies."

As a result of the approach taken in the Proposed Rule, the record-keeping requirements would extend to affiliated entities that, because of their size, activities, or other factors, would not be resolved under OLA and would not be relevant to the resolution under OLA of the broader group. This catch-all provision will impose significant costs on groups with such entities without any corresponding benefit to the FDIC. Requiring the capability to report this information of limited actual utility would substantially increase the cost and operational burden for the FDIC and for Records Entities of implementing the Proposed Rule.

Similarly, the definition of Records Entity encompasses entities that may be resolved under OLA or material to the resolution of the broader group, but whose QFC activities are *de minimis* and would not affect either the resolution of the entity itself or the broader group. Information with respect to the QFC portfolios of affiliates that are themselves unlikely to become Covered Financial Companies is not relevant to the FDIC as receiver, except to the extent that the QFCs of such affiliates are guaranteed, supported by or linked to the Covered Financial Company.

As discussed below, granular, transaction-level details about the QFCs of all affiliates within a corporate group is not tailored to assist the FDIC in satisfying its obligations under OLA. Rather, the additional information may have the contrary effect of inundating the FDIC with information that obscures the information that the FDIC will actually need. Especially considering the tight deadlines for decision making under OLA, the Associations believe that the FDIC would be better suited with a more carefully tailored set of data without the noise of unnecessary ancillary details.

**(c) Applying the recordkeeping requirements of the Proposed Rule to all entities in a financial group is inconsistent with the FDIC's resolution strategies under OLA**

Since the financial crisis, the FDIC along with other U.S. regulators and international colleagues have worked to develop more effective resolution strategies for the most systemically important financial companies. The FDIC has identified the SPOE resolution strategy as a principal focus as its preferred resolution strategy.[16] The Financial Stability Board and foreign regulators likewise have expressed support for this strategy. Under the SPOE strategy, only the top-level holding company for a financial group would be placed into receivership and its subsidiaries would remain open and operating. The regulators as well as many members of the Associations, singularly and as part of industry-wide efforts, have made significant progress towards facilitating an SPOE-style resolution of their corporate groups. The development of the ISDA 2014 Resolution Stay Protocol, aimed at ensuring the cross-border application of special resolution regime overrides of QFC close-out rights triggered by resolution, is a concrete demonstration of the focus on and progress towards the capabilities to implement the SPOE strategy.

One of the clear benefits of an SPOE-style resolution is that termination rights based upon the appointment of the receiver would be exercisable only by counterparties of the holding company and any subsidiaries with QFCs that are guaranteed or supported by the holding company.[17] The decision whether or not to transfer the guarantee and other support to the bridge financial company should require substantially less information than the decision on direct QFCs of the holding company in receivership. The primary focus of the FDIC would be on the existence of credit-support relationships, the presence of cross-default rights, and very limited information with respect to aggregate and net exposures on a counterparty group basis. Further, not all subsidiaries would be relevant to the overall operation or success of the resolution, meaning that this limited data set would be required for only the most material affiliates of the Covered Financial Company. Therefore, in an SPOE resolution where the principal risk of QFC termination is through subsidiary QFCs guaranteed or supported by the holding company, the FDIC would require access to a substantially smaller subset of data than required for transferring QFC portfolios or than is required under the Proposed Rule. This should be truncated to the credit-support relationships, the cross-default rights, and aggregate and net exposures on a counterparty group basis.

The Associations recognize that the SPOE strategy may not always be appropriate or possible. However, the FDIC's alternative strategies do not entail placing all entities within the group into OLA proceedings. Instead, as described above, only the most material entities within the group—those whose failure could materially affect the OLA resolution or pose systemic risks—would be eligible for resolution under OLA.

The Associations believe the recordkeeping rule should reflect the FDIC's own resolution strategies under OLA by narrowing the scope of the entities subject to the rule to only the most material entities within a group.

### 2. The Proposed Rule imposes significant compliance costs without commensurate benefit to the FDIC

The result of the overbroad application of the Proposed Rule to financial companies that are unlikely to be subject to OLA is the imposition of substantial costs on financial companies without any countervailing benefit to the FDIC. This is particularly problematic given the other reporting

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16 *See* FDIC SPOE Notice.

17 Counterparties to subsidiary QFCs that are only "**linked to**" the holding company (and do not have other specified credit-support relationships) cannot exercise their termination rights because those rights are overridden automatically and do not require any decision making or action on the part of the FDIC).

standards that many financial market participants must already meet for the SEC, the CFTC and foreign regulators.[18] Where a financial company meeting the simple standards of having total assets equal to or greater $50 billion is not a bank holding company and does not otherwise have to comply with the prudential standards required under Title I of the Dodd-Frank Act because it has not been designated as a Non-bank SIFI, the inconsistencies created by the Proposed Rule and the likely unnecessary application of the proposed requirements are even clearer.

An illustration of the over breadth of the Proposed Rule is that it would define as a Records Entity a subsidiary with a small volume of QFCs simply because it is owned by a holding company with $50 billion in total assets even if the holding company has no QFCs. While presumably an unintended consequence of the current wording of the Proposed Rule, it demonstrates that the proposed scope of the rule is cast far too broadly to conform to its statutory purpose. As currently drafted, a Records Entity includes a financial company that has open QFCs (or guarantees, supports, or is linked to an open QFC) and is a member of a corporate group including "at least one financial company" meeting the criteria in subsection (1)(iii)(A), (B), or (C) of the definition of Records Entity, which includes a company with total assets equal to or greater than $50 billion. The parent or affiliate meeting the asset threshold is not required to have any open QFCs because subsection (1)(D)(2) does not require it to have QFCs to trigger the obligation of its affiliate. As a result, the subsidiary is defined as a Records Entity solely due to the size of its parent without any analysis about the potential likelihood that any part of that financial group would be resolved under OLA. While the Associations recognize that the Proposed Rule includes an exemptions process, the over breadth of the standard should be addressed in the Proposed Rule to conform to the statutory requirement that the rule "differentiate" among financial companies using the specified factors analysis.

Based on the foregoing, and as required by the statutory rule-making authority, the Associations recommend that rather than relying on an arbitrary, fixed asset threshold, and applying requirements on all entities within a group without any distinction, Records Entities should be designated on the basis of a multivariable assessment of systemic risk posed by a financial company. The Associations note that in other rulemaking contexts, criteria other than a pure asset threshold have been used to determine if a financial company is important to the financial stability of the United States, and these more developed criteria could be applicable in the context of the Proposed Rule as well. While the Associations have expressed significant questions regarding the approaches proposed by the Federal Reserve to determine which institutions would be subject to the Global Systemically Important Bank capital surcharge, it does apply a multivariable analysis based on information collected by the Federal Reserve Board on Form FR Y-15, the Banking Organization Systemic Risk Report.[19] This report collects data on five dimensions of systemic risk: size, interconnectedness, substitutability, complexity, and cross-jurisdictional activity and all bank holding companies with over $50 billion in assets are required to file this report. While there are analytical flaws to applying this approach across-the-board

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[18] *See, e.g.,* European Banking Authority, Consultation Paper on Draft Regulatory Technical Standard on minimum set of the information on financial contracts that should be contained in the detailed records and the circumstances in which the requirement should be imposed (Article 71(8) BRRD) (6 March 2015) (the "**EBA Draft RTS**").

[19] *See* Letter to Robert deV. Frierson, Esq., Secretary, Board of Governors of the Federal Reserve System re: Notice of Proposed Rulemaking: Risk-Based Capital Guidelines – Implementation of Capital Requirements for Global Systemically Important Bank Holding Companies (April 2, 2015).

for all regulatory purposes, it does provide a more realistic proxy for systemic importance than the simple asset threshold included in the Proposed Rule.

This approach for a final rule is particularly necessary due to the direction in the authorizing statute to differentiate between financial companies, which inherently requires a focus on companies that are reasonably likely to be subject to OLA. The simple asset threshold of $50 billion or more and the expansion of coverage to all affiliates within a corporate group is not only inconsistent with the statute, but also incompatible with the appropriate distinctions between the prudential standards applied under Title I of the Dodd-Frank Act and the rare use of the resolution framework under Title II.

### 3. Entities that are merely "linked to" a QFC, and that do not also provide a guarantee or support, should not be Records Entities

Section 210(c)(16) of OLA, and the FDIC's final rule implementing that section, provide that QFCs of affiliates of a Covered Financial Company cannot be closed out in reliance on "specified financial condition clauses" that are "linked to" the Covered Financial Company (*i.e.*, triggered by the failure or resolution of the Covered Financial Company).[20] The statutory and regulatory prohibition on close-out based only on such linkages occurs automatically, and is not at the discretion of the FDIC.[21] As the FDIC is not required to take specific actions in respect of particular QFCs to effectuate the override of these cross-default provisions, the FDIC has no need for information on such contracts.[22] Similarly, information with respect to QFCs of affiliates that are "linked to" the Covered Financial Company is irrelevant to the FDIC's exercise of its authority under Section 210(c)(8), (9) and (10) to transfer QFCs of the Covered Financial Company. Because reporting with respect to such QFCs would not provide the FDIC with any benefit as receiver, the cost and burden of requiring Records Entities to report on such QFCs is unjustifiable.

In addition, the Proposed Rule requires financial companies to report with respect to all QFCs that they are linked to, but because of the broad definition of "linked to", financial companies may be required to report with respect to QFCs for which they do not have access to information required to comply. The scope of the definition of Records Entity in the Proposed Rule is limited by the definition of "financial company" in OLA, which excludes entities that are not organized or incorporated in the United States. However, if a financial company is linked to a QFC entered into by non-U.S. parties, it is required to comply with the record-keeping requirements with respect to such QFC. This aspect of the Proposed Rule has the effect of requiring records to be maintained by U.S. affiliates with respect to QFCs that may be entered into by non-U.S. parties, expanding the scope of the Proposed Rule past the legislative limits. This requirement also increases the operational complexity of implementing the Proposed Rule by mandating affiliates within a corporate group that may not have primary access to transaction-level details about a QFC to maintain records with respect to that QFC. Conversely, this information will not

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[20] Notice of Final Rulemaking, Enforcement of Subsidiary and Affiliate Contracts by the FDIC as Receiver of a Covered Financial Company, 77 Fed. Reg. 63205 (October 16, 2012) (the "**FDIC 210(c)(16) Final Rule**").

[21] *Id*.

[22] This is in contrast to the FDIC's authority under Section 210(c)(16) and the FDIC 210(c)(16) Final Rule to enforce contracts of affiliates of the Covered Financial Company that are guaranteed or supported by the Covered Financial Company, because the FDIC must take affirmative actions within one business day of being appointed receiver in order to override closeout rights in such contracts.

be relevant to the FDIC as receiver because such linked QFCs will not affect the rights of creditors to the U.S.-based Records Entity and will not affect the claims against the U.S.-based Records Entity.

The Associations recommend that the Proposed Rule eliminate "linked to" from the criteria establishing which financial companies are Records Entities. Similarly, the Associations recommend that all reporting on QFCs' linkages to affiliates be eliminated unless the affiliate also provides a guarantee or other support.

### B. The definition of Records Entity should be narrowed to include only financial companies that are likely to be Covered Financial Companies

For the reasons stated above, the Associations believe that the definition of Records Entity in the Proposed Rule is overbroad and make the following recommendations to allow for a more nuanced process for determining which financial companies should be designated as Records Entities.

To determine which entities should be subject to the recordkeeping requirements, the Secretary, in consultation with the FDIC and the PFRAs, should consider what information the FDIC will need to satisfy its obligations as receiver for a Covered Financial Company under OLA, and define a more comprehensive set of filters to be applied to a financial company to determine whether that financial company's designation as a Records Entity will provide the FDIC with sufficiently beneficial information to justify the significant burden of the rule. The Associations believe that to satisfy its obligations, the FDIC needs to have access to the following:

(1) Specific transaction-level trade details about the Covered Financial Company's QFC portfolios with each of its counterparties and their affiliates, as well as certain financial information necessary to evaluate the materiality of the portfolios to the resolution of the Covered Financial Company. This information is needed to allow the FDIC to complete its statutory duties within the time frames specified in OLA, and evaluate potential resolution alternatives. The extent of the information required could be streamlined under the FDIC's preferred SPOE resolution strategy.

(2) Information about the Covered Financial Company's obligations under guarantees or other support arrangements with respect to QFCs of affiliates or third parties. This information is needed to understand the consequences to the Covered Financial Company and the beneficiaries of any such guarantee or support arrangement of failing to transfer such guarantees or support (or otherwise providing "adequate protection").[23]

(3) Information about material QFC activities of material affiliates. This is needed to provide the FDIC with information about QFC activities that could have an impact upon the resolution of the Covered Financial Company or affect the viability of material affiliates.

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[23] As discussed more fully in Section III.A.3 above, even though the Proposed Rule requires a Records Entity to maintain records with respect to QFCs that a Records Entity is "linked to", because of the automatic override of specified financial condition clauses under OLA Section 210(c)(16), and the FDIC 210(c)(16) Final Rule, the FDIC as receiver for a Covered Financial Company, the FDIC does not have any discretion, and will not have to take any actions with respect to QFCs that the Covered financial company is only "linked to".

The Associations believe that in order to identify the information in (1) and (2), the FDIC will only need the full suite of QFC records of financial companies that are likely to become Covered Financial Companies, either themselves or because an affiliate is already a Covered Financial Company and the resolution of such entity under otherwise applicable insolvency laws would also have "serious adverse effects on financial stability in the United States" as described in Section II.B above.

With respect to the information identified in (3), the Associations recognize that the FDIC may require information about the material QFC activities of a Covered Financial Company's corporate group in order to make decisions about which QFCs are transferred, disaffirmed or repudiated. In the preamble to the Proposed Rule, the Secretary notes that the content of the records required under the Proposed Rule is necessary to allow the FDIC to:

> estimate the financial and operational impact on the covered financial company and its counterparties, or affiliated financial companies, of the FDIC's decision to transfer, disaffirm or repudiate, or retain the QFCs. It must also allow the FDIC to assess the potential impact that such decisions may have on the financial markets as a whole.[24]

However, this purpose does not require transaction-level detail about QFCs for entities that are only affiliates of a potential Covered Financial Company and would not themselves be subject to proceedings under OLA (and may not have QFC exposure that is material to any potential Covered Financial Company or corporate group as a whole). If the affiliate itself is not material to the resolution of any potential Covered Financial Company or if it does not have QFC exposure material to any potential Covered Financial Company, transaction-level detail about QFCs as required under the Proposed Rule, including information with respect to individual legal agreements and collateral arrangements, should not be necessary.

So long as the FDIC had records about the QFC portfolios of the entities that are likely to be subject to proceedings under OLA and that themselves have material QFC exposure, the Associations believe the FDIC would be able to understand the financial and operational impact of the transfer, disaffirmation or repudiation of a Covered Financial Company's QFC portfolios on the Covered Financial Company, its affiliated financial companies and its counterparties. Unless the scope of the Proposed Rule is narrowed in this or a similar way, the Proposed Rule would require reporting on entities whose QFC activities are not relevant to the FDIC as receiver of a Covered Financial Company.

#### 1. "Records Entity" should be limited to financial companies that are "Material Entities"

Based on the foregoing, the Associations propose that the Secretary limit the scope of the definition of Records Entity for each corporate group to their identified U.S. Material Entities. The first step of determining which financial companies within a group should be subject to the recordkeeping requirement should be to determine which financial companies could be material to the FDIC as receiver, either of the financial company itself or of an affiliate of the financial company. Identifying such entities closely parallels the process that large financial groups undergo in the United

[24] 80 Fed. Reg. at 992.

States to identify Material Entities in their Title I resolution plans. Material Entities are entities that are "significant" to "core business lines" or "critical operations" of a potential Covered Financial Company.[25]

The financial companies that are likely to be subject to the Proposed Rule have already considered which entities within the corporate group fit this profile and identified them in their living wills, pursuant to Title I of the Dodd-Frank Act, as "Material Entities." Further, the FDIC, together with the Federal Reserve, has participated in this designation process and has the ability to require the designation of other entities within a group as material. For any financial companies that may be subject to the Proposed Rule that do not file a U.S. resolution plan, the Associations recommend that the PFRA and the FDIC discuss with individual companies the identity of appropriate Records Entities.

In addition, the Proposed Rule should provide an explicit opportunity for exemption to the extent that such Material Entities have QFC exposures that would be immaterial to their own or an affiliate's resolution. Even for Material Entities identified in a Title I plan, if such Material Entity does not engage in a material level of QFC activities, its QFCs would not be relevant to the FDIC as receiver for the Covered Financial Company. Likewise, if the Material Entity were to become a Covered Financial Company itself, if its QFC exposure is not material to its own resolution, the FDIC's actions as receiver with respect to the QFC portfolio is unlikely to affect stability of the entity.

## IV. Scope of Records to be Maintained

The scope of the records that financial companies subject to the Proposed Rule would be required to maintain poses additional difficulties for a Records Entity to implement and do not provide clear benefits to the FDIC as receiver. In fact, certain of the information required by the Proposed Rule may actually complicate the FDIC's ability to make the decision required within the statutory time frames by proving of limited usefulness or by being of uncertain reliability where the Records Entity cannot confirm its accuracy. As described below, the Associations recommend that the scope of records required to be maintained be narrowed to align the data with the purpose of the rule and the actual benefits to the FDIC as receiver under OLA.

Further, many entities subject to the U.S. QFC recordkeeping rule will also be subject to similar requirements in other jurisdictions. In particular, the Associations note that the European Banking Authority ("**EBA**") recently published a consultation on its own recordkeeping requirement.[26] In narrowing the scope of the records required under the rule, the Associations urge the Secretary to coordinate with regulators and resolution authorities in other jurisdictions to come up with a common approach to recordkeeping requirements so as not to create conflicting, duplicative or inconsistent requirements.

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[25] "**Core business line**" means those business lines of a potential Covered Financial Company, including associated operations, services, functions and support, that, in the view of the potential Covered Financial Company, upon failure would result in a material loss of revenue, profit, or franchise value. 12 CFR 381.2(c). "**Critical operations**" means those operations of a potential Covered Financial Company, including associated services, functions and support, the failure or discontinuance of which, in the view of the potential Covered Financial Company or as jointly directed by the Board of the Federal Reserve and the FDIC, would pose a threat to the financial stability of the United States. 12 CFR 381.2(g).

[26] *See, e.g.,* the EBA Draft RTS.

## A. Records Entities are not well positioned to have and maintain an up-to-date understanding of their counterparties' corporate organization

The Proposed Rule requires Records Entities to identify QFC counterparties that are affiliates of one another. Data on such relationships is justified by the requirement that the FDIC treat all QFCs of affiliated counterparties the same—either transfer all or none, or repudiate all or none. However, the Proposed Rule also requires that Records Entities report on the organizational structure of their counterparties to demonstrate the chain or ownership that results in affiliation. This information is not relevant to the FDIC's role as receiver or its exercise of authority under either Sections 210(c)(8), (9), (10) or (16) because how the parties are affiliated does not change the statute's requirements or the FDIC's statutory authority. Further, this information is not typically requested from counterparties and is subject to continual change. A Records Entity whose relationship is only as a QFC counterparty would not be privy to this kind of information. To require that Records Entities report this information to regulators could necessitate counterparty covenants to alert the Records Entity immediately of any changes to the counterparty's corporate organization, imposing a burden on such counterparties. Records Entities would have no efficient means of verifying the information they collected from counterparties and reported to the regulators, and certain counterparty types might prefer not to disclose their corporate structure, which may be carefully organized for tax and other competitive advantages.

Additionally, even if this information was available, a Records Entity may not be able to disclose such identifying information about its counterparties. This could result from confidentiality provisions in agreements with counterparties that do not have clear exceptions for information sharing with regulators or from non-US privacy laws that restrict a Records Entity's ability to disclose identifying information about its counterparties. In the latter case, such non-US privacy laws have prevented financial companies from complying with certain aspects of the reporting requirements under Title VII of the Dodd-Frank Act and has required the staff of the CFTC to provide temporary no-action relief from these reporting requirements to avoid violating these laws.[27]

Finally, complying with this requirement may also be challenging for counterparties themselves. The Proposed Rule uses the Bank Holding Company Act definition of "control" to define "affiliate." Control analysis under the Bank Holding Company Act can be highly complex and may result in parties being considered affiliates under circumstances that non-financial companies would treat as unaffiliated (*e.g.*, a tech company taking a minority stake in a growing company, but having the right to appoint members of the board). A Records Entity is unlikely to have sufficient information to complete this complex analysis with respect to each of its counterparties or verify the conclusions made by its counterparties (which conclusions would implicate the Records Entity's compliance with the requirements of the final rule).

Absent any demonstrable benefit to the FDIC as receiver, this burden on both Records Entities and their counterparties is unjustified. Accordingly, the Associations request that the requirement to report on the organizational structure of counterparties that results in affiliation be eliminated. Alternatively, to the extent that the requirement is maintained, it should at least be

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[27] *See* CFTC Letter 14-89 (June 27, 2014) (extending relief under CFTC Letter 13-41 (June 28, 2013), which provided for relief from reporting requirements with respect to counterparties in certain "Enumerated Jurisdictions", including France, Korea, Luxembourg, the People's Republic of China, Switzerland, Taiwan, Belgium, India, Algeria, Singapore, Bahrain, Argentina, Hungary, Samoa, Austria and Pakistan, under certain conditions).

narrowed so that a Records Entity would not have to comply with the obligation if doing so would require it to violate a confidentiality provision in an agreement or applicable non-US privacy laws.

**B. The Proposed Rule's request for all records that a Records Entity provides to other regulators, including non-U.S. regulators, and as required by other regulations, is unnecessary and burdensome**

In addition to the specific data elements identified in Tables A-1 through A-4, the Proposed Rule also requires a Records Entity to report "any written data or information that is not listed in Tables A-1 through A-4…that the records entity is required to provide to an SDR, the CFTC, the SEC or any non-U.S. regulator with respect to any QFC." Unlike the data elements required to be tracked and reported under the Proposed Rule, the data reported to other regulators and to SDRs is not aimed at facilitating the FDIC's role as receiver for a failed financial company under OLA. To the contrary, data reported to financial markets regulators and to SDRs is driven by other policy objectives. Further, the data elements in Tables A-1 through A-4 alone should be sufficient to enable the FDIC to exercise authority under OLA and therefore the request for data provided to other authorities is not consistent with the intent of the rule or its authorizing statute. Lacking any benefit to the FDIC as receiver, the significant cost and burden of reporting this additional, unnecessary information is unjustified. Accordingly, the Associations request that this requirement be eliminated. To the extent that the FDIC as receiver believes it requires access to information beyond the scope of Tables A-1 through A-4 that is collected by an SDR or another regulator, the Associations urge the FDIC to coordinate with such parties directly.

Additionally, regulators in non-U.S. jurisdictions may impose recordkeeping obligations on financial institutions with respect to QFCs that are more narrowly tailored than the Proposed Rule.[28] The Associations note that the Proposed Rule's requirement to report on all information that is reported to non-US regulators imposes a potentially unlimited mandate to expand reporting on QFCs. This imposes a greater compliance burden for reporting requirements for financial companies subject to a final rule than that required by other regulators. For example, the EBA Draft RTS includes a minimum set of information that must be maintained for all institutions with the ability for regulators to identify additional information fields as necessary and aims to coordinate additional recordkeeping requirements with information that is already being provided to regulators in other contexts or to trade repositories to avoid duplicative reporting. Also, the EBA Draft RTS, unlike the Proposed Rule, does not prescribe a template in which the required information must be maintained. The result of the Proposed Rule's blanket requirement to report on "all" information that is submitted to non-US regulators is that financial companies subject to both sets of regulations may have to provide more information to the PFRAs and the FDIC with respect to non-US QFCs than they would under applicable non-US regulations.

The Associations believe that it is the responsibility of the Secretary, the FDIC and the PFRAs to work with regulators from other jurisdictions to develop a consistent, streamlined set of recordkeeping obligations that would apply on a global basis. The Associations further believe that regulators are best positioned to coordinate with each other and develop criteria to identify what information needs to be reported to facilitate the resolution of a global systemically important financial institution, rather than requiring financial companies to provide exhaustive information without a clear understanding of the scope or purpose for such reporting. Consistent and clear guidelines will help guide financial institutions in developing appropriate recordkeeping systems and practices, whereas the

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[28] *See, e.g.*, EBA Draft RTS.

current requirement in the Proposed Rule is unclear as to its scope and therefore not possible to incorporate into an institution-wide recordkeeping system.

### C. The Secretary should limit the Proposed Rule to exclude QFCs with respect to which a Records Entity provides a third-party guarantee

The Proposed Rule appears to be unintentionally overbroad in defining the scope of QFCs for which data must be collected where a Records Entity may, in the broadest sense, "guarantee or support" unaffiliated QFCs. Section 148.3(a)(2) requires a Records Entity to "maintain records for all QFCs that are guaranteed or supported by such records entity." While the Associations believe that it was the intention that the terms refer only to QFCs of affiliates that the Records Entity guarantees or supports, the definitions of the Proposed Rule do not include any such limitation. As a result, a company that provides, *e.g.*, a third-party guarantee or letter of credit in respect of a QFC of a non-affiliate could be considered to guarantee or support the QFCs of the non-affiliate for purposes of the Proposed Rule. These guarantees are not relevant to the FDIC as receiver under OLA because Section 210(c)(16) provides the FDIC with authority to enforce only "contracts with subsidiaries or affiliates of the covered financial company, the obligations under which are guaranteed or otherwise supported by…the covered financial company." As such, the FDIC would not have the ability to enforce contracts between non-affiliates in respect of which it provides a guarantee or other support. Accordingly, the Associations request that the Secretary exclude guarantees in respect of QFCs entered into between non-affiliates from the scope of the record-keeping requirements.

### D. The Secretary should modify the requirement to produce full-text searchable copies of all agreements

The Proposed Rule imposes requirements to produce full-text searchable copies of all agreements. However, given the purpose of facilitating the FDIC's decision-making during a resolution, these requirements would impose significant burdens without achieving any compensating benefits to improve decision-making by the FDIC. In fact, given the volume of agreements held by some Records Entities, the current requirement is likely to impair decision-making by the FDIC.

Section 148.4(a)(8) of the Proposed Rule requires that all agreements related to a QFC, including master agreements, confirmations, credit support documents and novation agreements, be in full-text searchable format. Further, in Section 148.3(a)(4), "Access to records", the Proposed Rule requires a Records Entity to be capable of providing the records specified in Section 148.4 to the PFRAs within 24 hours of a request. This implies that the Records Entity would need to be capable of providing copies of "all" agreements governing QFCs in a "full-text searchable" format pursuant to Section 148.4(a)(8) within 24 hours of request. A much more useful and tailored approach would be for the Records Entity to provide individual agreements in their current format (whether full-text searchable or not) as may be required by the FDIC as receiver or in preparation for a resolution under OLA.

While some firms are in the process of converting imaged documents into full-text searchable documents, this process takes a significant amount of time and resources to complete. One financial company estimates that it has 20 different repositories of documents and approximately 20,000,000 documents (although not all of these documents are related to QFCs, it will be necessary to evaluate each for inclusion). Merely running optical character recognition against existing images is insufficient, as the character-recognition process is not error free. Even for high-quality images, character-recognition results require thorough proofing in order to ensure reliable results, and error rates increase with the age of the original image.[29] Accordingly, a significant amount of time will be needed to complete the conversion process. With respect to the requirement in Section 148.3(a)(4), developing the ability to transmit "all" such documents would require building additional technological capabilities that are unlikely to ever be needed since the FDIC's focus will be on specific, significant master netting agreements rather than all miscellaneous agreements currently identified in the Proposed Rule.

It is not clear that either the requirement to produce "all" agreements or the requirement to produce such agreements in "full-text searchable" format confers a benefit on the FDIC as receiver. In the most likely resolution scenario, the FDIC as receiver would be reviewing QFCs on a portfolio basis with respect to counterparty groups rather than on an individual basis. Additionally, it is likely that the FDIC will be monitoring a financial company in distress and would be requesting information on QFCs in order to prepare for "resolution weekend." In cooperation with the PFRA and the Records Entity, the FDIC will be able to identify the relevant agreements and analyze the key provisions.

As an alternative to these requirements in the Proposed Rule, the Associations suggest that Records Entities be required to produce specifically requested contracts to the FDIC within 24 hours of request in any format. At a minimum, the Associations strongly request that the Secretary consider discussing with industry participants how to scale the requirement over a number of years based on a prioritization scheme and improvements in the technology of optical scanning.

### E. Overly burdensome requirements to track provisions of QFC legal documentation and unnecessary information

In order to maintain information to populate several of the data fields required by the Proposed Rules, some Records Entities will need to expend resources and effort greatly outsized to the potential benefit of this information to the FDIC as receiver for a Covered Financial Company. For example, Table A-3 of the Proposed Rule requires Records Entities to track individual provisions of QFC documents including cross-defaults, transfer restrictions, deviations from standard events of default or termination events in respect of all QFCs. While the existence of defaults triggered by resolution scenarios may be relevant to the FDIC, the detail required under the Proposed Rules is not, or could be provided in a less burdensome manner. Not all Records Entities currently track each of these kinds of contractual provisions in a separate database from the document itself for all contracts subject to the Proposed Rule because, in part, of the extensive effort required to review such information for the enormous volume of contracts. The effort to review each agreement and catalogue detailed provisions would be considerable, while not having any clear benefit to the FDIC.

Similarly, Tables A-1 through A-4 of the Proposed Rule require operational and business level details with respect to QFCs, such as trading desk identifiers and description, related inter-affiliate trades, points of contact and risk or relationship manager. These back-office or operational details are of very limited, if any, relevance to the decisions that the FDIC must make in a resolution as identified in the preamble to the Proposed Rule. Many of these elements are subject to change throughout the life of the contract and documenting all such changes imposes an undue burden on Records Entities without a clear benefit to the FDIC.

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29 Even an accuracy rate of 99.9% would result in two errors per average page of 2,000 characters.

The Proposed Rule also imposes different and much more extensive record-keeping requirements than those imposed by the PFRAs for prudential supervisory purposes. While these different and much more burdensome requirements create the risk of conflict with those prudential standards, the divergences also create the risk of greater confusion for record-keepers and for regulators or the FDIC in a resolution. For example, the Associations note that the requirements of the Proposed Rule go further than similar record-keeping requirements in the prudential supervisory context, pursuant to which the SEC has determined that such granular detail is not necessary.[30, 31] Likewise, the information required under the Proposed Rule goes far beyond what is required by the FDIC to support its role as receiver under the bank insolvency provisions of the Federal Deposit Insurance Act.[32] While the Associations certainly recognize that decision-making in order to implement an OLA resolution may require different information than prudential supervision, it is imperative that the Proposed Rule avoid conflict and unnecessary additional requirements that may complicate the supervisory process, potentially lead to inaccuracies and confusion, and actually impair the FDIC's ability to accomplish an orderly resolution. The Associations urge the Secretary to compare the current regulatory requirements with the Proposed Rule and ensure that a coherent record-keeping process is maintained. In addition, the Associations request that the Secretary evaluate whether the granularity of certain of the proposed requirements, as well as the formatting specifications, of the Proposed Rule are essential to the FDIC's role as receiver. The Associations believe that a less burdensome standard can be developed to assist the FDIC without imposing the very substantial burden on Records Entities that will be created by the Proposed Rule and the potential for impairing the mission of the FDIC as receiver to implement an orderly resolution.

### F. Identifying the "purpose" of a QFC

One of the data fields on Table A-1 requires the Records Entity to identify the "Purpose of the position (if the purpose consists of hedging strategies, include the general category of the item(s) hedged)". The addition of this data field is problematic in several respects. This is not a data field that financial companies currently record with respect to QFCs. Further, individual trades may have multiple

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30 "The [SEC] also is mindful, however, that requiring the reporting of detailed information concerning the master agreement and other documents governing security-based swaps could impose significant burdens on market participants. . . the [SEC] believes that, for security-based swaps that are not clearing transactions, requiring the reporting of the title and date of any master agreement, collateral agreement, margin agreement, or any other agreement incorporated by reference into the security-based swap contract—*but not the agreements themselves or detailed information concerning the agreements*—will facilitate regulatory oversight of the security-based swap market by providing regulators with a more complete understanding of a security-based swap counterparty's obligations while not imposing significant burdens on market participants. The [SEC] anticipates that, if a situation arose where the [SEC] or another relevant authority needed to consult information about a transaction contained in one of the related agreements, the [SEC] could request the agreement from one of the security-based swap counterparties. Knowing the title and date of the agreement will assist relevant authorities in identifying the agreement and thereby expedite the process of obtaining the necessary information." Regulation SBSR–Reporting and Dissemination of Security-Based Swap Information, 80 Fed. Reg. 14564, 14585-14586 (emphasis added).

31 The Associations further note that the SEC's record-keeping requirements for security-based swaps, like other record-keeping requirements do not require firms to store documents in "text-searchable" format as required by the Proposed Rule.

32 *See* 12 C.F.R. part 371.

purposes (*e.g.*, it might have been customer driven but also serves as a hedge) and the function of a trade may evolve over time. This type of data is unlikely to assist the FDIC as receiver deciding on the course of action to take for a QFC portfolio, particularly given the multitude of strategies pursued by sophisticated market participants. Considering the extent of outstanding QFCs, requiring Records Entities to revisit all existing QFCs to identify the original purpose for entering into such QFCs would be a significant challenge and in some instances may not be possible due to the passage of time. Additionally, identifying the purpose and hedging strategy associated with any particular QFC could be an involved and complicated analysis, the framework for which has not been identified by the Secretary in the Proposed Rule. Without any clear benefit to the FDIC, which is not evident, the substantial burden of this requirement is not justified. Therefore, the Associations recommend that this data field be removed from Table A-1 as a required data field for QFCs.

### G. Not all data fields are applicable to every type of QFC

The Associations note that the Tables included in the Proposed Rule require Records Entities to track data fields for all QFCs even though these data fields are not always applicable or relevant for all transaction types. In several, the data fields seem oriented around over-the-counter swaps and many of these fields would not be relevant with respect to other QFCs. For example, some securities contracts may not have a "termination date" but do have a "settlement date." In developing compliant systems, Records Entities will have to use their best judgment to determine which fields are applicable to different QFC types and if there are reasonable substitutes for some data fields in respect of different transaction types.

Therefore, the Associations recommend that the rule specifically allow Records Entities to use discretion when reporting data fields that may not match the terms of a QFC exactly.

## V. Scope of QFCs that Should be Subject to the Proposed Rule

The Proposed Rule imposes requirements on Records Entities for QFCs that are unlikely to be relevant to the FDIC in OLA proceedings. The definition of QFC is broad and encompasses a multitude of market transactions that each have distinct risk profiles.[33] These include cash-market or overnight transactions and traditional capital markets activities, such as purchases and sales of securities from and to an underwriter or initial purchaser. While these transactions and activities may fall within the definitions of QFCs, these types of transactions are not relevant to the FDIC's analysis or decision making during a resolution under OLA. As a result of their short term nature, structure, or function, these transactions would not pose a risk to the resolution of the Covered Financial Company or to the financial stability of the broader market. These contracts also typically do not contain the types of default provisions that Section 210(c)(8) and 210(c)(16) are designed to address during resolution. Similarly, the rule should not apply to transactions on behalf of customers where the Records Entity is acting as agent for or on behalf of a customer. These transactions also would not be relevant to the

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[33] In the Proposed Rule, "**qualified financial contract**" means any qualified financial contract as defined in OLA, including without limitation, any "swap" defined in section 1(a)(47) of the Commodities Exchange Act and in any rules or regulations issued by the CFTC pursuant to such section; any "security-based swap" defined in section 3(a) of the Securities Exchange Act of 1934 and in any rules or regulations issued by the SEC pursuant to such section; and any securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, and any similar agreement that the FDIC determines by regulation, resolution or order to be a qualified financial contract as provided in OLA section 210(c)(8)(D).

FDIC as receiver deciding whether to transfer or repudiate QFCs. Rather, in an OLA resolution, the FDIC will likely be concerned with the continuity of bilateral swaps, other derivatives and securities finance transactions of a Covered Financial Company and its most material affiliates.

Nevertheless, because the definition of QFC is not limited to those contract types that would be relevant to the FDIC as receiver, Records Entities would be required to comply with all of the record-keeping, maintenance, and reporting requirements of the Proposed Rule for these transactions. This would include, for example, maintaining the required records for each of the several million securities contracts institutions execute each day. As such, the Associations recommend that the Secretary narrow the scope of the rule requirements so that Records Entities are only required to maintain records that are relevant to the FDIC's decision-making in an OLA resolution such as over-the-counter swaps, derivatives and securities financing transactions. At the very least, the Associations recommend that the Secretary narrow the scope of the rule to exclude overnight and cash-market transactions and other transaction types that are not relevant to the FDIC's decision-making during resolution.

## VI. Effective Date and Compliance

The Proposed Rule introduces a new framework for recording and tracking information with respect to QFCs that will require financial institutions to make significant changes to their current reporting or recordkeeping practices and invest substantial resources, including, in some cases, the building of entirely new reporting or recordkeeping systems to be implemented on a group-wide basis. This is a significant technological endeavor that will require careful planning and build-time, which for some, will be difficult to complete in the 270-day compliance period articulated in the Proposed Rule.

The extent of these changes and therefore the amount of time financial institutions will require to become compliant will depend on, among other things, how many entities within the corporate group are parties to QFCs, the extent of their QFC activity, the current reporting or recordkeeping practices within the group and the scope of the final recordkeeping rule. The Associations note that the amount of time that a financial institution may require to comply with the Proposed Rule is not necessarily related to the extent of its current recordkeeping with respect to QFCs but rather the difference between current systems used to track this information and the required format for this information under the Proposed Rule. For example, in several institutions, data is recorded in product-specific databases and aggregating data in a unified format across these databases will require revamping the institution's approach to internal reporting and recording practices. Since the definition of a QFC is broad, the breadth of involvement at financial companies includes different divisions such as private wealth management, prime brokerage, securities and investment banking, among others. These divisions may house contract-specific information in different databases, requiring time to build data feeds from each division to produce a single report.

Further, the time it takes financial companies to comply with these recordkeeping requirements will vary. While some currently have systems that can be adapted to track the data required, other will need to build entirely new systems. One financial company estimates it will take an average effort of nine months to develop the reporting functionality, requiring at least 25 technology people on various teams. This estimate does not include any unforeseen dependencies or delays, which may add to the total time and effort. While many banks may generally have the required data in various databases, the effort to bring the right data together and marry it into a report in the format required is massive. As discussed in more detail in Section V, the broad scope of many aspects of the Proposed

Rule will increase the time and resources required to comply. In addition, unrelated regulatory requirements such as the daily disclosure of liquidity coverage ratios and compliance with the Volcker Rule are likely to place demands on the same resources and expertise needed to adapt or build the systems required to comply with the Proposed Rule.

The Associations fully acknowledge the importance of financial companies developing fully compliant systems that provide the FDIC with information sufficient to carry out its obligations under OLA, but given the competing demands on resources and the broad extent of the rule requirements, the Associations think this process should be iterative and will take far more time than is contemplated in the Proposed Rule. Therefore, the Associations recommend that the Secretary consider implementing the final rule in stages, focusing first on the QFCs and the information that the Secretary identifies as most essential to the FDIC. The Associations propose that the Secretary stagger the compliance dates by QFC type, starting with over-the-counter swaps and derivatives, then securities finance transactions, followed by any remaining QFCs within scope of the rule. The Associations propose that this process be done in consultation with the Secretary, the PFRAs and the FDIC. Such a staggered approach would allow Records Entities and regulators to agree on the appropriate approach and expand outward rather than requiring a full system build, without sufficient time and resources, all at once. The Associations believe that the first stage of compliance could be complete by two years after the effective date of a final rule. However, some may need more time and individual extensions should be available. As such, the Associations request that the Secretary implement the compliance schedule in stages, as we describe and extend the date for the first compliance period to two years following the effective date of the final rule. The Associations recommend that subsequent compliance dates following the initial two-year period be determined in consultation with the PFRAs and the Associations.

## VII. Implementation Issues

### A. The Secretary should clarify the timing of when requests are made and when data must be reported

The Proposed Rule states that a Records Entity must be capable of producing information within 24 hours of a request. Given that many of the entities that will be Records Entities are members of global financial groups, the timing of such requests is relevant. The Associations suggest clarifying that a request for information made before 5:00 p.m. (Eastern time) on a given day must be satisfied by 5:00 p.m. (Eastern time) on the following day, and that the information provided on the following day should be with respect to QFCs as of end-of-day on the date the request was provided.

### B. The Secretary should designate the FDIC as the main point of contact for interpretative and implementation questions regarding the final rule

The Associations understand that the Proposed Rule implicates several different regulatory agencies, each of which has an interest in compliance. However, the Associations believe that the process of complying with the final rule will require addressing interpretative questions. To facilitate this dialogue and to simplify our members' compliance efforts, the Associations believe that a single agency should be appointed as the point of contact for providing guidance. Because the purpose of the rule is to assist the FDIC in its role as resolution authority under OLA, the Associations request that the FDIC be designated the point of contact on this rule.

## VIII. Use of Legal Entity Identifiers

The Associations strongly agree with the Treasury's proposal to require the use of the Legal Entity Identifier ("**LEI**") for purposes of identifying the counterparties to a SIFI's QFCs. The LEI provides for the unambiguous identification of legal entities and therefore is ideally suited for identifying the counterparty information as it relates to both a firms position-level and aggregated counterparty-level information. Ensuring that the collection process is set up correctly from the beginning is critically important.

The accuracy of this reporting is critical given that counterparties could be significantly affected as the FDIC makes determinations about the resolution of specific contracts in a bankruptcy or receivership event. Having multiple identifiers for a given counterparty would lead to errors in identification as the process of mapping one identifier to another in the aggregation process is imperfect. Thus, the Associations urge the Secretary to avoid allowing the use of multiple entity identifiers and require only the LEI to be used for counterparty identification during this important receivership process. Furthermore, given the timeframes expected for the delivery of the information from a records entity to the Secretary, *i.e.*, 24 hours, the need for timely reference data is critical.

The global LEI system is in place today to support the Secretary's proposed use of the LEI for these purposes. To date, over 350,000 LEIs have been issued to entities around the globe with many more to come as a myriad of regulatory requirements become effective in 2015 and thereafter. The Global Legal Entity Foundation is operational and will be providing the "golden copy" of the global LEI database to the marketplace in the very near future and certainly within the timeframe to support this rulemaking. However, the Associations note that not all entities currently have LEIs, and in furtherance of our discussion in Section IV.G above, the Associations request that in such cases Records Entities be allowed to use reasonable substitutes when reporting on this data field.

In summary, the Associations strongly support the use of the LEI in this data collection and aggregation initiative. This is an ambitious date collection initiative, and the Associations believe it is imperative that the Treasury mandate the use of the LEI as the Associations see no other way to achieve the consistency and, more importantly, the accuracy of the data collected.

*   *   *   *   *

The Associations appreciate this opportunity to comment on the Proposed Rule and your consideration of the views expressed in this letter. The Associations support the goals of the Proposed Rule and the need to provide the FDIC, as receiver, with the information it needs to successfully resolve a failing financial group under OLA. However, as described in our comments, the Associations believe that certain aspects of the Proposed Rule are overly broad and would include within the requirements entities and, for some entities and QFCs, information that will not advance the expressed goals of the Proposed Rule. In fact, the Associations are concerned that, as currently drafted, the Proposed Rule may both undermine the efficient application of OLA and unduly burden reporting entities without providing a benefit to the FDIC.

If you have any questions or need further information, please do not hesitate to contact John Court (202-649-4628; john.court@theclearinghouse.org) or Carter McDowell (202-962-7327; cmcdowell@sifma.org).

Respectfully Submitted,

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cc: The Honorable Jacob J. Lew
*Secretary of the Treasury, as Chairperson of the FSOC*

The Honorable Janet L. Yellen
*Board of Governors of the Federal Reserve System*

The Honorable Thomas J. Curry
*Office of the Comptroller of the Currency*

The Honorable Mary Jo White
*Securities and Exchange Commission*

The Honorable Martin J. Gruenberg
*Federal Deposit Insurance Corporation*

The Honorable Timothy G. Massad
*Commodity Futures Trading Commission*

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## The Associations

The Clearing House

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Securities Industry and Financial Markets Association

The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit www.sifma.org.

American Bankers Association

The American Bankers Association is the voice of the nation's $15 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard $11 trillion in deposits and extend more than $8 trillion in loans.

Financial Services Roundtable

As advocates for a strong financial future™, Financial Services Roundtable (FSR) represents 100 integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. FSR member companies provide fuel for America's economic engine, accounting directly for $98.4 trillion in managed assets, $1.1 trillion in revenue, and 2.4 million jobs.

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