ICMA FAQs on the U.S. QFC Stay Rules

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Introduction

These ICMA FAQs supplement and should be read in conjunction with the ICMA note on the U.S. QFC Stay Rules (the "**QFC Stay Rules**") dated 20 December 2018, available on the ICMA website here (the "**ICMA note**"), which sets out a summary of the QFC Stay Rules' effects on capital markets documentation for vanilla, non-structured debt securities in primary markets outside the United States. This may include contracts governed by the laws of the United States (e.g. New York law) as well as any other laws (e.g. English law). Defined terms used in the ICMA note have the same meaning in these FAQs.

These ICMA FAQs reflect questions on the QFC Stay Rules received by ICMA staff to date. They will be kept under review and updated as appropriate.

The ICMA note and these FAQs focus on how to address the QFC Stay Rules' requirements where a *manager* or *dealer* is a "Covered Entity"[1]. The considerations may be different in respect of any *issuer* that is a Covered Entity.

The ICMA note and these FAQs also do not address how QFCs entered into after 1 January 2019 might affect in-scope QFCs entered into between the same parties or their affiliates prior to 1 January 2019.

FAQs

Q.1 Which banks are primarily affected by the rules in the context of underwriting vanilla, non-structured debt securities outside the United States?

Only "Covered Entities" are subject to the QFC Stay Rules. With certain limited exceptions, the term "Covered Entities" includes U.S. GSIBs and their subsidiaries worldwide, as well as the U.S. subsidiaries, branches and agencies of non-U.S. GSIBs. For more details, see the SIFMA note on the Application of the QFC Stay Rules to Underwriting and Similar Agreements dated 13 December 2018 (the "**SIFMA note**").

The Financial Stability Board publishes a list of GSIBs in November each year. The 2018 list can be found on the Financial Stability Board's website here.

[1] See further Q.1 below.

In the context of underwriting vanilla, non-structured debt securities outside the United States, Covered Entities will typically be the non-U.S. subsidiaries of U.S. GSIBs, which include Bank of America, Citigroup, Goldman Sachs, JP Morgan Chase, Morgan Stanley and Wells Fargo.

Any bank acting as lead manager for a syndicate or as arranger for an MTN or ECP programme establishment or update where a Covered Entity may be appointed as a dealer or manager should be aware of the impact of the QFC Stay Rules. Further information can be found in the ICMA note.

Q.2 Can the ISDA 2018 U.S. Resolution Stay Protocol (the "ISDA Protocol") be used to achieve compliance with the QFC Stay Rules in the context of underwriting debt securities outside the United States?

There may be some circumstances in which the ISDA Protocol may be used to achieve compliance with the QFC Stay Rules in the context of underwriting vanilla, non-structured debt securities outside the United States. For example, this might be the case where the issuer, any guarantor(s) and all Covered Entities that are a party to an "in-scope" MTN dealer agreement or ECP dealer agreement adhered to the ISDA Protocol ***after*** the date that the relevant dealer agreement was signed (see further Q.3 and Q.5 below).

However, it seems likely that the ISDA Protocol will not be available as a means of remediating all relevant in-scope QFCs in the context of underwriting debt securities because the relevant parties may not have all adhered to the ISDA Protocol.

In addition, it is worth emphasizing that the ISDA Protocol would not remediate any MTN or ECP dealer agreement that is updated after the date that the relevant parties adhered to the Protocol, and so such updated agreements would need to contain the relevant language to comply with the QFC Stay Rules (as set out in Exhibit 1 to the ICMA note) if they are "in-scope" QFCs[2].

In the light of the above points, the first option for Covered Entities is likely to be to seek to include relevant language to comply with the QFC Stay Rules in any in-scope QFCs related to underwriting debt securities outside the United States, as described further in the ICMA note and these FAQs.

Q.3 What approaches are being considered in respect of MTN programmes that will be updated during 2019 and drawdowns under such programmes?

As set out in the ICMA note, an MTN dealer agreement and any drawdown under it will typically be considered to be "in-scope" for the QFC Stay Rules for MTN dealers/managers that are Covered Entities.

[2] This is subject to the phased compliance dates applicable under the QFC Stay Rules, although see Q.4 below.

Such MTN dealers/managers are planning to approach the inclusion of the relevant language to comply with the QFC Stay Rules (as set out in Exhibit 1 to the ICMA note) as follows. Please also see Q.4 below in relation to the "phased compliance" period.

A. **All MTN dealer agreements**

Include the relevant language in the MTN dealer agreement and incorporate the specific provision by reference or otherwise include it in the form of subscription agreement at the time of the first programme update after 1 January 2019.

Currently, U.S. GSIBs are generally not contemplating updating MTN dealer agreements (by way of side letter or otherwise) outside of the usual programme update cycle, but would seek to remediate any drawdowns under MTN dealer agreements prior to the time of the usual programme update, as described below.

B. **Syndicated drawdowns under MTN dealer agreements *before* the dealer agreement has been remediated**

Include the relevant language in the drawdown subscription agreement.

C. **Syndicated drawdowns under MTN dealer agreements *after* the dealer agreement has been remediated**

The relevant language should have been incorporated by reference or otherwise included in the form of subscription agreement set out in the MTN dealer agreement at the time of the first programme update after 1 January 2019 (see A. above).

Therefore, no further action should be needed for syndicated drawdowns that use the form of subscription agreement set out in the MTN dealer agreement.

D. **Non-syndicated drawdowns under MTN dealer agreements *before* the dealer agreement has been remediated**

In this scenario, typically no separate subscription agreement is entered into. Therefore the following different approaches could be taken.

i. Check whether the issuer, any guarantor(s) and the Covered Entity dealer have adhered to the ISDA 2018 U.S. Resolution Stay Protocol ***after*** the date of the MTN dealer agreement. If so, this would operate to remediate the contract between such issuer, any guarantor(s) and Covered Entity dealer in respect of the non-syndicated MTN drawdown.

ii. Include the relevant language in any dealer confirmation letter or dealer accession letter.

iii. Include the relevant language in a side letter to the issuer and any guarantor(s). A form of side letter is available from ICMA staff on request[3].

E. **Non-syndicated drawdowns under MTN dealer agreements *after* the dealer agreement has been remediated**

No action should be required because the drawdown is carried out on the terms of the MTN dealer agreement that has already been remediated (see A. above).

Q.4 Does the "phased compliance" approach in the QFC Stay Rules impact upon the above approaches to MTN programmes that will be updated during 2019 and drawdowns under such programmes?

The QFC Stay Rules envisage different compliance dates for new in-scope QFCs depending on the identity of the parties to the contract, as detailed in the ICMA note. However, ICMA understands that the U.S. GSIBs listed in Q.1 above will be seeking to comply with the QFC Stay Rules from 1 January 2019 despite the phased compliance deadlines.

Q.5 What approaches are being considered in respect of ECP programmes?

As set out in more detail in the ICMA note, there is an argument that the ICMA form of ECP dealer agreement (September 2015) set out in the ICMA Primary Market Handbook could be considered not to be in-scope of the QFC Stay Rules and so no action would be required in respect of ECP programmes that use the ICMA form of ECP Dealer Agreement. This remains a topic for discussion.

In respect of ECP programmes that don't use the ICMA form of ECP dealer agreement and where the ECP dealer agreement is considered to be in-scope of the QFC Stay Rules (e.g. because the agreement contains a transfer restriction applicable to the dealers), Covered Entity ECP dealers are considering the following approaches.

A. Include the relevant language in the ECP dealer agreement at the time of the first programme update after 1 January 2019. This would remediate the ECP dealer agreement and all issuance under it, because ECP issuance is carried out on the terms set out in the ECP dealer agreement.

B. Prior to the time of the first programme update after 1 January 2019, different approaches could be taken.

i. Check whether the issuer, any guarantor(s) and all Covered Entity ECP dealers have adhered to the ISDA 2018 U.S. Resolution Stay Protocol after the date of the ECP

[3] Contact: RegulatoryHelpdesk@icmagroup.org

dealer agreement. If so, this would operate to remediate the ECP dealer agreement and issuance under it.

ii. Include the relevant language in a programme-level side-letter to the issuer and any guarantor(s) from any Covered Entity dealers. A form of side letter is available from ICMA staff on request[4]. This would remediate the ECP dealer agreement and all relevant issuance under it, because ECP issuance is carried out on the terms set out in the ECP dealer agreement.

Q.6 Do parties need to consider the interaction of any language that is included in contracts in respect of the QFC Stay Rules with similar language related to resolution regimes in other jurisdictions?

As described in more detail in the SIFMA note, the QFC Stay Rules relate to the U.S. resolution regimes. Affected entities may also need to include language in typical debt capital markets contracts related to resolution regimes in other jurisdictions. The interaction of such language and resolution regimes in different jurisdictions generally is considered to be a matter for resolution authorities, rather than the parties to the relevant agreement.

Q.7 Do the QFC Stay Rules envisage any exemptions for different types of counterparties (for example, sovereign or supranational issuers)?

No. There are no exemptions related to the identity of the counterparty or counterparties to an in-scope QFC entered into by a Covered Entity. (There are different compliance dates for different types of counterparties, see Q.4 above.)

[4] Contact: RegulatoryHelpdesk@icmagroup.org