The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE

MEMO# 24722

November 18, 2010

ICI Comment Letter on FDIC Orderly Liquidation Proposal; Nov. 30 Conference Call to Discuss Additional Topics for Comment

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November 18, 2010

TO: SEC RULES COMMITTEE No. 56-10
FIXED-INCOME ADVISORY COMMITTEE No. 31-10
MONEY MARKET FUNDS ADVISORY COMMITTEE No. 62-10
CLOSED-END INVESTMENT COMPANY COMMITTEE No. 26-10 RE: ICI COMMENT LETTER ON FDIC ORDERLY LIQUIDATION PROPOSAL; NOV. 30 CONFERENCE CALL TO DISCUSS ADDITIONAL TOPICS FOR COMMENT

As we previously informed you, [1] the FDIC has proposed a rule to implement certain provisions of Title II the Dodd-Frank Wall Street Reform and Consumer Protection Act relating to orderly liquidation authority. [2] Orderly liquidation refers to the new process for liquidating a failing non-bank financial company whose failure would have serious adverse effects on U.S. financial stability ("covered financial company").

The proposed 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. It addresses the treatment of similarly situated claimants; personal service agreements; claims based on contingent obligations; and insurance companies and their subsidiaries. The ICI has submitted a comment letter on the proposed rule. Our letter is attached and summarized below. In addition to requesting comments on the proposed rule, the Notice sets forth a list of broader questions on which the FDIC requests comment by January 18, 2011. These questions are provided below.

The Institute will hold a conference call on Tuesday, November 30, at 2:00 p.m. Eastern to discuss these questions. The dial-in number for the call is 888/847-6595, and the passcode

is 19720. 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.

Summary of ICI Comment Letter

ICI's letter begins by applauding the FDIC for attempting to clearly define and circumscribe the situations in which similarly situated creditors may be treated differently during the liquidation of a covered financial company. It states that we believe the proposal to exclude long-term bondholders and certain other creditors from the categories of creditors who may receive additional payments substantially addresses our concerns regarding the authority granted by Title II of the Dodd-Frank Act.

The letter then addresses three main points. First, it recommends that the FDIC reconsider its proposal to value U.S. Treasury and agency securities used as collateral at par value, rather than fair market value. It explains that this treatment could actually create perverse incentives and other unintended consequences. The letter next requests further clarification of the scope and mechanics of proposed §380.2(c), noting a number of ambiguities in the section. Finally, the letter requests clarification as to the status of obligations that are not "contingent obligations" under the definition provided in §380.4.

Questions Posed by FDIC for Additional Comment

On the November 30 conference call, we will discuss how ICI might respond to the following questions in a comment letter.

1. What other specific areas relating to the FDIC's orderly liquidation authority under Title II would benefit from additional rulemaking?
2. Section 209 of the Dodd-Frank Act requires the FDIC, "[t]o the extent possible," "to harmonize applicable rules and regulations promulgated under this section with the insolvency laws that would otherwise apply to a covered financial company." What are the key areas of Title II that may require additional rules or regulations in order to harmonize them with otherwise applicable insolvency laws? In your answer, please specify the source of insolvency laws to which you are making reference.
3. With the exception of the special provisions governing the liquidation of covered brokers and dealers (see section 205), are there different types of covered financial companies that require different rules and regulations in the application of the FDIC's powers and duties?
4. Section 210 specifies the powers and duties of the FDIC acting as receiver under Title II. Are regulations necessary to define how these specific powers should be applied in the liquidation of a covered company?
5. Should the FDIC adopt regulations to define how claims against the covered financial company and the receiver are determined under section 210(a)(2)? What specific elements of this process require clarification?
6. Should the FDIC adopt regulations governing the avoidable transfer provisions of section 210(a)(11)? What are the most important issues to address for the fraudulent transfer provisions? What are the most important issues to address for the preferential transfers provisions? How should these issues be addressed?
7. What are the key issues that should be addressed to clarify the application of the setoff provisions in section 210(a)(12)? How should these issues be addressed?
8. Do the provisions governing the priority of payments of expenses and claims in

section 210(b) and other sections require clarification? If so, what are the key issues to clarify in any regulation?

9. Section 210(b)(4), (d)(4), and (h)(5)(E) address potential payments to creditors "similarly situated" that are addressed in this Proposed Rule. Are there additional issues on the application of this provision, or related provisions, that require clarification in a regulation?
10. Section 210(h) provides the FDIC with authority to charter a bridge financial company to facilitate the liquidation of a covered financial company. What issues surrounding the chartering, operation, and termination of a bridge company would benefit from a regulation? How should those issues be addressed?
11. Regarding actual direct compensatory damages for the repudiation of a contingent obligation in the form of a guarantee, letter of credit, loan commitment, or similar credit obligation, should the Proposed Rule be amended to specifically provide a method for determining the estimated value of the claim? In addition to the statutory considerations in valuation, including the likelihood that the contingent claim would become fixed and its probable magnitude, what other factors are appropriate? If so, what methods for determining such estimated value would be appropriate? Should the regulation provide more detail on when a claim is contingent?
12. Are the provisions of the Dodd-Frank Act relating to the classification of claims as administrative expenses of the receiver sufficiently clear, or is additional rulemaking necessary to clarify such classification?
13. Should the Proposed Rule's definition of "long-term senior debt" be clarified or amended?

Mara Shreck
Associate Counsel

Attachment

endnotes

[1] See ICI Memorandum No. 24649, dated Oct. 25, 2010.

[2] Notice of Proposed Rulemaking Implementing Certain Orderly Liquidation Authority Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 75 Fed. Reg. 64170 (Oct. 19, 2010), available at http://www.fdic.gov/news/news/press/2010/pr10224a.pdf ("Notice").
