iib

INSTITUTE OF INTERNATIONAL BANKERS

299 Park Avenue, 17th Floor
New York, N.Y. 10171
Direct: (646) 213-1149
Facsimile: (212) 421-1119
Main: (212) 421-1611
www.iib.org

RICHARD W. COFFMAN
General Counsel
E-mail: rcoffman@iib.org

Submitted via www.regulations.gov

April 7, 2015

Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Attn: Qualified Financial Contracts Recordkeeping Comments

Ladies and Gentlemen:

The Institute of International Bankers ("IIB") appreciates the opportunity to comment on the proposed rulemaking to implement the qualified financial contracts ("QFCs") recordkeeping requirements under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("DFA").[1] The IIB represents internationally-headquartered banking and financial institutions from over 35 countries around the world doing business in the U.S.

A significant number of IIB members have U.S. subsidiaries that may constitute a "Financial Company" for purposes of the Proposal. Certain of these subsidiaries have total consolidated assets equal to or greater than $50 billion (the "$50 Billion Threshold"). More specifically, the operations of these U.S. subsidiaries consist of those conducted by (i) foreign banking organizations ("FBOs") that will be required to establish a U.S. intermediate holding company ("IHC") as the top-tier U.S. holding company for those operations pursuant to the final rules issued by the Board of Governors of the Federal Reserve System (the "Federal Reserve Board") under DFA Section 165,[2] and (ii) foreign nonbank financial companies, none of which themselves, and none of whose U.S. operations separately, have been designated as "systemically important to the United States" by the Financial Stability Oversight Council ("FSOC") pursuant to DFA Section 113[3] (such U.S. subsidiaries, "U.S. Non-SIFIs"). Because the Proposal contemplates application to *any* Financial Company that, among other things, meets

[1] 80 Fed. Reg. 966 (Jan. 7, 2015) (the "Proposal"). Unless otherwise indicated by the context, capitalized terms in this letter have the meanings ascribed in the Proposal.

[2] See 79 Fed. Reg. 17240 (March 27, 2014). The IHC requirement is codified at 12 C.F.R. 252.153.

[3] For purposes of this letter, "systemically important to the United States" means a determination by FSOC that results in subjecting a nonbank financial company (whether U.S. or non-U.S.) to supervision by the Federal Reserve Board and, in particular, the enhanced prudential standards prescribed under DFA Section 165.

the $50 Billion Threshold, an IHC and each of its Financial Company subsidiaries are potentially within scope of the Proposal by virtue of subparagraphs (1)(iii)(C) and (D) of the definition of "records entity" set forth in proposed Section 148.2, and likewise with respect to any U.S. Non-SIFI that meets the $50 Billion Threshold.

Our comments focus principally on the proposed $50 Billion Threshold. For the reasons discussed below, we believe that the $50 Billion Threshold satisfies neither the specific requirements of Title II nor its underlying policies, and we recommend that in its place a more tailored approach that looks beyond asset size be developed and published for further comment. In our view, an asset threshold, *if any*, *might* be utilized solely for the purpose of identifying those Record Entities that *might* be within the scope of the QFC recordkeeping requirement (and thereby also identifying those that definitively are not because they are below the threshold), with the final determination made pursuant to a more tailored approach, but under no circumstances should a single-factor asset threshold be used as a means of determining those that definitively are included. In addition to questions regarding the $50 Billion Asset Threshold, we address timing considerations that are specific to IHCs. With regard to the other aspects of the Proposal we agree with the views expressed in the letter submitted jointly by The Clearing House Association L.L.C., the Securities Industry and Financial Markets Association, the American Bankers Association, The Financial Services Roundtable and the International Swaps and Derivatives Association, Inc..

I. The $50 Billion Threshold Satisfies Neither the Specific Requirements of Title II Nor Its Underlying Policies; A Different Approach Should Be Taken

As discussed in the Proposal, QFC recordkeeping is integral to the effective exercise of the FDIC's receivership powers in an orderly liquidation authority ("OLA") proceeding. Those powers are directed at the resolution of systemically important nondepository financial institutions and is intended as an extraordinary measure whose application is predicated on, among other requirements, a determination by the Treasury Secretary, in consultation with the President and upon the written recommendation of the Federal Reserve Board and the Federal Deposit Insurance Corporation (the "FDIC"), that "the failure of [a Financial Company] and its resolution under otherwise applicable Federal or State law would have serious adverse effects on financial stability in the United States."[4] As described in the Senate Banking Committee's report on an earlier version of DFA:

> There is a strong presumption that the bankruptcy process will continue to be used to close and unwind failing financial companies, including large, complex ones. The orderly liquidation authority could be used if and only if the failure of the financial company would threaten U.S. financial stability. Therefore the threshold for triggering the orderly liquidation authority is very high.[5]

[4] DFA Section 203(b)(2); 12 U.S.C. 5383(b)(2).

[5] S. Rep. No. 111-176 (April 30, 2010) at 4.

Consistent with this statutory purpose, the threshold for triggering QFC recordkeeping requirements likewise should be very high and directed at identifying those Financial Companies whose failure and resolution by means other than an OLA proceeding would have "serious adverse effects" on U.S. financial stability. As described in the Proposal, the proposed definition of "records entity" is intended to capture "only those financial companies with QFC positions for which the FDIC is most likely to be appointed as receiver."[6] This approach in general accords with Congressional intent, but we respectfully submit that the proposed $50 Billion Threshold does not.

A. The Proposed $50 Billion Threshold Does Not Conform to the Specific Requirements of Title II and Is Over-Inclusive and Not Reliably Predictive of the Type of Financial Companies That Are Intended To Be Within Its Scope

The Proposal implements the requirements of DFA Section 210(c)(8)(H), subparagraph (iv) of which requires that the QFC recordkeeping regulations "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." Notably, the other two types of Records Entities identified in the Proposal – nonbank financial companies designated under DFA Section 113 ("U.S. SIFIs") and financial market utilities designated under DFA Title VIII ("Designated FMUs") (subparagraphs (1)(iii)(A) and (B) of the definition, respectively) – acquire their status as either a U.S. SIFI or Designated FMU as the result of a statutorily prescribed multi-factor analysis, and there is no suggestion that asset size should be given any greater (or lesser) weight than any other factor.[7] We respectfully submit that a similar, multi-factor approach is called for with respect to determining other types of Financial Companies that might be Records Entities. As discussed below, we do not believe it would be appropriate to base such determinations solely on an asset threshold.

The Proposal characterizes the $50 Billion Threshold as "a useful means for identifying those entities that are of a sufficient size that they could potentially be considered for orderly liquidation under Title II."[8] As incorporated into the Proposal, however, the $50 Billion Threshold would be *the exclusive distinguishing means* and not merely *a useful means* for identifying such entities.[9] In addition, by focusing on identifying entities that "could potentially"

[6] 80 Fed. Reg. at 972.

[7] In the case of U.S. SIFIs, DFA Section 113 prescribes 11 factors that must be considered, and in the case of Designated FMUs DFA Section 804 prescribes 5 factors.

[8] See 80 Fed. Reg. at 972.

[9] The other two proposed criteria for designation as a Records Entity – the entity is not an exempt entity and it is a party to an open QFC or guarantees, supports or is linked to an open QFC – are common to all Records Entities regardless of their asset size or other basis for inclusion.

be considered for OLA, the Proposal sets the standard for the $50 Billion Threshold on a basis that is inconsistent with the broader intention to identify only those institutions which "most likely" would be subject to an OLA proceeding.

As incorporated into the Proposal, the $50 Billion Threshold establishes the "outer boundary" for identifying the Financial Companies comprising a corporate group that would be Records Entities and thus subject to the QFC recordkeeping requirement pursuant to subparagraphs (1)(iii)(C) or (D) of proposed Section 148.2. Because the threshold is based on a Financial Company's total consolidated assets, a subsidiary of a Financial Company would not be a Records Entity unless the Financial Company itself has total consolidated assets equal to or greater than $50 billion. As applied to bank holding companies ("BHCs"), for example, under the Proposal, a parent BHC may itself be a Records Entity if, among other things, it meets the $50 Billion Threshold (subparagraph (1)(iii)(C) of the proposed definition) and, whether or not such a BHC itself is a Records Entity, any Financial Company subsidiary of the BHC will be a Records Entity regardless of its asset size if it is not an exempt entity and is a party to an open QFC or guarantees, supports or is linked to an open QFC of an affiliate (subparagraph (1)(iii)(D) of the proposed definition). As there is no threshold applied to QFC exposures that trigger the recordkeeping requirement, the scope of its application throughout a U.S. BHC corporate group is potentially quite broad. The same is the case with respect to U.S. Non-SIFIs, and, as discussed below in Part II, the QFC recordkeeping requirement also would apply to each IHC and each of its Financial Company subsidiaries that have qualifying QFC transactions.

Indeed, and again focusing on BHCs for illustrative purposes, the $50 Billion Threshold potentially brings within scope of the QFC recordkeeping requirement corporate groups whose non-IDI operations (*i.e.*, their Financial Company subsidiaries) account for a very limited portion of the group's overall activities. For example, the $50 Billion Threshold would potentially bring within scope of the Proposal 33 BHC corporate groups, 9 of which are owned by FBOs.[10] The total consolidated assets of these BHCs range in size from approximately $55 billion to more than $2.5 trillion (for those owned by FBOs the upper range is approximately $290 billion). For the preponderance of 25 of the BHCs that are potentially brought within scope of the QFC recordkeeping requirement by virtue of the $50 Billion Threshold (*i.e.*, excluding the 8 BHCs that have been designated as global systemically important banks ("G-SIBs") by the Financial Stability Board ("FSB")), the operations of their insured bank subsidiaries account for the substantial majority of their total consolidated assets – for 16 of these BHCs their insured bank subsidiaries account for more than 95% of their total consolidated assets and only 2 have insured bank subsidiaries that account for less than 65% of their total consolidated assets.[11] As these

[10] Based on data as of December 31, 2014 as reported on the National Information Center (NIC") web site (http://www.ffiec.gov/nicpubweb/nicweb/HCSGreaterThan10B.aspx).

[11] These percentages are derived from total consolidated assets of the insured bank subsidiaries as reported in their December 31, 2014 Call Reports as compared to the parent BHC information for the same date reported on the NIC web site.

insured bank subsidiaries operate outside the scope of the Proposal and are themselves subject to a separate QFC recordkeeping required (albeit one triggered only when they are in a "troubled" condition), one reasonably might question the value of the $50 Billion Threshold as a means for identifying those Financial Companies "most likely" to become subject to an OLA proceeding.

Accordingly, we believe that the $50 Billion Threshold will result in application of the Title II QFC recordkeeping requirements to a significant number of Financial Companies whose prospects of resolution under Title II are remote at best. In general, and in particular during a period such as the present in which large financial institutions are confronted with having to come into compliance with a cascade of significant and far-reaching DFA and other financial-stability-related requirements, the guiding impetus should be to regulate in a manner that more precisely identifies those entities intended to be covered by the policies underlying the requirements. Such an approach better serves the interests of both the regulatory authorities and those subject to their regulation. This is not a scientific process, and allowances must be made for the considerable margin of error that is inherent to such undertakings, but we respectfully submit that in the case of Title II QFC recordkeeping requirements the proposed $50 Billion Threshold falls far short of this goal.

B. Reference To the $50 Billion Threshold in DFA Section 165 Provides, At Best, Limited Insight for Purposes of DFA Title II

The Proposal refers to DFA Section 165 in support of the $50 Billion Threshold, stating that it serves "similar purposes" under DFA but without explaining the nature or extent of the similarity.[12] Section 165 directs the Federal Reserve Board to establish capital, liquidity, risk management and other enhanced prudential standards (collectively, "EPS") in order to "prevent or mitigate risk to the financial stability of the United States that could arise from the material financial distress or failure, or ongoing activities, of large, interconnected financial institutions" and for this purpose designates a $50 billion total consolidated asset threshold as the basis for determining the institutions that fall within the scope of Section 165.[13] Certainly, it is intended that a BHC that is subject to Section 165 EPS would, by virtue of its compliance with the EPS, avoid being "in default or in danger of default" within the contemplation of Title II, and in this regard Section 165 and Title II work in tandem to address the "too-big-to-fail" problem.

It is not necessarily the case, however, that the failure of a BHC that is subject to Section 165 EPS would have the type of "serious adverse effects" on U.S. financial stability that would trigger an OLA proceeding under Title II, and in this more telling sense a $50 billion asset threshold has little probative value for purposes of Title II. Notably, the $50 billion threshold in Section 165 was adopted in order to avoid singling out any particular institution as one that is

[12] See 80 Fed. Reg. at 972.

[13] 12 U.S.C. 5365(a)(1).

too-big-to-fail.[14] Moreover, Section 165 itself recognizes that a $50 billion asset threshold by itself is of limited value for purposes of addressing DFA's financial stability concerns by authorizing the Federal Reserve Board in establishing the EPS to "differentiate among companies on an individual basis or by category, taking into consideration their capital structure, riskiness, complexity financial activities (including the financial activities of their subsidiaries), size and any other risk-related factors that the [Federal Reserve Board] deems appropriate."[15] It is precisely this type of "tailored" approach that is missing from the application of the $50 Billion Threshold in the context of the Proposal.

Even within the framework of Section 165 itself, significant policy questions recently have been raised, including in Congress, regarding the utility of a $50 billion asset threshold and whether the purposes of Section 165 would be more effectively achieved by means of a more tailored approach. For example, legislation was introduced in the last Congress and has been reintroduced in the current Congress to replace the Section 165 $50 billion asset threshold as the "trigger" for EPS in favor of a methodology that defines the "gateway" to Section 165 EPS by reference to the multi-factor, "indicator-based approach" adopted by the FSB to identify G-SIBs.[16] Applying this approach to the "systemic importance" information reported by BHCs to the Federal Reserve Board on Form FR Y-15, a recent study sponsored by the Office of Financial Research provided a compelling illustration of the indiscriminate nature of a single-factor, asset-based threshold as the means to identify systemically significant BHCs.[17]

C. The Approach Taken by FSOC Regarding Designations under DFA Section 113 and Title VIII Underscores the Congressional Intent That Entities Subject To Title II Be Identified by Consideration of Multiple Factors

In further support of the $50 Billion Threshold, the Proposal refers to FSOC's application of a $50 billion threshold as "an initial evaluation tool" in connection with its determinations under DFA Section 113.[18] However, as discussed above, those determinations require a much more probing process, one which entails consideration of the multiple factors specified in Section 113. FSOC likewise is required under DFA Section 804 to apply a multi-factor approach

---

[14] See S. Rep. No. 111-176 at 2 (the $50 billion threshold was adopted in order to "avoid identification of any bank holding company as systemically significant").

[15] 12 U.S.C. 5365(a)(2)(A).

[16] See H.R. 4060 (113th Congress) and H.R. 1309 (114th Congress).

[17] "Systemic Importance Indicators for 33 U.S. Bank Holding Companies: An Overview of Recent Data," by Meraj Allahrakha, Paul Glasserman, and H. Peyton Young (February 12, 2015).

[18] See 80 Fed. Reg. at 972.

in designating financial market utilities that are, or are likely to become, systemically important.[19]

Consequently, the Proposal posits a framework in which two of the three entities potentially within scope of the definition of "records entity" –U.S. SIFIs and Designated FMUs (respectively, subparagraphs (1)(iii)(A) and (B) of the proposed definition) – come within the scope of the QFC recordkeeping requirement by virtue of a process requiring the application of multiple factors, whereas the third type (those entities covered by subparagraph (1)(iii)(C) of the proposed definition) are treated as coming within the scope of the QFC recordkeeping requirement solely by virtue of their asset size. There is no basis in the statute for such an incongruous result. Indeed, it is contrary to the authorizing provisions of DFA Section 210(c)(8)(H)(iv), and the policy considerations discussed above further counsel strongly against its adoption. In addition, with respect to U.S. Non-SIFIs we believe it would be more consistent with the Dodd-Frank Act's overall "too-big-to-fail" architecture and would better serve the purposes of Title II in particular, to subject them to the QFC recordkeeping requirement only if and when they would be designated as U.S. SIFIs.

D. The Need To Adopt A Different Approach

In light of the foregoing considerations, we recommend that a more tailored approach be developed and published for further comment in place of the proposed $50 Billion Threshold. For example, such an approach might focus on a Financial Company's activities and incorporate something like the multi-factor approach applied for purposes of measuring the relative systemic importance of internationally active financial institutions, such as the FSB's indicator-based approach. Other approaches also might be appropriate.

In our view, an asset threshold, *if any*, *might* be utilized solely for the purpose of identifying those Record Entities that *might* be within the scope of the QFC recordkeeping requirement (and thereby also identifying those that definitively are not because they are below the threshold), with the final determination made pursuant to a more tailored approach, but under no circumstances should a single-factor asset threshold be used as a means to determine those that definitively are included. Were further consideration to be given to applying an asset threshold in this manner, we believe a significantly higher threshold would be appropriate. Understanding the difficulties inherent to prescribing any asset threshold, we believe there would be merit to considering $250 billion as an appropriate point of demarcation for these purposes. This approach would look analogously to a key criterion for application of the advanced approaches to risk-based capital under the U.S. Basel III rules as a rough proxy for identifying a more appropriately limited number of Financial Companies to which a more tailored approach to designation as a Records Entity would apply. Here too, other approaches also might be considered.

[19] See 12 U.S.C. 5463(a)(2).

II. IHC-Related Implementation Considerations

Under the rules implementing DFA Section 165 each FBO whose U.S. subsidiaries have in the aggregate $50 billion or more of assets is required to establish an IHC as the top-tier U.S. holding company for virtually the entirety of its U.S. subsidiaries' operations. Thus, each IHC will have $50 billion or greater of total consolidated assets and consequently will be the FBO's top-tier Financial Company – *i.e.*, the top-tier Financial Company identified by subparagraph (1)(iii)(C) of the proposed definition of Records Entity and the ultimate point of reference for determining the FBO's U.S. Corporate Group.

Under the Section 165 final rules, IHCs must be established by July 1, 2016, which date also marks the effective date for the other Section 165 EPS applicable to IHCs. In many instances, the establishment of an IHC will result in significant restructuring of an FBO's U.S. Financial Company subsidiaries, a process that entails substantial systems development and IT resources. Similarly, for all FBOs subject to the 165 EPS compliance with the other EPS requirements poses significant systems and IT challenges.

If adopted as specified in the Proposal, we believe there is a realistic prospect that the effective date of final QFC recordkeeping requirements would occur in close proximity to the Section 165 EPS effective date, thereby compounding the very significant compliance challenges confronted by FBOs. While recognizing the need for timely implementation of the QFC recordkeeping requirement, we respectfully request that the foregoing considerations be taken in to account in prescribing the effective date for IHCs and their Records Entity subsidiaries.

*   *   *

We appreciate the Department's consideration of our comments on the Proposal. Please contact the undersigned if we can be of further assistance.

Sincerely,

Richard Coffman
General Counsel