

MEMO# 25346

July 22, 2011

FDIC Adopts Final Rule Implementing Certain Orderly Liquidation Authority Provisions of Dodd-Frank Act

[25346]

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TO: SEC RULES MEMBERS No. 89-11

FIXED-INCOME ADVISORY COMMITTEE No. 55-11

MONEY MARKET FUNDS ADVISORY COMMITTEE No. 44-11

CLOSED-END INVESTMENT COMPANY MEMBERS No. 56-11 RE: FDIC ADOPTS FINAL RULE IMPLEMENTING CERTAIN ORDERLY LIQUIDATION AUTHORITY PROVISIONS OF DODD-FRANK ACT

The Federal Deposit Insurance Corporation (FDIC) has adopted a final rule to implement certain provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act relating to orderly liquidation authority. [\[1\]](#) The final 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. According to the notice, the final rule represents the culmination of an initial phase of rulemaking stemming from several proposals and requests for comment. [\[2\]](#) We understand that additional rulemaking may follow.

Two elements of the final rule were the subject of ICI member interest and comments. These are discussed briefly below.

Timing of Valuation of Collateral Securing Claims Against a Covered Financial Company (§380.50(b))

The FDIC initially proposed that collateral securing claims against a covered financial company would be valued as of the date of the appointment of the receiver. In January this approach was adopted as part of an interim final rule. In the final rule, the FDIC revised this provision to provide instead that the fair market value of such collateral shall be determined at the time of the proposed use or disposition of the property. This approach is consistent with the comparable provision of the Bankruptcy Code, and addresses the

concerns expressed in the ICI's comment letter on the earlier provision. [3]

Clarification that Qualified Financial Contracts are Not Subject to the Requirement to Seek Consent of the Receiver Before Exercising Contractual Rights Against Property of a Covered Financial Company (§380.51)

As initially proposed, §380.51 sought to implement the provision, set forth in Section 210(c)(13)(C) of the Dodd-Frank Act, precluding 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. The proposed rule section did not exclude property securing qualified financial contracts, which are explicitly excepted from the consent requirements under the Dodd-Frank Act. The FDIC added this exclusion as §380.51(g) in the final rule, consistent with ICI's request for clarification. [4]

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endnotes

[1] The final rule is available at <http://www.gpo.gov/fdsys/pkg/FR-2011-07-15/pdf/2011-17397.pdf>.

[2] See ICI Memorandum No. [24649](#), dated Oct. 25, 2010, summarizing the initial rule proposal; ICI Memorandum No. [24936](#), dated Feb. 2, 2011, summarizing an interim final rule and describing additional questions for comment; and ICI Memorandum No. [25042](#), dated March 23, 2011, summarizing an additional rule proposal.

[3] See Letter from Karrie McMillan, General Counsel, Investment Company Institute, to Robert E. Feldman, Executive Secretary, Federal Deposit Insurance Corporation, dated March 23, 2011. The provision was initially adopted as §380.2(c).

[4] See Letter from Karrie McMillan, General Counsel, Investment Company Institute, to Robert E. Feldman, Executive Secretary, Federal Deposit Insurance Corporation, dated May 23, 2011.