

MEMO# 25002

March 3, 2011

Draft ICI Comment Letter on FDIC Interim Final Rule Implementing Certain Orderly Liquidation Authority Provisions of Dodd-Frank; Comments due to ICI by Friday, March 11

[25002]

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TO: SEC RULES COMMITTEE No. 19-11
FIXED-INCOME ADVISORY COMMITTEE No. 26-11
MONEY MARKET FUNDS ADVISORY COMMITTEE No. 13-11
CLOSED-END INVESTMENT COMPANY COMMITTEE No. 13-11 RE: DRAFT ICI COMMENT LETTER ON FDIC INTERIM FINAL RULE IMPLEMENTING CERTAIN ORDERLY LIQUIDATION AUTHORITY PROVISIONS OF DODD-FRANK; COMMENTS DUE TO ICI BY FRIDAY, MARCH 11

As we previously informed you, [\[1\]](#) the FDIC has adopted an interim final rule to implement certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) relating to orderly liquidation authority. [\[2\]](#) The rule is intended to provide greater clarity and certainty to the financial industry on certain key issues, and to ensure that the liquidation process reflects the Dodd-Frank Act’s mandate of transparency. In addition, the FDIC’s Notice poses additional questions for comment, and invites comments on any aspect of the interim rule that would refine the rule further.

The Institute has prepared a draft comment letter, which is attached and summarized below. Comments on the interim final rule are due to the FDIC no later than March 28, 2011. Please provide any comments on the draft letter to Mara Shreck at mshreck@ici.org or 202/326-5923 by Friday, March 18, 2011.

Summary of Draft ICI Comment Letter

The draft letter begins by noting that ICI members are major investors in the U.S. bond and money markets, as well as in qualified financial contracts (“QFCs”) such as repurchase

agreements and over-the-counter derivatives transactions. They therefore have a strong interest in ensuring that any liquidation of a covered financial company minimizes risk to the financial system, maximizes the value of the liquidated company, and treats creditors fairly in doing so. As in the previous letters to FDIC on orderly liquidation, [3] the draft letter asserts that clarity and certainty must be critical elements of the orderly liquidation process. As explained below, consistent with these principles, the draft letter requests clarification on two aspects of the resolution of collateralized QFCs. The draft letter then offers recommendations regarding the timing of valuation of collateral, in response to certain of the questions posed in the Notice.

Recommended Clarifications Regarding the Resolution of Collateralized Qualified Financial Contracts

The draft letter requests that the FDIC clarify that the provisions in the interim final rule relating to the valuation of collateral are only intended to apply in the event a QFC is not transferred to a bridge financial company. While the rule text is ambiguous on this issue, several provisions of the Dodd-Frank Act indicate that, when a QFC is transferred to a bridge entity, both parties are expected to meet their obligations under the contract. In these circumstances, it would seem unnecessary to assign value to collateral at the time a receiver is appointed.

The draft letter also recommends the FDIC clarify that no provisions of the interim final rule are intended to foreclose the rights of a creditor in a collateralized QFC to take possession of the collateral following the one-day stay provided for under the Dodd-Frank Act. Again, this is consistent with provisions in the Dodd-Frank Act, but the rule text suggests that the FDIC might itself liquidate collateral and pay its established value to the creditor under a QFC.

Recommendations for the Valuation of Collateral and Adjustments for Market Fluctuations

In response to questions posed in the Notice, the draft letter offers recommendations for the timing of valuation of collateral. While the interim final rule establishes that collateral will be valued as of the date of the appointment of a receiver, the Notice asks whether other dates should be considered. The draft letter suggests that, for QFCs, the proper time for the valuation of collateral is the time at which a creditor takes possession of – and therefore may dispose of – the collateral. Specifically, in the case of QFCs terminated by the creditor, the collateral would be valued at the end of the one-day stay, at which time termination is permitted and the creditor may take possession of the collateral. For QFCs not terminated by the seller (or transferred to a bridge entity, as discussed earlier), the collateral would be valued at the time the QFC is repudiated by the receiver – again, the date the creditor may take possession of the collateral. The draft letter notes that this approach would be consistent with certain provisions in the Dodd-Frank Act as well as the Bankruptcy Code.

Mara Shreck
Associate Counsel

[Attachment](#)

endnotes

[1] See ICI [Memorandum](#) No. 24936, dated Feb. 2, 2011, summarizing the interim final rule

and additional questions.

[2] The Notice is available at
<http://www.fdic.gov/regulations/laws/federal/2011/11finalJan25.pdf>.

[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 (<http://www.ici.org/pdf/24725.pdf>) and January 18, 2011 (<http://www.ici.org/pdf/24866.pdf>).

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