

MEMO# 30408

November 18, 2016

Draft Comment Letter on FDIC Proposal on Stays in Qualified Financial Contracts of Certain FDIC-Regulated Banks - Your Comments Requested by November 30

[30408]

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TO: Derivatives Markets Advisory Committee

Fixed-Income Advisory Committee

ICI Global Regulated Funds Committee

Money Market Funds Advisory Committee

SEC Rules Committee RE: Draft Comment Letter on FDIC Proposal on Stays in Qualified Financial Contracts of Certain FDIC-Regulated Banks - Your Comments Requested by November 30

The Federal Deposit Insurance Corporation ("FDIC") recently issued proposed rules ("FDIC Proposal") which would require FDIC-regulated banks and their subsidiaries that are part of a US global systemically important banking organization ("GSIB") or foreign GSIB that operates in the United States, to include certain restrictions in their qualified financial contracts ("QFCs").^[1] The FDIC Proposal is substantively identical to, and would complement, the proposal ("Board Proposal") of the Board of Governors of the Federal Reserve System ("Board") issued in May, and the proposal ("OCC Proposal") of the Office of the Comptroller of the Currency issued in August.^[2]

The FDIC requests comments on its proposal by December 12, 2016. ICI has drafted a comment letter, attached and summarized briefly below, to respond to the FDIC Proposal. If you have comments on the draft comment letter, please send them to me in writing at sarah.bessin@ici.org by Wednesday, November 30.

ICI's draft comment letter acknowledges that, although the FDIC Proposal would apply only to "covered FSIs," which are excluded from the scope of the Board Proposal and the OCC Proposal, the operative provisions of the FDIC Proposal are substantively the same as the Board Proposal and the OCC Proposal. The letter therefore explains that the extensive comments ICI provided on the Board Proposal apply similarly to the FDIC Proposal, and would incorporate and submit those comments as an attachment to the letter.^[3]

The draft comment letter reiterates two key points made in August ICI Letter. First, while we support incorporation of provisions in QFCs that recognize the applicability of

enforceability protections relating to resolution proceedings and the attendant statutory stay in the cross-border context, we do not support provisions that would require contracting parties to include stay and transfer provisions and a prohibition on cross-default rights in affected QFCs. Second, the letter notes our support for exclusions from the proposed prohibition of a counterparty's exercise of default rights against a direct party or a guarantor. We assert that the exclusion should be extended, however, to permit the exercise of default rights by a counterparty against a direct party or a covered support provider with respect to *any* direct default under the covered QFC, and not just with respect to direct defaults resulting from payment or delivery failure or the direct party becoming subject to certain resolution or insolvency proceedings.

The draft comment letter also supports the FDIC Proposal's exclusion of stay and transfer provisions and a prohibition on cross-default rights in QFCs with respect to proceedings under Title II of the Dodd-Frank Act. The letter notes that this proposed limitation appropriately acknowledges existing statutory restrictions on cross-default rights under the Dodd-Frank Act, and would avoid the legal uncertainty and confusion that could result from imposing, by regulation, an additional prohibition on the exercise of cross-default rights in QFCs. To ensure consistent treatment of QFCs of GSIBs and their subsidiaries, and avoid legal uncertainty and confusion, the draft comment letter recommends that the Board and OCC include identical exclusions in their final rules.

The draft comment letter makes several other points regarding consistency among the FDIC Proposal, the Board Proposal, and the OCC Proposal:

- The FDIC Proposal, like the Board Proposal and the OCC Proposal, includes a safe harbor based on adherence to the ISDA 2015 Universal Resolution Stay Protocol ("2015 Protocol"). Because fund advisers may not lawfully adhere to the 2015 Protocol for fiduciary reasons, we recommended that the Board and the OCC include as a safe harbor, as an alternative to the 2015 Protocol, a protocol such as the ISDA Resolution Stay Jurisdictional Modular Protocol that would permit market participants to adhere on a jurisdiction-by-jurisdiction, client-by-client, and dealer-by-dealer basis. Our draft letter urges the FDIC to coordinate closely with the Board and the OCC to broaden its proposed safe harbor in a manner identical to the Board and the OCC.
- The FDIC Proposal includes a process for approval of enhanced creditor protection conditions that is substantially similar to that under the Board Proposal and the OCC Proposal, except that a covered FSI would apply to the FDIC for review of such enhanced creditor protections. Similar to our comment about the safe harbor, we urge the FDIC to develop a single, coordinated process with the Board and the OCC for review and approval of enhanced creditor protections, when an application is made on behalf of a GSIB and its subsidiaries. Otherwise, QFCs of different entities in the GSIB group could be subject to different creditor protections, raising fairness issues, increasing legal and operational complexity, and impeding the FDIC's, Board's, and OCC's shared goal of orderly resolution.
- Finally, we urge the FDIC to agree with the Board and the OCC on a uniform set of compliance dates that will be applicable to all three regulators' final rules. We also request that the FDIC, the Board, and the OCC provide asset managers with a compliance period that is at least six months longer than the compliance period provided to covered FSIs, covered banks, and covered entities under the final rules.

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[Attachment](#)

endnotes

[1] For a summary of the FDIC Proposal, please see ICI Memorandum No. 30341 (Oct. 25, 2016), *avail. at* <https://www.iciglobal.org/iciglobal/pubs/memos/ci.memo30341.global>.

[2] ICI submitted a comment letter on the Board Proposal in August and a comment letter on the OCC Proposal in October. See Letter to Mr. Robert deV. Frierson, Secretary, Board of Governors of the Federal Reserve System, from David W. Blass, General Counsel, Investment Company Institute, dated Aug. 5, 2016, *available at* http://www.federalreserve.gov/SECRS/2016/August/20160815/R-1538/R-1538_081216_130439_377948682013_1.pdf ("August ICI Letter"); Letter to Legislative and Regulatory Activities Division, from David W. Blass, General Counsel, Investment Company Institute, dated Oct. 18, 2016, *available at* <https://www.regulations.gov/document?D=OCC-2016-0009-0006> ("October ICI Letter").

[3] See August ICI Letter and October ICI letter, *supra* note 2.