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October 31, 2008

Mr. Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Attention: Comments, Recordkeeping Requirements
For Qualified Financial Contracts

Ladies and Gentlemen:

The International Swaps and Derivatives Association, Inc. ("ISDA") appreciates this opportunity to comment on the Notice of Proposed Rulemaking (the "Notice") with respect to Recordkeeping Requirements for Qualified Financial Contracts (the "Proposed Rule") that was published in the Federal Register on July 28, 2008 by the Federal Deposit Insurance Corporation (the "FDIC").

ISDA, which represents participants in the privately negotiated derivatives industry, is the largest global financial trade association by number of member firms. ISDA was chartered in 1985, and today has over 800 member institutions from 56 countries on six continents. These members include most of the world's major institutions that deal in privately negotiated derivatives, as well as many of the businesses, governmental entities and other end users that rely on over-the-counter derivatives to manage efficiently the risks inherent in their core economic activities.

In this comment letter, ISDA will (1) provide one general comment on the Proposed Rule, (2) comment on specific aspects of the Proposed Rule, and (3) provide minor suggestions to clarify

the text of the Proposed Rule, in the event that the particular provisions are adopted as proposed. ISDA has also considered the specific issues and questions listed in the Notice and believes it has addressed many of the issues in the body of its letter.

1. General Comment

ISDA understands and appreciates why the FDIC has published the Proposed Rule. The Federal Deposit Insurance Act (the "FDI Act") in the case of a receivership requires the FDIC to decide how to handle an institution's qualified financial contracts ("QFCs") in a limited time frame. ISDA hopes that the FDIC's need for access to information about QFCs will be balanced against the current structures of the QFC activities of major dealer institutions so as not to require a greater new burden than is necessary to meet the information needs of the FDIC.

With that perspective in mind, ISDA questions why the Table A1 position level data in Appendix A is necessary at all, particularly for major dealer institutions. While a smaller bank that enters into QFCs mainly for hedging purposes might be able to easily assemble the Table A1 data in central electronic files so that the information is available at the close of processing of each business day, this would be a much bigger challenge for a large dealer. Major dealers have in their files the information required by Table A1¹, and major dealers regularly aggregate this information in order to monitor risk on many levels. Position level data, however, is typically kept for separate geographic areas or lines of business such as interest rate and currency derivatives, repos, securities lending, credit derivatives and so forth. It is not aggregated for the purpose of maintaining a database, such as that proposed in the draft regulation. It would be a major and expensive task to combine this position level data into central electronic files as would be required by the Proposed Rule. Furthermore, ISDA does not understand how the Table A1 data for thousands upon

¹ The one exception is the "purpose of the position" requirement. For most QFCs, ISDA's members that would be subject to the Proposed Rule do not keep this information for individual transactions. Moreover, in a dynamic hedging environment the purpose of an individual transaction can change from time to time as the rest of a portfolio changes and markets move.

thousands of individual transactions at a large dealer institution would help the FDIC decide how to choose among its options in the limited time frame available in the case of a receivership. ISDA acknowledges that the Table A2 counterparty level data would be important in this context; the Table A1 data, however, would be too detailed and not very relevant to the FDIC's decision-making process, which would be focused on net exposures to counterparties and their affiliates and not on individual transactions.

2. Specific Comments

A. Definition of "Troubled Condition" and Period for Compliance.

As noted in the Notice, the authority for the Proposed Rule is found in Section 908 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which permits recordkeeping requirements to be established for institutions determined to be in a "troubled condition". The Proposed Rule sets forth five alternative tests that would trigger the recordkeeping requirements. As structured, ISDA believes that the Proposed Rule would have the inevitable effect of broadcasting to an unacceptably large audience that the FDIC has determined that a bank is in troubled condition. This is equivalent to disclosing that the bank's regulatory rating is 3 or less. As the FDIC knows, a bank's regulatory rating is highly confidential, non-public information. In this regard, our U.S. bank members are mindful of OCC Bulletin 2005-4, "Interagency Advisory on the Confidentiality of the Supervisory Rating and Other Nonpublic Supervisory Information". Because of the large number of personnel needed to implement the proposed requirements (credit, legal, collateral, risk, technology and operations personnel, many of whom work on trading floors), it would be nearly impossible to keep this information confidential. This could fuel speculation and spread rumors about the bank's financial condition and might even seriously impair the bank's liquidity.

ISDA recommends that this risk be reduced, by making the proposed requirements mandatory upon banks rated 4 or 5, but discretionary with respect to banks rated 3. This discretion should include the ability to set a reasonable implementation schedule and should involve the Office of the Comptroller of the Currency or other relevant primary regulator of the bank. This discretion overall will likely reduce the number of banks rated 3 to which the requirements will be applied.

ISDA cautions that it would be an inadvertent and unfortunate result if the definition of "troubled condition" is applied too broadly. Overly broad application will increase attendant disclosure risk and, of course, require institutions to spend significant personnel and financial resources to comply with the Proposed Rule when the likelihood of failure is low.

The twin risks of public disclosure and waste of bank resources may also be reduced by harmonizing the proposed requirements with other record keeping requirements placed upon the banks, as further described below.

The Proposed Rule would require compliance within 30 days after written notice to an institution. While 30 days might be appropriate for a small bank, it would be far too short a period for a bank that is a major dealer in QFCs. ISDA encourages the FDIC to develop implementation timelines appropriate for major dealers through consultation with such institutions and appropriate regulatory agencies.

B. Table A2 of Appendix A

The requirement to aggregate data for a counterparty and its affiliates on a daily basis will be burdensome for some institutions that have large, global QFC activities. ISDA believes that it should be sufficient for the FDIC's purposes for the banks in "troubled condition" to have systems in place, such that the aggregated data requested in Table A2 would be available on a weekly basis and in a flexible format suitable to each individual bank. ISDA notes that major dealers keep and

aggregate counterparty level data, but not necessarily in the format requested by the FDIC. Building new systems or bridges to accommodate the desired format across numerous product lines and across global markets would require significant time and resources for major dealers. To avoid such a costly and unnecessary devotion of resources, precisely at a time when a bank may have a compelling need to deploy such resources elsewhere in order to prevent failure, ISDA encourages the FDIC to permit QFC dealers to provide counterparty level data in flexible formats that can be developed more efficiently from existing reporting systems. Alternatively, if the FDIC believes a uniform format is necessary, ISDA encourages the FDIC to base the format on the Basel II systems which many institutions are already in the process of implementing. Piggybacking off the Basel II systems would increase efficiency, reduce costs and promote confidentiality, as fewer individuals and less overt efforts would be required to produce the desired information.

Finally, we trust that in applying the proposed requirements the FDIC will be mindful of, and acknowledge, the evolving nature of the instruments that may be classified as QFCs. Thus, one bank may view a class of novel instruments as QFCs, while another bank may not do so. Under no circumstances should a bank's failure to report transactions under the proposed requirements constitute a basis for foreclosing the bank from claiming such transactions are QFCs at a later date or in another context.

3. Textual Suggestions

In the event that the FDIC elects to adopt the text and format as set forth in the Proposed Rule, ISDA would like to suggest two minor clarifications to the text, as shown below in italics.

The second to last field in Table A2 should read, "Counterparty's collateral excess or deficiency with respect to all *of the institution's* positions with each counterparty, as determined under each applicable agreement including thresholds and haircuts where applicable."

The second bullet under Appendix A Part B.1. should read, "A list of the affiliates of the counterparties that are also counterparties to QFC transactions with the institution or its affiliates, and the specific master netting agreements, *if any*, under which they are counterparties."

Conclusion

ISDA appreciates the opportunity to comment on the Proposed Rule and is eager to work with the FDIC to develop a recordkeeping system that appropriately balances the FDIC's need for information in a short time frame with QFC dealers' interests in maximizing efficiency and confidentiality in their institutions.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert C. Pech". The signature is written in a cursive, flowing style.

The International Swaps and Derivatives Association, Inc.

