

MEMO# 30341

October 25, 2016

FDIC Issues Proposal on Stays in Qualified Financial Contracts of FDIC-Regulated Banks That Are Part of a Global Systemically Important Banking Organization

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TO: DERIVATIVES MARKETS ADVISORY COMMITTEE No. 65-16
FIXED-INCOME ADVISORY COMMITTEE No. 43-16
ICI GLOBAL REGULATED FUNDS COMMITTEE No. 73-16
MONEY MARKET FUNDS ADVISORY COMMITTEE No. 27-16
SEC RULES MEMBERS No. 66-16 RE: FDIC ISSUES PROPOSAL ON STAYS IN QUALIFIED FINANCIAL CONTRACTS OF FDIC-REGULATED BANKS THAT ARE PART OF A GLOBAL SYSTEMICALLY IMPORTANT BANKING ORGANIZATION

The Federal Deposit Insurance Corporation (“FDIC”) recently issued proposed rules (“FDIC Proposal”) that would require FDIC-regulated banks and their subsidiaries that are part of a global systemically important banking organization (“GSIB”) 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”) issued in May by the Board of Governors of the Federal Reserve System (“Board”),[\[2\]](#) and the proposal (“OCC Proposal”) issued in August by the Office of the Comptroller of the Currency (“OCC”).[\[3\]](#) The FDIC Proposal is summarized briefly below, focusing on those aspects of the Proposal that differ from the Board Proposal.

The FDIC requests comments on its proposal within 45 days after publication in the *Federal Register*. ICI plans to submit a comment letter on the FDIC Proposal. We expect our comments to be substantially similar to the comments we filed with the OCC.

The FDIC Proposal would apply to “covered FSIs,” which are excluded from the scope of the Board Proposal.[\[4\]](#) “Covered FSIs,” under the FDIC Proposal, would be defined to include any state savings association or state non-member bank that is a direct or indirect subsidiary of (i) a global systemically important bank holding company; or (ii) a global systemically important foreign banking organization and any subsidiary of a covered FSI.

The operative provisions of the FDIC Proposal are substantively the same as the Board Proposal and the OCC Proposal. The proposed scope of covered QFCs and default rights is identical to the Board Proposal and the OCC Proposal. Similar to the Board Proposal and the OCC Proposal, the FDIC Proposal would require QFCs entered into with covered FSIs to contain contractual provisions that recognize the automatic stay of termination and transfer provisions applicable in resolution proceedings under the Orderly Liquidation Authority provisions of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) and the Federal Deposit Insurance Act.^[5] It would also generally require QFCs entered into by covered FSIs to prohibit the QFC counterparty from exercising default rights based on an affiliate of the counterparty becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding, and would limit restrictions on transfer of credit enhancements.^[6]

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.^[7] The FDIC recognizes, as does the Board and the OCC, that an alternative protocol could be consistent with its proposal.^[8] The FDIC Proposal also includes a process for approval of enhanced creditor protection conditions that is identical 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. The FDIC states that it expects to consult with the OCC and Board during its consideration of a request under this provision,^[9] but it is unclear how identical requests for approval of enhanced creditor protections by a GSIB and its subsidiaries would be handled by the various regulators.

The proposed transition periods for the FDIC Proposal are described in the same way as under the Board Proposal and the OCC Proposal. For example, the FDIC Proposal would take effect on the first day of the first calendar quarter that begins at least one year after the issuance of a final rule. The FDIC Proposal does not address, however, whether the FDIC and the Board plan to coordinate the effective dates of their respective rules.^[10]

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endnotes

^[1] Federal Deposit Insurance Corporation, Restrictions on Qualified Financial Contracts of Certain FDIC-supervised Institutions; Revisions to the Definition of Qualifying Master Netting Agreement and Related Definitions, *available at* https://www.fdic.gov/news/board/2016/2016-09-20_notice_sum_b_fr.pdf (“Proposing Release”).

^[2] For a description of the Board Proposal, please see ICI Memorandum No. 29916 (May 16, 2016), available at <https://www.iciglobal.org/iciglobal/pubs/memos/memo29916>. ICI filed a comment letter on the Board Proposal on August 5, 2016. 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* <https://www.ici.org/pdf/30119.pdf>.

^[3] For a description of the OCC Proposal, please see ICI Memorandum No. 30165 (Aug. 24, 2016), available at <https://www.iciglobal.org/iciglobal/pubs/memos/memo30165>. ICI filed a

comment letter on OCC Proposal on October 18, 2016. See Letter to Legislative and Regulatory Activities Division, from David W. Blass, General Counsel, Investment Company Institute, dated Oct. 18, 2016, *available at* <https://www.ici.org/pdf/30322.pdf>.

[4] The Board Proposal would apply to: (1) any US GSIB bank holding company; (2) any subsidiary of such a bank holding company that is not a “covered bank;” and (3) the US operations of any foreign GSIB with the exception of any “covered bank.” The FDIC explains that its intention was to “address the QFCs of covered FSIs, a class of FDIC-supervised institutions that are subsidiaries of the covered entities addressed in the [Board Proposal], but which are not otherwise covered by the [Board Proposal] nor the [OCC Proposal].” Memorandum to Board of Directors of the FDIC from Arthur J. Murton, Director, Office of Complex Financial Institutions and Doreen R. Eberley, Director, Division of Risk Management Supervision, FDIC, dated Sept. 20, 2016, at 5, *available at* https://www.fdic.gov/news/board/2016/2016-09-20_notice_sum_b_mem.pdf (“FDIC Memo”).

[5] See proposed section 382.3.

[6] See proposed section 382.4. The FDIC Proposal would not apply proposed section 382.4 to proceedings under Title II of the Dodd-Frank Act. The FDIC explains that, “[u]nder Title II, the stay-and-transfer provisions would address both direct default rights and cross-default rights . . .” and therefore, the FDIC believes it is unnecessary to impose stays against the exercise of cross-default rights in QFCs through the proposed rules. See Proposing Release, *supra* note 1, at 31.

[7] See proposed section 382.5.

[8] The FDIC explains that “ISDA is expected to continue supplementing the Protocol with ISDA Resolution Stay Jurisdictional Modular Protocols for the United States and other jurisdictions. A jurisdictional module for the United States that is substantively identical to the Protocol in all respects (aside from exempting QFCs between adherents that are not covered entities, covered FSIs, or covered banks) would be consistent with the current proposal.” Proposing Release, *supra* note 1, at n.91.

[9] Proposing Release, *supra* note 1, at 42.

[10] The FDIC staff, however, states that it “expects that the staff of the agencies will recommend that the agencies’ final rules contain parallel requirements and be published simultaneously.” FDIC Memo, *supra* note 4, at 6.