

THE LAW OFFICES OF  
**JEREMY D. WEINSTEIN**  
A PROFESSIONAL CORPORATION

August 29, 2018

Ms. Ann E. Misback, Secretary  
Board of Governors of the  
Federal Reserve System  
20<sup>th</sup> Street and Constitution Ave, N.W.  
Washington, D.C. 20551  
Telefacsimile: 202-452-3819  
reg.comments@federalreserve.gov

Mr. Robert E. Feldman  
Executive Secretary  
Attention: Comments  
Federal Deposit Insurance Corporation  
550 17<sup>th</sup> Street, NW  
Washington, D.C. 20429  
comments@fdic.gov

Re: Docket No. OP-1614; Proposed 165(d) Guidance for the Domestic Firms;  
Resolution Planning Guidance for Eight Large, Complex U.S. Banking Organizations  
83 Fed. Reg. 32856 (July 16, 2018)

Ladies and Gentlemen:

You propose the following requirement for resolution plans for the eight largest U.S. banks (defined as “firms”<sup>1</sup>):

*Legal Obstacles Associated with Emergency Motions:* The Plan should address legal issues associated with the implementation of the stay on cross-default rights described in Section 2 of the International Swaps and Derivatives Association 2015 Universal Resolution Stay Protocol (Protocol), similar provisions of any U.S. protocol,<sup>36</sup> [36 U.S. protocol has the same meaning as it does at 12 CFR 252.85(a). *See also* 12 CFR 382.5(a) (including a substantively identical definition).] or other contractual provisions that comply with the Agencies’ rules regarding stays from the exercise of cross-default rights in qualified financial contracts, to the extent relevant.<sup>37</sup> [37 See 12 CFR part 47, 252.81-.88, and part 382 (together, the “QFC stay rules”). If the firm complies with the QFC stay rules other than through adherence to the Protocol, the plan also should explain how the alternative compliance method differs from Protocol, how those differences affect the analysis and other expectations of this “Legal Obstacles Associated with Emergency Motions” section, and how the firm plans to satisfy any different conditions or requirements of the alternative compliance method.]<sup>2</sup>

The International Swaps and Derivatives Association, fka the International Swap Dealers Association (“ISDA”), is a registered lobbying group<sup>3</sup> that supports banks and banking activities. Every company using ISDA’s Protocol must pay \$500 to ISDA.<sup>4</sup>

You note the requirement of compliance with QFC stay rules, and that compliance can be through adherence to ISDA’s Protocol or other contractual provisions that comply with your rules, and then provide that if compliance is through any means *other than* using ISDA’s Protocol, presumably even by contractual provisions that bilaterally mimic ISDA’s Protocol, the

<sup>1</sup> 83 Fed. Reg. 32856.

<sup>2</sup> 83 Fed. Reg. 32867 col. 1.

<sup>3</sup> e.g., <http://disclosures.house.gov/ld/pdfform.aspx?id=300450267>

<sup>4</sup> <https://www.isda.org/protocol/isda-2018-us-resolution-stay-protocol/>. ISDA can presumably increase this at will.

bank must write this up in its plan. Both the extra work and exposure to regulatory scrutiny would discourage the bank from implementing the QFC stay rules through any means other than through ISDA's Protocol.


The copyrighted document of a privately owned financial industry lobbying group is already hardwired into your rules.<sup>5</sup> ISDA's powerful inside track came through with the subtlety of *Mondo Cane* in your respective NOPRs, when you said ISDA's Protocol, written months before you even proposed your QFC stay rules, complied.<sup>6</sup> You now propose to push for ISDA Protocol adherence by tens of thousands of companies doing business with the big banks, with each adhering company paying \$500 to ISDA.

Lobbyist dollars are long-term; lobbyists use money to get favorable laws and regulations for their members and clients. As regulators addressing major financial institution safety and soundness, do you view your mission as protecting the public from reckless bank behavior, or the banks from the public? Pushing the public to subsidize a bank industry lobbyist is a statement of whose interests you think should be paramount in the long term.

I thought current ISDA President Scott O'Malia was terrific as a Commodity Futures Trading Commission commissioner, a breath of fresh air and a source of badly needed level-headedness. The CFTC, and all in Main Street industries who had grown to count on his ballast, suffered a serious loss when he left. I would have hoped that such a prominent example of the revolving door between lobbying and government would have given you at least some pause before you proposed a rule that pushes the public to fund that same lobbying group. Mr. O'Malia cannot be faulted for looking after the interests of his organization. You can.

I therefore respectfully suggest that your final guidance say that bilateral contractual provisions that are substantively identical to the ISDA Protocol, such as a form of same made available for free by ISDA<sup>7</sup> or anyone else, do not need a special write-up. I also respectfully recommend, in furtherance of transparency of the interests between government and the private sector, that you calculate and disclose the amount of money the Final Guidance will encourage companies to pay to ISDA for ISDA Protocol adherence and related functionality.

Yours truly,

  
Jeremy D. Weinstein

cc: Congressman Mark DeSaulnier  
Mr. Scott O'Malia, President, ISDA  
Financial Times

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<sup>5</sup> at 252.85(a)(3)(i).

<sup>6</sup> 81 Fed. Reg. 29181 col. 2; 81 Fed. Reg. 74331 col. 3.

<sup>7</sup> e.g., <https://www.isda.org/a/gZjEE/Standard-Language-Part-I-of-US-Stay-Regulations.pdf>