INVESTMENT COMPANY INSTITUTE

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May 23, 2011

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Re: Notice of Proposed Rulemaking Implementing Certain Orderly Liquidation Authority Provisions

Dear Mr. Feldman:

The Investment Company Institute[1] appreciates the opportunity to comment on the FDIC's proposed rule implementing certain provisions of its authority to resolve covered financial companies under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[2] ICI members are major participants in the financial markets, as described more fully in our previous comment letters on implementation of the FDIC's orderly liquidation authority.[3] They thus have a strong interest in ensuring that the liquidation of covered financial companies minimizes risk to the financial system, maximizes the value and minimizes the losses from the liquidated company, and treats creditors fairly in doing so.

As we explained in our previous letters, we believe that clarity and certainty are critical elements of the orderly liquidation process. Consistent with promoting these objectives, we applaud the FDIC for offering the public multiple opportunities to comment on proposed and future orderly liquidation

[1] The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $13.1 trillion and serve over 90 million shareholders.

[2] *Notice of Proposed Rulemaking Implementing Certain Orderly Liquidation Authority Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 76 Fed. Reg. 16325 (March 23, 2011) ("Notice").

[3] *See* Letters from Karrie McMillan, General Counsel, Investment Company Institute, to Robert E. Feldman, Executive Secretary, Federal Deposit Insurance Corporation, dated November 18, 2010 ("November Letter"), January 18, 2011 ("January Letter"), and March 23, 2011 ("March Letter").

rulemaking, and incorporating comments into each new rulemaking.[4] Along the same lines, we continue to request further clarification on the process by which qualified financial contracts ("QFCs"), particularly those that involve collateral, would be resolved under the multiple scenarios that could arise in an orderly liquidation. Our March Letter focused on these scenarios. Additionally, we have recommended that that the FDIC adopt a provision specifying that, in the absence of a rule specific to Title II, the relevant provisions of the Bankruptcy Code and related judicial interpretations will serve as binding precedent.[5] We continue to urge this approach.

With respect to the current Notice, we urge the FDIC to clarify the application – or, more accurately, the inapplicability – of certain aspects of the new proposed rule to QFCs. The Notice and proposed rule text do not distinguish between QFCs and other secured transactions or claims. As a result, certain sections – in particular, those relating to the treatment of secured claims – would appear to apply to QFCs. As discussed below, the Dodd-Frank Act clearly excludes QFCs from the mandates that these sections of the proposed rule are intended to address, and would appear to exclude them from others. We also offer comments on a question posed in the Notice relating to the valuation of collateral.

Applicability of Proposed Administrative Claims Process to QFCs

Proposed §§380.50-55 address the treatment of secured claims, but do not explicitly exclude QFCs, although the Dodd-Frank Act makes clear that certain provisions in those sections should not apply to QFCs. Specifically, §380.51 seeks to implement the provision, set forth in Section 210(c)(13)(C) of the Dodd-Frank Act, precluding most secured claimants from exercising rights against pledged collateral for 90 days after the FDIC is appointed receiver of a covered financial company, absent consent from the FDIC. Subparagraph (ii) of that Section of the Dodd-Frank Act, however, explicitly excepts QFCs, an exception that is not carried forward into §380.51. In addition, Section 210(c)(8)(A) of the Dodd-Frank Act expressly preserves the rights of a party to a QFC under a security agreement, including the rights to take control of and liquidate collateral; hence, a party to a QFC need not seek the consent of the FDIC to exercise such rights.

Similarly, §380.52(b) provides that if the FDIC repudiates a secured contract of the covered financial company – in which case the security interest will secure a claim for repudiation damages under §380.52(a) – the FDIC may consent to the exercise of rights against the property subject to a

[4] For example, we appreciate that proposed §380.26 addressed our request in the November and March Letters that the FDIC clarify that §380.2(c) only applies if a contract is *not* transferred to a bridge financial company, because a bridge financial company is expected to meet the obligations of the covered financial company under the terms of a QFC transferred to it. We strongly support the clarifications provided by that Section.

[5] *See* January and March Letters. This is consistent with the mandate, in Section 209 of the Dodd-Frank Act, "to seek to harmonize applicable rules and regulations promulgated under this section with the insolvency laws that would otherwise apply to a covered financial company."

security interest, such as liquidation. Repudiation by the receiver should not affect the preservation of the rights of a party to a QFC to take control of and liquidate collateral. Thus, as above, a party to a repudiated QFC need not seek the consent of the FDIC to exercise such rights.

The applicability of §380.54 to QFCs is less clear. This provision permits the FDIC as receiver to sell property subject to a security interest and pay the proceeds, up to the amount of the secured claim, to the claimant; it further clarifies that the purchaser of the property shall take the property free and clear of the security interest, and the security interest shall instead attach to the proceeds of the sale. Consistent with the intent of the Dodd-Frank Act not to interfere with the exercise of a counterparty's contractual rights in the resolution of a QFC, and as explained further below, we do not believe this provision should apply to QFCs. We recommend that the FDIC clarify that it will not.

As discussed in our March letter, there are three potential avenues for the resolution of a QFC under the orderly liquidation process. One is that the QFC, together with any related collateral, is transferred to a bridge financial company. As set forth in proposed §380.26, in this case, the bridge financial company assumes the obligations of the covered financial company under the QFC, including with respect to the collateral, which is no longer the property of the covered financial company. Thus, we do not believe that §380.54 would apply.

A second avenue for the resolution of a QFC is that it is repudiated by the FDIC as receiver. As noted above, in this event, Section 210(c)(8)(A) of the Dodd-Frank Act preserves the rights of a party to a QFC under a security agreement, including the rights to take control of and liquidate collateral. Permitting the FDIC as receiver to sell the covered property, as provided under §380.54, would contravene the intent of Section 210(c)(8)(A). Thus, §380.54 should not apply in the event of repudiation of a QFC.

The third possibility is that a QFC may be left in the receivership, presumably with the expectation that the counterparty will terminate the contract pursuant to its contractual rights. As in the case of repudiation, Section 210(c)(8)(A) explicitly preserves all rights under security arrangements or other credit enhancements related to a QFC, including the rights to take control of and liquidate collateral. Again, by authorizing the FDIC as receiver to sell the covered property in the context of a QFC, §380.54 would conflict with the Dodd-Frank Act, and therefore should not apply in these circumstances.

For the same reasons, we believe §380.55 should not apply to QFCs, and warrants clarification. This section permits the FDIC as receiver to pay the secured creditor the fair market value of the property subject to a security interest, up to the value of the secured claim, and retain the property free and clear. As explained above, in the event a QFC and any related collateral are not transferred to a bridge financial company, the contractual rights of the counterparty with respect to the collateral are preserved; thus, the receiver does not have the authority to retain the collateral.

Question 16 – Valuation of Collateral

We recommend that the portions of question 16 in the Notice that address the valuation of collateral that is surrendered, sold, or redeemed by the receiver under the proposed rule be considered separately from valuation of collateral securing QFCs. Our March Letter discusses at length the appropriate timing for the valuation of collateral securing QFCs. Because a party to a QFC may take control of and ultimately dispose of collateral securing a QFC more quickly than other types of property subject to a security interest, the considerations regarding collateral securing a QFC, as outlined in our March Letter, may be different than those applicable to other secured property.

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ICI appreciates the FDIC's attention to our comments. If you have any questions, please contact me at 202/326-5815, Mara Shreck at 202/326-5923, or Frances Stadler at 202/326-5822.

Sincerely,

/s/ Karrie McMillan

Karrie McMillan
General Counsel