THE LAW OFFICES OF
JEREMY D. WEINSTEIN
A PROFESSIONAL CORPORATION

December 12, 2016

Robert E. Feldman, Executive Secretary,
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, DC 20429
Agency Web site: http://www.FDIC.gov/regulations/laws/federal/
Email to comments@fdic.gov
Electronically to www.regulations.gov: Docket ID RIN 3064–AE46

Re: Comments on Proposed Rulemaking of the Federal Deposit Insurance Corporation (the "FDIC"): *Restrictions on Qualified Financial Contracts of Certain FDIC-Supervised Institutions; Revisions to the Definition of Qualifying Master Netting Agreement and Related Definitions*, 81 Fed. Reg. 74326, RIN 3064–AE46, published on October 19, 2016 ("Proposed Rule")

Ladies and Gentlemen:

I submit these comments in my personal capacity as a United States citizen. The Proposed Rule is an executive branch initiative to substantively reduce major legal rights of companies doing business with the US arms of big Chinese, Japanese, Swiss, French, US and other foreign banks without legislation. This end-run is done by requiring the US arms of "Global Systemically Important Banking organizations",[1] or "GSIBs" to require companies with which they do business to sign contracts giving the GSIBs these special rights. The Proposed Rule is "substantively identical" to rules proposed by the Fed[2] and the OCC.[3]

The FDIC states companies who don't like it can go elsewhere and try to negotiate a level playing field: "Counterparties are also able to prudently manage risk through other means, including entering into [contracts] with entities that are not GSIB entities and therefore would not be subject to the proposed rule."[4] This cloak of a supposed freedom of contract is disingenuous; few counterparties have sufficient leverage to obtain contract terms other than those the FDIC is proposing to mandate for big banks, and few other banks will offer the desired hedging products and those that do will themselves not be on a level playing field.

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[1] Sometimes called by the FDIC "global significantly important banking entit[ies]", e.g. 81 Fed. Reg. 74346 cols. 2-3.
[2] 81 Fed. Reg. 74327 col. 1: Proposed Rulemaking of the Board of Governors of the Federal Reserve System: *Restrictions on Qualified Financial Contracts of Systemically Important U.S. Banking Organizations* ..., 81 Fed. Reg. 29169, RIN 7100 AE-52 (May 11, 2016).
[3] Office of the Comptroller of the Currency, *Mandatory Contractual Stay Requirements for Qualified Financial Contracts*, 81 Fed. Reg. 55381, RIN 1557-AE05 (Aug. 19, 2016).
[4] 81 Fed. Reg. 74339 col. 1.

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As just one example, the Proposed Rule would require U.S. companies, public pension plans, and state agencies to agree to a higher burden of proof in litigation than the domestic and foreign big banks: "after an affiliate of the direct party has entered a resolution proceeding, (a) the party seeking to exercise the default right [which necessarily is the counterparty, as the GSIB is bankrupt] shall bear the burden of proof that the exercise of that right is indeed permitted by the [contract] and (b) the party seeking to exercise the default right must meet a 'clear and convincing evidence' standard, a similar standard, or a more demanding standard."[5]

I respectfully ask the FDIC to explain what more than an executed copy of the written contract is required to (a) "prove" the right in the contract and to (b) meet the FDIC's "clear and convincing evidence" standard. I also respectfully ask the FDIC to provide the analogous case law, Federal Rule of Evidence, or other statutory standard that it expects an Article III federal Judge to apply in a dispute in order to meet its requirements.

The FDIC seeks to protect the entities for which it is responsible not by ensuring their safety and soundness, but rather by mandating a Judge's thumb on the scale. The FDIC does not cite any instance of a court awarding money that the counterparty did not "clearly and convincingly" prove was owed, or of a court inadequately protecting the interests of a bank on any level, much less one that allegedly threatens the global financial system, because of the burden of proof in litigation.

The Fed[6] and the OCC[7] justify the Proposed Rule with the need to protect the financial system from panic and contagion, yet weeks or months later in a court proceeding determined by a Judge, there is no panic. For example, parent guaranties, subject to these Proposed Rules, give the right to demand money and then, if the money is not paid, file a lawsuit demanding that money. The defendant guarantor then has 30 days or so to answer the complaint, and this is followed by a year or two of litigation before any money changes hands. In bankruptcy, filed claims are processed years later. There is no threat to the financial system, or risk of requiring asset fire sales, from making demands under guaranties. On the same grounds advanced in its Proposed Rule, the FDIC could justify all banks requiring their U.S. company, public pension plan, and state agency counterparties to forego any Constitutional rights or contract terms that a resolution authority might find inconvenient, such as jury trial, accounting, default interest, or prevailing party attorneys fees.

In its cost-benefit analyses, the FDIC ignores the cost of impaired contract rights on the "voluntary" counterparty. Loss of rights has a cost. The U.S. company will not know if it can or must enter into a replacement hedge of a commercial risk, or its appropriate price, since it cannot know if and when the hedge it has with a failing GSIB will terminate. Although the FDIC does include as a "cost" that the big banks will make

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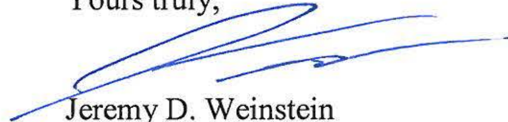
[5] 81 Fed. Reg. 74336 cols. 2-3.
[6] 81 Fed. Reg. 29170
[7] 81 Fed. Reg. 55382.

less money because they will sell fewer financial products,[8] the FDIC should include the costs of: (i) the risks to U.S. companies, public pension plans, and state agency counterparties of unhedged market movements, (ii) being squeezed by not receiving collateral while posting collateral, (iii) having to sell their own assets at fire-sale prices in order to remain solvent during the various stay periods, and (iv) an asymmetrical burden of proof in litigation.

In the context of this real harm to real companies, I respectfully ask the FDIC to elaborate on the nature of the allegedly offsetting "other forms of protections for counterparties" to which the FDIC (but not the Fed or the OCC) refers as justifying no need for the big banks to offer counterparties any "quid" for the massive rights change "quo".[9] The FDIC also should examine the increased paper work burden that the requirements of the Proposed Rule put on non-bank counterparties to GSIBs.

I provided comments in response to the Fed NOPR,[10] and copied my Congressman and both Senators. In sole response, I received the attached letter from Senator Feinstein, thanking me for "express[ing] my concerns about the low interest-rate policies of the Federal Reserve Board, also known as 'the Fed.'" I hope it is clear that my concerns are not about low-interest rate policies. Government officials create and exacerbate substantial, long-term systemic risk potentially far more dangerous than big bank solvency when they routinely ignore or patronize citizens. Therefore, I hope you will consider my comments, and the effects of your rulemaking on non-banks and individuals, such as the retirees depending on the pension plans that will be disadvantaged by these rules.

Yours truly,



Jeremy D. Weinstein

cc: Stephen Bannon

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[8] 81 Fed. Reg. 74338, col. 3.

[9] 81 Fed. Reg. 74339, col. 1.

[10] submitted August 5, 2016, available at http://www.federalreserve.gov/SECRS/2016/August/20160809/R-1538/R-1538_080516_130430_575674104050_1.pdf

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COMMITTEE ON RULES AND
ADMINISTRATION

United States Senate
WASHINGTON, DC 20510-0504
http://feinstein.senate.gov

September 28, 2016

Mr. Jeremy D. Weinstein
Law Offices of Jeremy D. Weinstein
1512 Bonanza St
Walnut Creek, California 94596

Dear Mr. Weinstein:

Thank you for contacting me to express your concerns about the effects of the low-interest rate policies of the Federal Reserve Board, also known as "the Fed." I appreciate hearing from you, and I welcome the opportunity to respond.

On December 16, 2015, citing strong domestic job growth and decreased unemployment rates, the Federal Reserve Board voted unanimously to increase the federal funds target interest rate from zero percent to 0.25 percent. As you know, after the economic crisis of 2008, the Federal Reserve Board purchased assets such as Treasuries and mortgage backed securities in an effort to stimulate the economy by lowering long-term interest rates, supporting mortgage markets, and promoting investment. The Federal Reserve Board viewed this action, also known as quantitative easing, as necessary to uphold its statutory mandate to promote maximum employment and support price stability. In recent Congressional testimony, Federal Reserve Chair Janet Yellen noted that the Fed would like to continue to gradually increase the interest rates to prevent creating shocks in the economy.

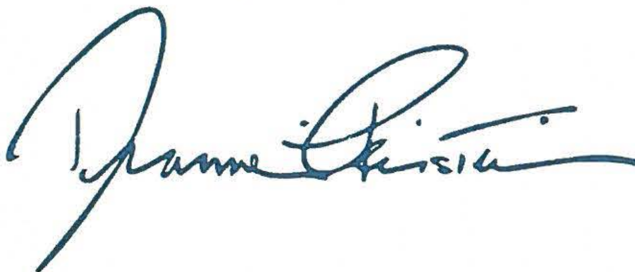
Going forward, Americans, including investors and home buyers, will receive increased interest on their deposits at the bank as a result of this action by the Federal Reserve. The Federal Reserve has maintained the low federal funds rate for much of the economic downturn in order to encourage banks to lend at low interest rates, which contributed to the recent historically low interest rates for mortgages.

I am not aware of any legislation before the Senate to prevent the Federal Reserve from increasing interest rates. However, I have made careful note of your

concerns and will keep them in mind should such legislation be considered in the Senate.

Once again, thank you for writing. If you have any additional questions or concerns, please do not hesitate to contact my Washington, D.C., office at (202) 224-3841, or visit my website at http://feinstein.senate.gov. Best regards.

Sincerely,



Dianne Feinstein
United States Senator

For information about my positions on issues of concern to California and the nation, please visit http://feinstein.senate.gov. You can also follow me on Facebook, Twitter and YouTube.

DF:ns