



4810-25-P

DEPARTMENT OF THE TREASURY

31 CFR Part 148

Qualified Financial Contracts Recordkeeping Related to Orderly Liquidation Authority

AGENCY: Department of the Treasury.

ACTION: Notification of exemption.

SUMMARY: The Secretary of the Treasury (the “Secretary”), as Chairperson of the Financial Stability Oversight Council, after consultation with the Federal Deposit Insurance Corporation (the “FDIC”), is issuing a determination regarding a request for an exemption from certain requirements of the rule implementing the qualified financial contracts (“QFC”) recordkeeping requirements of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act” or the “Act”).

DATES: The exemption granted is effective [INSERT DATE OF PUBLICATION IN FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Peter Phelan, Deputy Assistant Secretary for Capital Markets, (202) 622-1746; Daniel Harty, Director, Office of Capital Markets, (202) 622-0509; Peter Nickoloff, Financial Economist, Office of Capital Markets, (202) 622-1692; or Stephen T. Milligan, Deputy Assistant General Counsel (Banking & Finance), (202) 622-4051.

SUPPLEMENTARY INFORMATION:

Background

On October 31, 2016, the Secretary published a final rule pursuant to section 210(c)(8)(H) of the Dodd-Frank Act requiring certain financial companies to maintain records with respect to their QFC positions, and the associated counterparties, legal documentation, and collateral, that would assist the

FDIC as receiver in exercising its rights and fulfilling its obligations under Title II of the Act (the “rule”).¹

Section 148.3(c)(3) of the rule provides that one or more records entities may request an exemption from one or more of the requirements of the rule by writing to the Department of the Treasury (“Treasury”), the FDIC, and the applicable primary financial regulatory agency or agencies, if any.² Among other things, the written request for an exemption must provide details as to the size, risk, complexity, leverage, frequency and dollar amount of QFCs, and interconnectedness to the financial system of each records entity, to the extent appropriate, and any other relevant factors and specify the reasons why granting the exemption will not impair or impede the FDIC’s ability to exercise its rights or fulfill its statutory obligations under sections 210(c)(8), (9), and (10) of the Act.

The rule provides that, upon receipt of a written recommendation from the FDIC, prepared in consultation with the primary financial regulatory agency or agencies for the applicable records entity or entities, the Secretary may grant, in whole or in part, a conditional or unconditional exemption from compliance with one or more of the requirements of the rule to one or more records entities.³ The rule further provides that, in determining whether to grant an exemption, the Secretary will consider any factors deemed appropriate by the Secretary, including whether application of one or more requirements of the rule is not necessary to achieve the purpose of the rule.⁴

Request for Exemption

On August 14, 2018, Wells Fargo & Company submitted, on behalf of its subsidiaries Wells Fargo Clearing Services, LLC (“WFCS”) and Wells Fargo Advisors Financial Network, LLC (“FiNet”), a request for an exemption from the rule to Treasury, the FDIC, and, as the primary financial regulatory agencies for WFCS and FiNet, the Securities and Exchange Commission (“SEC”) and the Commodity

¹ See 31 CFR part 148; 81 FR 75624 (Oct. 31, 2016).

² See 31 CFR 148.3(c)(3).

³ See 31 CFR 148.3(c)(4)(i).

⁴ See 31 CFR 148.3(c)(4)(ii).

Futures Trading Commission (“CFTC”), which Wells Fargo supplemented with information provided on March 5, 2019, in response to questions from the FDIC, and on June 26, 2019, and August 30, 2019, in response to questions from Treasury.⁵ Wells Fargo requested an exemption for WFCS and FiNet from compliance with sections 148.3 and 148.4 of the rule for WFCS’ and FiNet’s current and future QFC portfolio consisting of QFCs entered into by WFCS or FiNet with or on behalf of clients, referred to herein as “client activity QFCs,” and QFCs entered into by WFCS or FiNet in connection with or in support of client activity QFCs. As an alternative, Wells Fargo requested an exemption for QFCs, and all credit enhancements related to such QFCs, entered into by WFCS and FiNet with, on behalf of, or for the benefit of clients for which any of their transactions would be defined as being with a “customer” under the Securities Investor Protection Act, as amended (“SIPA”),⁶ and transactions entered into in order to facilitate or complete transactions with such a customer. Wells Fargo also asked for an exemption from certain guarantees WFCS enters into for the benefit of a futures commission merchant in connection with WFCS’ introduction of customer trades to such futures commission merchant.

In support of its request, Wells Fargo submitted information detailing the types, volume, and complexity of client activity and related QFCs to which WFCS and FiNet are a party. Wells Fargo stated that WFCS and FiNet’s primary business activities comprise retail securities and commodities brokerage, investment advisory services, asset management, estate planning, retirement planning, and portfolio analysis and monitoring services and that WFCS, as a self-clearing broker-dealer, also carries the customer accounts of and provides clearing services on a fully disclosed basis to FiNet and various unaffiliated broker-dealers.

Wells Fargo represented that the client activity QFCs of WFCS and FiNet consist of retail cash and margin securities transactions, retail brokerage agreements, margin agreements, non-purpose lending

⁵ Each of WFCS and FiNet is registered with the SEC as a broker-dealer under the Securities Exchange Act of 1934 and as an investment adviser under the Investment Advisers Act of 1940 and is registered with the CFTC as an introducing broker under the Commodity Exchange Act.

⁶ 15 U.S.C. 78aaa *et seq.*

agreements, and a limited number of mortgage-backed securities forward transactions. As to leverage, Wells Fargo represented that retail margin and securities-based lending is done in accordance with initial and maintenance margin requirements. As to WFCS' and FiNet's interconnectedness to the rest of the financial system, Wells Fargo noted that the activities of WFCS and FiNet are limited to certain products and types of clients and, moreover, that their operations, funding, and liquidity are independent from the separate Wells Fargo broker-dealer subsidiary, Wells Fargo Securities, LLC, that serves institutional clients.⁷ Furthermore, neither WFCS nor FiNet is registered with the CFTC as a swap dealer or a futures commission merchant; the lack of these registrations restricts their ability to transact in certain types of QFCs, including OTC derivatives. Finally, Wells Fargo asserted that the extent and nature of WFCS' and FiNet's businesses with respect to client activity QFCs, as described above, support its view that granting the requested exemption would not impair or impede the FDIC's ability to exercise its rights under section 210(c)(8), (9), and (10) of the Act.

Treasury received a final recommendation from the FDIC, prepared in consultation with the SEC and CFTC, regarding the exemption request, and, after consultation with the FDIC, Treasury is making the determination discussed below.⁸

Evaluation of the Exemption Request

The FDIC has the authority under Title II to transfer the assets and liabilities of any financial company for which it has been appointed receiver under Title II (a "covered financial company") to either a bridge financial company established by the FDIC or to another financial institution.⁹ The FDIC

⁷ Wells Fargo Securities, LLC was not included within the exemption request.

⁸ All exemptions to the recordkeeping requirements of the rule are made at the discretion of the Secretary, and the Secretary's discretion is not limited by any recommendations received from other agencies. Exemptions from the FDIC's recordkeeping rules under 12 CFR part 371 (Recordkeeping Requirements for Qualified Financial Contracts) are at the discretion of the board of directors of the FDIC and entail a separate request and process and different policy considerations. References to the FDIC in this document should not be taken to imply that the FDIC has determined that similar exemptions under part 371 would be available.

⁹ See, e.g., 12 U.S.C. 5390(a)(1)(G)(i).

generally has broad discretion under Title II as to which QFCs it transfers to the bridge financial company or to another financial institution subject to certain limitations, including the “all or none rule.”¹⁰

Separately, if the FDIC is appointed receiver of a covered financial company that is a broker-dealer and the FDIC establishes a bridge financial company to assist with the resolution of that broker-dealer, the FDIC must, pursuant to section 210(a)(1)(O) of the Act,¹¹ unless certain conditions are met, transfer to the bridge financial company all “customer accounts” of the broker-dealer and all associated “customer name securities” and “customer property,” as those terms are defined by reference to SIPA.¹² There are two conditions under which the FDIC is permitted not to transfer all such customer accounts, customer name securities, and customer property to the bridge financial company: (i) if the FDIC determines, after consulting with the Securities Investor Protection Corporation and the SEC, that such customer accounts, customer securities, and customer property are likely to be promptly transferred to another registered broker-dealer or (ii) if the transfer would materially interfere with the ability of the FDIC to avoid or mitigate serious adverse effects on financial stability or economic conditions in the United States.¹³

Not all of a broker-dealer’s clients qualify as “customers” under SIPA. For instance, a client of a broker-dealer that engaged in an FX spot transaction or an FX forward would not be a “customer” under SIPA with respect to those transactions.¹⁴ Even if such a client were otherwise to have a customer relationship with the broker-dealer under SIPA, such as by virtue of having a brokerage account for the trading of securities, then, although that customer account would be required to be transferred pursuant to

¹⁰ For further discussion of the FDIC’s authorities and responsibilities addressed in this section of the document, see the notice of exemption issued with respect to Morgan Stanley Smith Barney, 83 FR 66618, 66619-20 (Dec. 27, 2018).

¹¹ 12 U.S.C. 5390(a)(1)(O).

¹² See 15 U.S.C. 78aaa *et seq.* See also section 201(a)(10) of the Dodd-Frank Act (12 U.S.C. 5381(a)(10)) (providing that the terms “customer,” “customer name securities,” and “customer property” as used in Title II shall have the same meaning as provided in SIPA).

¹³ See 12 U.S.C. 5390(a)(1)(O)(i)(I)–(II).

¹⁴ See 15 U.S.C. 78lll(2) (defining “customer” as . . . “any person (including any person with whom the debtor deals as principal or agent) who has a claim on account of *securities* received, acquired, or held . . .” (emphasis added); *id.* section 78lll(14) (defining “security” to exclude currency and rights to buy and sell currency other than FX options and other derivatives executed on a national securities exchange).

section 210(a)(1)(O) of the Act, the FX spot transaction or forward would not be required to be transferred pursuant to section 210(a)(1)(O) of the Act. However, pursuant to the all or none rule, if the FDIC were to transfer a customer account that held QFCs between the broker-dealer and the client, the FDIC would be required to transfer (i) all QFCs between the broker-dealer and the client and, if the client is a non-natural person, (ii) all QFCs between the broker-dealer and any affiliates of such client.

Determination of Exemption

Given the above-discussed restrictions on the FDIC's discretion as to whether or not to transfer QFCs from a broker-dealer, the limited nature of WFCS and FiNet's businesses, and the limited types of QFCs entered into by WFCS and FiNet with their clients, Treasury has determined to exempt WFCS and FiNet from the recordkeeping requirements of the rule with respect to any QFCs with clients that are their respective customers under SIPA with respect to any transactions or accounts such customers have with WFCS and FiNet, respectively, subject to the conditions stipulated below.¹⁵ Treasury does not expect that granting this exemption will unduly interfere with the FDIC's ability to avoid or mitigate serious adverse effects on financial stability or economic conditions in the United States. In the case of each of WFCS and FiNet, the size, risk, complexity, and leverage of its QFCs with its customers do not present a high likelihood that the financial stability exception to the transfer requirement of section 210(a)(1)(O) of the Act would be met. If the financial stability exception is not met, the FDIC would likely either transfer, pursuant to section 210(a)(1)(O), all of a broker-dealer's customer accounts, customer name securities, and customer property included in such customer accounts and any other QFCs with such customer to the bridge financial company or transfer all such accounts, securities, and property to another broker-dealer. In either case, the FDIC would not need the detailed records required by the rule with respect to QFCs to accomplish the transfer. Likewise, Treasury has determined to exempt any guarantees of such QFCs by a third party if the guarantor is an affiliate of the customer, is itself a customer of WFCS or FiNet, as

¹⁵ As used in the remainder of this notification of exemption, the term "customer" means a person who is a customer as defined in SIPA with respect to any transaction or account it has with WFCS or FiNet.

applicable, or does not have any other QFCs with WFCS or FiNet, as applicable. In addition, Treasury has determined to exempt WFCS from the recordkeeping requirements of the rule with respect to any QFC entered into by WFCS with a clearing organization for the purpose of facilitating the clearance or settlement of any QFC subject to the exemption discussed above. As used in the exemption, the term “clearing organization” includes, among other things, clearing agencies registered with the SEC and derivatives clearing organizations registered with the CFTC.¹⁶

Treasury has determined not to exempt (i) QFCs with clients that are not customers under SIPA with respect to any transactions or accounts they have with WFCS and FiNet or (ii) WFCS’s or FiNet’s QFCs with third parties that are not customers, such as transactions with other broker-dealers entered into to fulfill obligations to customers or to hedge risk, other than the guarantees and the QFCs with clearing organizations discussed above. The exemption would not include any guarantees WFCS may enter into for the benefit of a futures commission merchant in connection with WFCS’ introduction of customer trades to such futures commission merchant. Because the FDIC would retain discretion as to whether to transfer or retain QFCs with clients that are not customers under SIPA, and in consideration of the size of the QFCs with non-customer third parties and the risks they impose, the FDIC would need the detailed records required by the rule to make a transfer determination with respect to such transactions of WFCS and FiNet. To the extent the transactions excluded from this exemption qualify for the exemptions previously granted by Treasury with respect to cash market transactions and overnight transactions, WFCS or FiNet would only be required to maintain limited records with respect to such transactions.¹⁷

Conditions of the Exemption

The exemption granted below is based on the factual representations made by Wells Fargo on behalf of WFCS and FiNet to Treasury, the FDIC, the SEC, and the CFTC in its submissions. Treasury reserves the right to request an updated submission from WFCS and FiNet as to their business, and to

¹⁶ The exemption cross-references the definition from section 402 of the Federal Deposit Insurance Corporation Improvement Act of 1991, 12 U.S.C. 4402.

¹⁷ See 83 FR 65509 (Dec. 21, 2018).

rescind or modify the exemption, at any time. Further, Treasury intends to reassess the exemption in five years. At that time, Treasury, in consultation with the FDIC and the primary financial regulatory agencies, would evaluate any material changes in the nature of WFCS' and FiNet's businesses as well as any relevant changes to market structure or applicable law or other relevant factors that might affect the reasons for granting the exemptions. Treasury expects that it would provide notice to WFCS and FiNet prior to any modification or rescission of the exemption and that, in the event of a rescission or modification, Treasury would grant a limited period of time in which to come into compliance with the applicable recordkeeping requirements of the rule.

TERMS AND CONDITIONS OF THE EXEMPTION

Each of WFCS and FiNet (each a "records entity") is hereby granted an exemption from the requirements of 31 CFR 148.3 and 148.4 for the following: (i) any QFC entered into by the records entity with or on behalf of any customer of the records entity that is booked and carried in accounts at the records entity maintained for the benefit of such customer and (ii) any guarantee of such an exempt QFC if the guarantor (x) is an affiliate of the customer whose obligations are guaranteed, (y) is itself a customer of the records entity, or (z) does not have any other QFCs with the records entity. In addition, WFCS is hereby granted an exemption from the requirements of 31 CFR 148.3 and 148.4 for QFCs entered into by WFCS with a clearing organization in order to facilitate the clearance or settlement of any QFC referenced in clause (i) of the preceding sentence. For purposes of the exemption, "customer" means a person who is a customer as defined in 15 U.S.C. 7811(2) with respect to any transactions or accounts it has with the records entity, and "clearing organization" has the meaning provided in 12 U.S.C. 4402.

The exemption is subject to modification or revocation at any time the Secretary determines that such action is necessary or appropriate in order to assist the FDIC as receiver for a covered financial company in being able to exercise its rights and fulfill its obligations under sections 210(c)(8), (9), or (10) of the Act. The exemption extends only to WFCS and FiNet and to no other entities.

Dated: December 13, 2019.

Peter Phelan
Deputy Assistant Secretary for Capital Markets
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