

Treasury Adopts Substantially Revised Final QFC Recordkeeping Rule

October 28, 2016

Earlier today, the Secretary of the Treasury (the “Secretary”), as chairperson of the Financial Stability Oversight Council (“FSOC”) adopted a final rule (“Final Rule”) implementing recordkeeping requirements for qualified financial contracts (“QFCs”) in connection with Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), or Orderly Liquidation Authority (“OLA”). The Final Rule requires certain financial institutions to maintain and be capable of providing to regulators, within 24 hours of request, specified records related to QFCs. The specified purpose of the Final Rule is to ensure that necessary information is available to assist the Federal Deposit Insurance Corporation (“FDIC”), as receiver, in resolving a financial institution that may be subject to OLA.

Although the general structure of the Final Rule is similar to the Proposed Rule, the Secretary softened the Final Rule in a number of key respects in response to comments, including by narrowing the scope of entities subject to the Final Rule and providing for a staggered and extended compliance schedule. These changes will reduce the burden of complying with the Final Rule, both for those entities directly subject to its requirements and their counterparties. Unfortunately, the Secretary did not address certain suggested changes on key issues that could have focused the Final Rule more narrowly on entities and products that would be more likely to be relevant to the FDIC’s decisions under OLA.

This alert memorandum highlights some key changes from the Secretary’s proposed rule issued on January 7, 2015 (the “Proposed Rule”).

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

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Scope of Records Entity

- Like the Proposed Rule, the Final Rule applies directly to certain “financial companies” organized under U.S. state or federal law (“Records Entities”) that are a party to a QFC.¹
- Like the Proposed Rule, the Final Rule applies to large financial groups, including those with financial companies subject to the Federal Reserve Board’s enhanced prudential standards and designated as Non-bank SIFIs or global systemically important bank holding companies (“G-SIBs”), as well as financial market utilities designated as systemically important.
 - For all other financial groups with \$50 billion or more in total consolidated assets, the Final Rule excludes from its requirements those that have, on a consolidated basis, total gross notional derivatives outstanding of less than \$250 billion and derivatives liabilities of less than \$3.5 billion.
- Like the Proposed Rule, the Final Rule would deem all affiliates in a corporate group that contains a single Records Entity to all be Records Entities.
 - Significantly, the Secretary accepted comments to include in the Records Entity definition only affiliates that are subject to consolidation for accounting purposes rather than those that meet the more complex “control” test under the Bank Holding Company Act.
 - The Final Rule also provides a *de minimis* exemption, as requested by commenters, for entities that are party to 50 or fewer open QFC positions. Such entities are only required to

maintain copies of the documents that govern QFC transactions.

- The Final Rule includes an exemption for “derivatives clearing organizations” registered with the Commodity Futures Trading Commission (“CFTC”) and “clearing agencies” registered with the Securities and Exchange Commission (“SEC”) that otherwise meet the definition of Records Entity from all recordkeeping requirements, so long as such entities (i) are in compliance with applicable CFTC or SEC recordkeeping requirements and (ii) are capable of, and not restricted from, transmitting to the FDIC electronically such records within 24 hours of a request.
- The Final Rule excludes insurance companies from the Records Entity definition. Like the Proposed Rule, the Final Rule also excludes insured depository institutions, which are already subject to similar, although less stringent, recordkeeping requirements promulgated by the FDIC.
- As requested by commenters, entities that are “linked to” the QFCs of their affiliates—that is, referenced in the QFCs of affiliates (e.g., as a “Specified Entity” in an ISDA Master Agreement)—but that are not themselves party to any QFCs are excluded from the definitions of Records Entity on the theory that the FDIC has the ability to enforce QFCs that are “linked to” an entity in receivership without taking any special actions. An entity that guarantees or supports the QFCs of an affiliate would still be a Records Entity.

Scope of Products

- The Secretary did not accept requests to exclude certain transaction types, such as cash and spot transactions and QFCs entered into with retail customers. The Final Rule thus requires Records Entities to maintain the required data for all QFCs to which it is a party.

¹ “Financial company” is defined by cross reference to 12 U.S.C. § 5381(a)(11), which defines the entities eligible for resolution under OLA, and includes bank holding companies, non-bank systemically important financial companies (“Non-bank SIFIs”), companies predominantly engaged in financial activities, and certain subsidiaries of the foregoing that are predominantly engaged in financial activities.

- In addition to the *de minimis* and clearing exemptions, the Final Rule retains the ability for Records Entities to apply for an exemption from particular requirements under the Final Rule. The Final Rule does not describe the format that a request for an exemption must take, but does identify certain factors that must be addressed. The Final Rule did not continue the distinction between “specific” and “general” exemptions contained in the Proposed Rule.

Information That Must be Maintained

- The Final Rule sets out four tables in appendices with required data fields that must be maintained, on a daily basis, based on previous end-of-day records and values, related to individual positions, netting sets, collateral and applicable documentation. The structure of the data tables generally matches that in the Proposed Rule, though certain fields have been eliminated and additional detail has been provided on data formats.
 - The Final Rule adds the requirement that Records Entities maintain and use “master data lookup tables” to report certain information that is common to different entities and transactions. The master data lookup tables are intended to reduce duplicative data entries and improve the functionality of the tables.
- The Final Rule eliminates certain data fields that commenters argued were overly burdensome to maintain, including fields related to the purpose of a QFC position, operational and business-level details relating to QFC positions, industry codes and documentation status.
- Although the Final Rule requires a Records Entity to maintain governing documentation for QFCs, it eliminates the requirement to keep such documents in a searchable format, which commenters noted would have significantly increased the burden and cost of complying with recordkeeping requirements.

- The Secretary also eliminated the requirement to maintain copies of information provided by the Records Entity to other regulators, swap data repositories or security-based swap data repositories.
- The Final Rule also replaces the requirement for a Records Entity to maintain full organizational charts of the corporate group of a QFC counterparty with the more narrow requirement to maintain records on the identity of the immediate and ultimate parent entities of each counterparty.

Compliance

- The Final Rule’s effective date is 60 days after publication in the Federal Register, and provides a tiered approach for compliance, depending on a Records Entity’s size.
 - All Records Entities must comply with the requirement to designate a contact person 90 days after the effective date.
 - The other requirements under the Final Rule must be complied with within:
 - 540 days after the effective date for a Records Entity with at least \$1 trillion in total consolidated assets or a Records Entity in the same corporate group;
 - Two years after the effective date for a Records Entity with at least \$500 billion but less than \$1 trillion in total consolidated assets or a Records Entity in the same corporate group;
 - Three years after the effective date for a Records Entity with at least \$250 billion but less than \$500 billion in total consolidated assets or a Records Entity in the same corporate group); and
 - Four years after the effective date for all other Records Entities.

More Information

- The Final Rule is due to be published in the Federal Register on October 31, 2016. The pre-

publication draft of the Final Rule can be found at
<https://s3.amazonaws.com/public-inspection.federalregister.gov/2016-25329.pdf>.

- Our Alert Memorandum on the Proposed Rule can be found at
<https://www.clearygottlieb.com/~media/cgsh/files/news-pdfs/new-qfc-recordkeeping-rule-proposed-by-treasury-secretary-as-chairman-of-fsoc.pdf>.

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