MEMO# 24649

October 25, 2010

FDIC Proposes Rules Implementing Certain Orderly Liquidation Authority Provisions of Dodd-Frank

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TO: SEC RULES COMMITTEE No. 45-10
FIXED-INCOME ADVISORY COMMITTEE No. 24-10
MONEY MARKET FUNDS ADVISORY COMMITTEE No. 55-10 RE: FDIC PROPOSES RULES IMPLEMENTING CERTAIN ORDERLY LIQUIDATION AUTHORITY PROVISIONS OF DODD-FRANK

The FDIC has proposed a rule to implement certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act relating to orderly liquidation authority. 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 questions on additional issues, with a longer comment period, for consideration in a future proposed rulemaking. The proposal is available at: http://www.fdic.gov/news/news/press/2010/pr10224a.pdf.

Likely of greatest interest to Institute members is the proposed treatment of similarly situated claimants. The proposal also addresses the treatment of personal service agreements; claims based on contingent obligations; and insurance companies and their subsidiaries. Each of these is discussed briefly below.

Comments on the proposed rule are due no later than November 18, 2010. The Institute will hold a conference call on Monday, November 1, at 3:30 p.m. eastern to discuss the proposed amendments. The dial-in number for the call is 888/566-5901, and the pass code is 48725. If you plan to participate on the call, please send an email to Jennifer Odom at jodom@ici.org. If you are unable to participate on the call, please provide your comments before the call to Mara Shreck at 202/326-5923 or mshreck@ici.org.

Comments on the broader questions are due January 18, 2011.

Treatment of Similarly Situated Claimants (§380.2)

The Dodd-Frank Act permits the FDIC, as receiver for a nonbank financial company to be liquidated under Title II, to pay certain creditors more than similarly situated creditors under certain circumstances. In brief, the FDIC may make such additional payments in order to maximize the value of the company's assets, minimize the loss on the sale or other disposition, or initiate and continue operations that are essential to the implementation of a receivership and any bridge financial company.

The proposed rule clarifies these provisions by setting forth certain categories of creditors who never satisfy these requirements. Specifically, bond holders that hold unsecured debt with a term of more than 360 days will never receive additional payments compared to other general creditors. Also excluded are holders of subordinated debt, shareholders, and other equity holders. The attention to long-term unsecured debt is intended to distinguish bondholders from commercial lenders or other providers of financing who have made lines of credit available to the company that are essential for its continuing operation and orderly liquidation. Holders of debt that is not excluded may receive additional payments, as determined on a case-by-case basis based on the statutory requirements. Any such payments must be approved by the Board of Directors of the FDIC.

The proposed rule also states that, if a secured creditor is under-secured due to a drop in the value of the collateral, the unsecured portion of the claim will be treated as a general creditor claim. If the collateral consists of US Treasury securities or other government securities, however, the FDIC will value these obligations at par.

The proposal sets forth a number of specific questions on this section of the proposed rule.

Personal Service Agreements (§380.3)

The proposed rule addresses how personal services agreements, including collective bargaining agreements, may be repudiated if doing so would promote the orderly liquidation of the company. The proposed rule also addresses the FDIC's use of services of employees who have a personal services agreement with the company, such as if certain of the company's operations are continued by a bridge financial company.

Contingent Obligations (§380.4)

The proposed rule treats as provable contingent obligations, such as guarantees, letters of credit, loan commitments, and similar credit obligations that become due on the occurrence of a specified future event. The compensatory damages for repudiation of such an obligation by the receiver would be no less than the estimated value of the claim as of the date the FDIC was appointed receiver.

Insurance Company Subsidiaries (§380.5) and Liens on Insurance Company Assets (§380.6)

The proposed rule provides that where the FDIC acts as receiver for an insurance company subsidiary, the value realized from the disposition of the subsidiary will be distributed in accordance with the priority of expenses and unsecured claims set forth in section 210(b)(1) of the Dodd-Frank Act. The proposed rule further limits the ability of the FDIC to take liens on the assets of an insurance company and its covered subsidiaries, as required by the Dodd-Frank Act.

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