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U.S. Regulators Require Banks And Bank Affiliates To Amend Contracts With Utilities.

New rules adopted by federal banking regulators will affect many electric power, natural gas, and other contracts between banks or their affiliates and their utility counterparties, including public power, cooperative, and investor-owned utilities. While the regulations are complex and cover a variety of arrangements and scenarios, this Alert highlights those regulations that are likely relevant to most U.S. utilities.

Key regulations affecting bank-counterparty contracts include:

- Requiring contract amendments to incorporate Dodd-Frank legislation enacted in 2010, which blocked the exercise of contract termination and related rights if the bank or bank affiliate faces insolvency at a time when U.S. regulators deem it a global systemically important banking institution (G-SIB) and thus put the bank's insolvency in a special bankruptcy proceeding.
- Extending regulations beyond Dodd-Frank to block a counterparty (e.g., a utility) from exercising certain cross-default rights when an affiliate of the contracting party (i.e., bank or bank affiliate) enters into ordinary bankruptcy proceedings.

Utility contracts affected include:

- Qualified Financial Contracts (QFCs) with a bank or an affiliate of a bank regulated by the Federal Reserve, the Federal Deposit Insurance Corporation (FDIC), or the Comptroller of the Currency.
- QFCs as defined under Dodd-Frank, which includes but is not limited to forward contracts (e.g., ISDAs, EEIs, NAESBs power purchase agreements) and certain swaps, hedges, and commodity contracts that allow termination, liquidation, etc., upon insolvency.

Contract amendment deadlines and obligations include:

- Counterparties must amend contracts by January 1, 2019 (the first compliance date), if they want to enter into new transactions with the bank or bank affiliate after that date.
- Otherwise, affected banks and their affiliates are expected to contact nonfinancial counterparties, such as utilities, to obtain amendments prior to January 1, 2020 (the later compliance date).

Because it is possible that affected banks and their affiliates may inadvertently overlook some contracts or fail to persuade some counterparties to amend their QFCs, regulators have set up other provisions.

- If regulators determine after the compliance deadlines that the levels of noncompliant QFCs held by banks continue to pose a risk to the financial system, they have suggested that they may consider additional rules to address those remaining QFCs.

To amend contracts, regulators have set forth two methods: (1) Send \$500 and a letter to ISDA acknowledging adherence to the ISDA Stay Protocol, which is capable of amending any type of QFC (whether it was an ISDA document or not), or (2) Bilaterally amend the actual QFC. The first method

is easiest and may offer other advantages over amending bilaterally.

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