March 1, 2012

TO: Board of Directors

FROM: James Wigand
Director
Office of Complex Financial Institutions

Michael H. Krimminger
General Counsel

SUBJECT: Notice of Proposed Rulemaking Regarding the Enforcement of Subsidiary and Affiliate Contracts by the FDIC as Receiver for a Covered Financial Company

RECOMMENDATION

The attached Notice of Proposed Rulemaking ("NPR") proposes a regulation to implement the provisions of section 210(c)(16) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act" or the "Dodd-Frank Act"),[1] codified at 12 U.S.C. §5390(c)(16). This section permits the Federal Deposit Insurance Corporation ("FDIC" or the "Corporation"), as receiver for a covered financial company, to enforce contracts of subsidiaries or affiliates of the covered financial company despite contract clauses that purport to terminate, accelerate, or provide for other remedies based on the insolvency, financial condition or receivership of the parent covered financial company. This section provides the FDIC, as receiver, with statutory authority that is critical to strategies designed to maximize the value of the financial group of companies owned by the covered financial company and to mitigate systemic risks.

[1] 12 U.S.C. § 5301 *et seq.*

Under the statute, this right to enforce subsidiary or affiliate contracts may be exercised with respect to all contracts "linked" to the covered financial company. As a result, contracting parties may not terminate, accelerate, or exercise other remedies under the contract and the FDIC, as receiver, is not required to take any affirmative action. If, however, the covered financial company provided a guaranty or other support to the subsidiary or for that contract, that support and any related assets and liabilities must be transferred to or assumed by a bridge financial company or other qualified third party or the receiver must otherwise provide adequate protection with respect to the obligations of the subsidiary or affiliate under the contract. The Proposed Regulation would clarify the intent and scope of this important section, would provide for notice to counterparties, and would define certain key terms.

The Office of Complex Financial Institutions recommends that the Board of Directors approve and adopt the NPR and authorize its publication in the *Federal Register* with a 60-day comment period. The General Counsel concurs in such recommendation.

EXECUTIVE SUMMARY

Title II of the Dodd-Frank Act authorizes the appointment of the FDIC as receiver for a financial company whose failure would pose a significant risk to the financial stability of the United States (a "covered financial company"). Under section 210(c)(16) of the Act, the FDIC as receiver is empowered to enforce contracts of subsidiaries or affiliates of the covered financial company that link a counterparty's rights and remedies under the contract to the financial condition of the covered financial company. The regulation makes clear that the effect of this enforcement authority is that no party may terminate, liquidate, accelerate or exercise any remedy under a contract simply as a result of the appointment of the receiver and the exercise of its orderly liquidation authorities as long as the receiver complies with the statutory requirements. In order to exercise this authority, the Corporation as receiver must either: (i) transfer any supporting obligations of the covered financial company (along with all related assets and liabilities) to a bridge financial company or qualified third-party transferee by the statutory one-business-day deadline; or (ii) provide adequate protection to such contract counterparties.

This authority is critical to the preservation of going-concern value of a covered financial company that is part of a large, interconnected corporate structure. The preservation of these contracts in full force and effect will allow the receiver to continue operations of subsidiaries without triggering a cascading series of defaults following the appointment of the receiver and without causing otherwise viable subsidiaries and affiliates also to be placed into receivership.

The Proposed Regulation would clarify the conditions and requirements applicable to the receiver, address requirements for notice to affected counterparties, and define certain key terms. The Proposed Regulation would provide definition and context to the type of default provision – called a "specified financial condition clauses" in the Proposed Regulation – that may be avoided by the receiver's enforcement authority. It would make clear that counterparties to contracts with subsidiaries or affiliates of the covered financial company may not terminate or exercise remedies under these contracts based solely upon the appointment of the receiver as long as the support obligations have been transferred to a bridge financial company or other qualified transferee or the counterparties have otherwise been provided adequate protection. The Proposed Regulation would clarify and implement the statutory intent that a "specified financial condition" clause includes any clause that links termination rights or other remedies not only to the insolvency of the covered financial company or the appointment of the receiver, but also to any exercise of the orderly liquidation authority provided under Title II.

If approved by the Board, the Proposed Regulation would be promulgated under section 209 of the Dodd-Frank Act, codified at 12 U.S.C. § 5389, which authorizes the FDIC, in consultation with the Financial Stability Oversight Council ("FSOC"), to prescribe such rules and regulations as the FDIC considers necessary or appropriate to implement provisions of Title II. In accordance with the consultation requirement of section 209, a term sheet outlining the Proposed Regulation was provided to key staff including members of the Resolutions Subcommittee of the FSOC on January 18, 2012. A draft of the regulatory text was also provided and discussed at a meeting of the FSOC Resolutions Subcommittee on February 6, 2012. The term sheet and regulatory text also were circulated to FSOC Deputies on January 31, 2012. The regulatory text reflects several changes and improvements made as a result of this consultation process, including changes to the definition of "control," to clarify the intended effect of the enforcement power, and to the scope of the one-business-day deadline.

DISCUSSION

I. Background

Title II of the Dodd-Frank Act establishes the authority of the FDIC for the orderly liquidation of a covered financial company following the FDIC's appointment as receiver and provides for additional implementation of the orderly liquidation authority by rulemaking. The Proposed Regulation would be issued, with request for comments, to interpret and implement the authorities granted to the Corporation under section 210(c)(16) of the Act to enforce subsidiary and affiliate contracts in certain circumstances. The provisions of the Proposed Regulation are harmonized with bankruptcy law to the extent possible, consistent with the mandate of section 209 of the Act. In particular, the definition of the term "adequate protection," which is used and has been interpreted under section 361 of the Bankruptcy Code has been conformed to that statutory definition in many respects.

Fundamental to the orderly liquidation of a covered financial company is the ability to continue key operations, transactions and services that will maximize the value of the firm's assets and operations and avoid a disorderly collapse in the marketplace. To facilitate this continuity of operations, the Dodd-Frank Act provides several tools to preserve the value of the covered financial company's assets and business lines, including the powers granted in section 210(c)(16). Specifically, section 210(c)(16) provides that:

> The Corporation, as receiver for a covered financial company or as receiver for a subsidiary of a covered financial company (including an insured depository institution) shall have the power to enforce contracts of subsidiaries or affiliates of a covered financial company, the obligations under which are guaranteed or otherwise supported by or linked to the covered financial company, notwithstanding any contractual right to cause the termination, liquidation, or acceleration of such contracts based solely on the insolvency, financial condition or receivership of the covered financial company if –

(i) such guaranty or other support and all related assets and liabilities are transferred to and assumed by a bridge financial company or a third party (other than a third party for which a conservator, receiver, trustee in bankruptcy or other legal custodian has been appointed, or which is otherwise the subject of a bankruptcy or insolvency proceeding)... [by 5:00 p.m. (eastern time) on the business day following the date of appointment]; or

(ii) the Corporation, as receiver, otherwise provides adequate protection with respect to those obligations.

The conditions contained in (i) and (ii) of the quoted statute were included to assure counterparties that any contractual right to guarantees or other support, including claims on collateral or other related assets, would be protected. Thus, section 210(c)(16) requires, as a condition to the authority to enforce subsidiary or affiliate contracts that are "linked to" the financial condition of the covered financial corporation through a default provision, that the Corporation as receiver transfer any guaranty or other support provided by the specified covered financial company for the contractual obligations together with all related collateral to a bridge financial company or other qualified transferee within one business day after its appointment as receiver. In the alternative, if the receiver does not transfer the support and the related assets and liabilities, the receiver must provide "adequate protection" with respect to any support or collateral not transferred in order to preserve its right to enforce the contract of the subsidiary or affiliate.

In providing for the orderly liquidation authority of Title II, Congress recognized the structural complexity of large financial companies that might pose a threat to the financial stability of the nation. Accordingly, the Dodd-Frank Act provides certain particular authorities with respect to subsidiaries and affiliates of the covered financial company. For instance, section 210(a)(1)(E) of the Dodd-Frank Act provides an expedited procedure to allow the Corporation to appoint itself as the receiver of certain subsidiaries of a covered financial company if the Corporation and the Secretary of the Treasury jointly determine that such subsidiary is in default or in danger of default and that such action would mitigate serious adverse effects on the financial stability of the United States and would facilitate the orderly liquidation of the covered financial company. That section further provides that upon such an appointment, the subsidiary would be treated as a covered financial company, and the Corporation would be able to exercise the full range of special powers available to the receiver.

In certain cases, however, the receiver for the covered financial company may find that the best course of action to maximize the value of the covered financial company and to mitigate systemic risk would be to avoid actions that place subsidiaries in danger of default or that necessitate complex interlocking receiverships. The affiliated legal entities that collectively comprise a complex financial institution typically share and provide intra-group funding, guarantees, administrative support, human resources and other operational and business functions. Some of these operations and activities may be critical to the day-to-day functions and overall operations of the group. In addition, certain significant subsidiaries of a covered financial company may be essential to core business lines or conduct critical operations that, if discontinued, may threaten the stability of the financial markets. In these circumstances, orderly liquidation of a covered financial company may best be accomplished by establishing a single receivership of the parent holding company and transferring valuable operations and assets to a solvent bridge financial company, including the stock or other equity interests of the company's various subsidiaries. Accordingly, the Dodd-Frank Act provides the FDIC with the tools and flexibility to act effectively as receiver for the covered financial company at the holding company or parent level without placing solvent subsidiaries into receivership. This approach may be the best means of preserving value, minimizing the shock to the financial system, providing additional flexibility to mitigate cross-border resolution issues for global systemically-important financial companies, and allowing for a more expeditious resolution of a covered financial company.

Where such an approach is adopted, the powers granted to the receiver under section 210(c)(16) are essential to preservation of going-concern value of the subsidiaries for the benefit of the parent in receivership. Absent this statutory provision, counterparties to contracts of subsidiaries and affiliates could exercise contractual rights to terminate their agreements based upon the insolvency of the specified covered financial company. As a result, otherwise viable affiliates of the covered financial company could become insolvent, thereby inciting the collapse of interrelated companies and potentially amplifying ripple effects throughout the economy.

As described in more detail below, this Proposed Regulation would clarify the scope of the authority granted in section 210(c)(16) as well as conditions and requirements applicable to the receiver. The Proposed Regulation would address requirements for notice to affected counterparties and defines key terms. It also would clarify the term "adequate protection" in a manner consistent with its interpretation under the Bankruptcy Code.

II. The Proposed Regulation - Section-by-Section Analysis

Paragraph (a) of the Proposed Regulation would state the general rule with respect to the authority granted under section 210(c)(16) of the Dodd-Frank Act, i.e., that the contracts of a subsidiary or affiliate of a covered financial company are enforceable notwithstanding the existence of a "specified financial condition clause" that provides a counterparty with the right to terminate or exercise remedies based upon the financial condition of the parent or affiliate covered financial company, provided that the FDIC as receiver for the covered financial company transfers all support and related assets and liabilities that back the obligations of such subsidiary or affiliate. To the extent that the receiver fails to transfer all support and related assets and liabilities, it must provide adequate protection to such counterparty to preserve its right to enforce the contracts of the subsidiary. The effect of this ability to enforce the contract is intended to be broad enough to preclude the counterparties from terminating or exercising other remedies such as requiring additional collateral but is intended to be limited in scope solely to remedies arising out of a specified financial condition clause not other contractual defaults by the subsidiary or affiliate. The ability either to transfer support or to provide adequate protection can be exercised in the alternative, or in combination. For example, if some, but not all collateral is transferred, appropriate adequate protection may be provided in lieu of the collateral not transferred.

The deadline for the transfer of support is the same as the time limit applicable to the transfer of qualified financial contracts under section 210(c)(10) of the Dodd-Frank Act, i.e., by 5:00 p.m. (eastern time) on the next business day. Although the decision to provide adequate protection in lieu of transferring support must also be made and steps must be taken that are reasonably calculated to provide notice within a business day, the language of the Proposed Regulation does not require that the adequate protection be fully in place by that next-day deadline. Although the failure to complete within a business day the documentation or transactions necessary should not be deemed to be a waiver of the right to enforce the contract, once the receiver has provided notice of its intent to transfer support or provide adequate protection, the counterparty would be entitled to the benefit of the adequate protection even before the documentation or transfer of collateral were fully completed, if necessary.

The Proposed Regulation would provide that a qualified transferee such as a bridge financial company or solvent third-party acquirer, as well as the Corporation as receiver, would have the authority to enforce linked contracts under the section 210(c)(16) of the Dodd-Frank Act. This is consistent with the intent of the statute that subsidiary and affiliate contracts should remain in effect and enforceable through the entire orderly resolution process. Also, the subsidiary or affiliate continues to have the ability to enforce the terms of such contract as well. In essence, the effect of such authority to enforce is substantively the same as a prohibition of the counterparty to assert a specified financial condition clause against the subsidiary or affiliate. Effectively, the Proposed Regulation would make clear that the practical effect of the operation of section 210(c)(16) is similar to that of section 210(c)(13) (prohibiting counterparties from the exercise of certain rights arising out of *ipso facto* clauses) and section 210(c)(8) (prohibiting counterparties to qualified financial contracts from the exercise of certain rights arising out of walkaway clauses); counterparties are prohibited from exercising remedies under a specified financial condition clause if the statutory conditions are met.

The statute expressly states that the power to enforce contracts of a subsidiary in the circumstances described in section 210(c)(16) is vested in "[t]he Corporation, as receiver for a covered financial company or as receiver for a subsidiary of a covered financial company (including an insured depository institution)." This is captured in subparagraph (a)(3) of the Proposed Regulation. This recognizes that the preservation of value through the enforcement of subsidiary and affiliate contracts is important to all of the interconnected entities that are related to the entity in receivership. The effect of the statute is to prohibit the counterparty from terminating or exercising remedies based solely on the condition of the covered financial company. Once the essential link to the covered financial company is established via the specified financial condition clause, all of the subsidiaries of the covered financial company as well as the bridge financial company or qualified transferee share the benefit of the authority to enforce.

Definitions

The Proposed Regulation would include eight definitions: "linked," "specified financial condition clause," "support," "related assets and liabilities," "qualified transferee," "subsidiary," "affiliate," and "control."

A contract is "**linked**" to a covered financial company if it contains a specified financial condition clause naming the covered financial company as the specified company.

The term "**specified financial condition clause**" is intended to broadly capture any provision that gives any counterparty a right to terminate, accelerate or exercise default rights or remedies as a result of any action or circumstance that results in or arises out of the exercise of the orderly liquidation authority. Each aspect of the definition of the term "specified financial condition clause" should be read expansively to effectuate the statutory intent that counterparties are effectively stayed from exercising rights under such a clause to terminate contracts or exercise other remedies during a Title II resolution process if the requirements of the statute are met. Thus, a specified financial condition clause includes any clause that might be interpreted as giving rise to a termination right or other remedy due to the insolvency of the specified covered financial company that might have precipitated the appointment of the receiver, such as an act of insolvency or a downgrade in a rating from a rating agency. Likewise, the definition is broad enough to include a change in control provision that creates termination rights or other remedies upon the appointment of the FDIC as receiver or other change in control, such as the transfer of stock in the subsidiary to the bridge financial company or the sale, conversion or merger of the bridge financial company or its assets. The intent is to allow the subsidiary or affiliate contract to remain in effect despite the exercise of any or all of the authorities granted to the FDIC as receiver for a covered financial company throughout the orderly liquidation process.

Although the language of the statute refers to the counterparty's rights as "termination, liquidation or acceleration," that list of remedies is not intended to be exclusive as the overall intent of the statute is to provide the FDIC with the power it needs to preserve going-concern value of the covered financial company as long as the rights of counterparties to receive bargained-for support is respected. Accordingly, the Proposed Regulation uses the broader phrase "terminate, liquidate, accelerate or declare a default under" the contract. In effect, the specified financial condition clause is unenforceable if the statutory requirements are met. In addition, by clarifying that the link created by the specified financial condition clause may operate "directly or indirectly," the Proposed Regulation clarifies that the scope of the defined term includes contracts where the specified company under the clause may be another company or an affiliate in the corporate structure so long as the ultimate triggering event relates to the financial condition of the covered financial company or the Title II actions take with respect to that covered financial company. The term "specified company" used in the definition is consistent with terminology commonly used in such provisions in derivatives contracts to refer to the company whose financial condition is the basis for the termination right or other remedy.

Language in this definition is borrowed from sections of the Dodd-Frank Act addressing related matters, such as the enforceability of contracts of the covered financial company notwithstanding *ipso facto* clauses (section 210(c)(13)) and walkaway clauses with respect to qualified financial contracts (section 210(c)(8)(F)). The fact that this language is adapted and expanded upon should not be deemed to reflect any interpretation of the meaning or possible limitations of those sections. The broad language of this definition reflects the intent that it be read to accomplish the purpose of section 210(c)(16) to ensure that the receiver has the power to avoid precipitous terminations by counterparties of the subsidiary resulting in disorderly collapse and a loss of value to the covered financial company.

In the event a counterparty (including its affiliates) has more than one contract with the subsidiary or affiliate of the covered financial company, any contract with a cross-default provision with respect to another contract containing a specified financial condition clause also would be "linked."

The term "**support**" means to guarantee, indemnify, undertake to make any loan, advance or capital contribution, maintain the net worth of the subsidiary or affiliate, or provide other financial assistance. The proposed definition does not include other assistance that is not financial in nature, such as an undertaking to conduct specific performance. Generally, if the obligation of the counterparty to perform is linked to the financial condition of the parent, the support also would likely be financial, and other types of arrangements are beyond the scope of what was intended by the statute. We are requesting comments with respect to whether this definition is sufficiently comprehensive in the Notice of Proposed Rulemaking.

The term "**related assets and liabilities**" includes assets of the covered financial company serving as collateral securing the covered financial company's support obligation, and setoff rights or netting arrangements to which the covered financial company is subject if they are related to the covered financial company's support. It should be noted, however, that if the "support" were in the nature of a non-recourse guarantee, or an unsecured limited recourse guarantee, the related assets and liabilities would not consist of all of the assets of the covered financial company. The transfer of an unsecured guarantee or obligation to a qualified transferee would meet the requirements of the Proposed Regulation in this regard, without the transfer of any particular assets. The definition also broadly includes any liabilities of the covered financial company that directly arise out of or relate to its support of the obligations or liabilities of the subsidiary or affiliate. In some instances, this definition may be redundant with the definition of support, as a guaranty could be both a related liability or a supporting obligation. The broader definition is intended to make clear that the full range of supporting obligations and related assets and liabilities must be transferred to ensure that the counterparties are in substantially the same position as they were prior to the transfer to the qualified transferee.

It is important to note that in some situations "support" and "related assets and liabilities" are themselves qualified financial contracts. Section 210(c)(8)(D)(ii)(XII) of the Act includes "securities contracts" as qualified financial contracts, and defines securities contracts to include "any security agreement or arrangement or other credit enhancement related to any agreement or transaction referred to in this clause, including any guarantee or reimbursement obligation in connection with any agreement or transaction referred to in this clause." To the extent such support and related assets and liabilities are securities contracts or other forms of qualified financial companies, they are subject to the rules applicable to the treatment of qualified financial contracts, including the so-called all-or-none rule under section 210(c)(9).

The term "**qualified transferee**" specifically includes a bridge financial company as well as any other unrelated third parties that assume the support of the covered financial company (and all related assets and liabilities). A qualified transferee can include both the bridge financial company and a subsequent transferee; for instance, if assets and liabilities, including the support and related assets and liabilities are transferred first to a bridge financial company and then to another acquirer either prior to or upon the termination of the bridge financial company pursuant to the orderly liquidation authorities granted under Title II of the Dodd-Frank Act.

The definition of the terms "**subsidiary**" and "**affiliate**" are consistent with the definitions given to such terms in the Dodd-Frank Act. Section 2(18) of the Act, codified at 12 U.S.C. § 5301(18), provides that these terms will have the same meanings as in section 3 of the FDI Act (12 U.S.C. §1813). Under the FDI Act, the term "subsidiary" is broadly defined as "any company which is owned or controlled directly or indirectly by another company…." "Affiliate is defined by reference to the Bank Holding Company Act, 12 U.S.C. § 1841(k) as "any company that controls, is controlled by, or is under common control with another company."

The statute refers to the definition of "**control**" provided in the FDI Act, which in turn, refers to the definition provided in the Bank Holding Company Act, 12 U.S.C. 1841(a). The Proposed Regulation streamlines these cross references, clarifies that certain provisions of the Bank Holding Company Act definition are inapplicable in this context, and adopts the flexible approach of conforming to the relevant provisions of the Bank Holding Company Act and regulations promulgated thereunder at the time of appointment of the receiver.

In effect, the Proposed Regulation would define "control" to include a company that directly or indirectly or acting through one or more persons owns, controls, or has the power to vote 25 percent or more of any class of voting securities of the company. Under the Proposed Regulation, a company may also exercise "control" if that company controls in any manner the election of a majority of the directors or trustees of the company. This definition is consistent with the Bank Holding Company Act definition as it has been reflected in regulations promulgated under that section, including Regulation W (12 C.F.R. 223.3(g)) and Regulation Y (12 C.F.R. 225.2(e)).

Section 2 of the Dodd-Frank Act expressly adopts the FDI Act definitions that incorporate the Bank Holding Company Act definitions "except to the extent the context otherwise requires." Parts of the Bank Holding Company Act definition of "control" are inapposite to the context of section 210(c)(16). Provisions that provide for a determination of "control" made by the Federal Reserve Board of Governors pursuant to a notice and hearing are inconsistent with the expedited decision-making expressly required by section 210(c)(16) and would undermine the statutory goal of providing prompt certainty to counterparties with respect to their contractual rights and remedies.

Adequate Protection

Paragraph (c) of the Proposed Regulation describes the different ways that the Corporation may provide adequate protection in the event that it does not transfer a covered financial company's support to a qualified transferee. The definition of adequate protection is consistent with the definition in section 361 of the Bankruptcy Code, which also formed the basis of the definition of adequate protection in the context of treatment of certain secured creditors under 12 C.F.R. 380.52. Adequate protection may include any of the following: (1) making a cash payment or periodic cash payments to the counterparties of the contract to the extent that the failure to cause the assignment and assumption of the covered financial company's support and related assets and liabilities causes a loss to the counterparties; (2) providing to the counterparties a guaranty, issued by the Corporation as receiver for the covered financial company, of the obligations of the subsidiary or affiliate of the covered financial company under the contract; or (3) providing relief that will result in the realization by the claimant of the indubitable equivalent of the covered financial company's support. The phrase "indubitable equivalent," which appears in 361 of the Bankruptcy Code, is intended to have a meaning consistent with its meaning in bankruptcy, in conformance with section 209 of the Dodd-

Frank Act that requires rules promulgated under Title II of the Act to be "harmonized" with the Bankruptcy Code where possible.

It is important to note that although a guaranty of the Corporation as receiver is expressly included among the enumerated examples of "adequate protection" in paragraph (c) of the Proposed Regulation, the omission of such specific reference in 12 C.F.R. 380.52 is not intended to suggest that such a guaranty would not constitute adequate protection to secured creditors under to 12 C.F.R. 380.52. The guaranty of the receiver is, in any event, the indubitable equivalent of any guaranty or support that it may replace, and the express mention of the guaranty is added only for the avoidance of any doubt. Any such guaranty issued in accordance with the Act would be backed by the assets of the covered financial company, and also would be supported by the orderly liquidation fund and the authority of the Corporation as manager of the orderly liquidation fund to assess the financial industry pursuant to section 210(o) of the Act. Such a guaranty would in all events qualify as the indubitable equivalent of any guaranty or support that it may replace. The express mention of the guarantee is added merely for the avoidance of any doubt. The NPR will request comment on whether the interpretation of "adequate protection" under Section 380.52 should be consistent with the interpretation under the Proposed Rule, and whether Section 380.52 should be amended to include the express reference to the receiver's guarantee for the sake of consistency and clarity.

Notice of Transfer or Provision of Adequate Protection

Paragraph (d) of the Proposed Regulation provides that if the Corporation as receiver transfers any support and related assets and liabilities of the covered financial company or decides to provide adequate protection in accordance with subparagraphs (a)(1) and 2, it will promptly take steps to notify contract counterparties of such transfer or provision of adequate protection. Although the statute does not contain a notice requirement, the Proposed Regulation would require that these reasonable steps be taken to provide notice in recognition of the practical reality that contract counterparties will need to know whether they may exercise remedies under a specified financial condition clause. In acknowledgement of the public's growing reliance on communication using the internet as well as the prevalence of online commerce, the Proposed Regulation provides that the Corporation may post such notice on its public website, the website of the covered financial company or the subsidiary or affiliate, or provide notice via other electronic media. While the Corporation will endeavor to provide notice in a manner reasonably calculated to provide notification to the parties in a timely manner, the provision of actual notice is not a condition precedent to enforcing such contracts. Any action by a counterparty in contravention of section 210(c)(16) will be ineffective, whether or not such counterparty had actual notice of the transfer of support or provision of adequate protection. Further, where the contract of the subsidiary or affiliate is linked to the covered financial company but not otherwise supported by the covered financial company, actual notice by the Corporation of its appointment as receiver or its intent to exercise the authority under section 210(c)(16) is not required.

CONCLUSION

The Proposed Regulation would establish the scope of the powers of the Corporation as receiver under section 210(c)(16) as well as the conditions and requirements applicable to the Corporation as receiver for a covered financial company under that section; would address requirements for notice to certain affected counterparties and would define key terms as used in section 210(c)(16) and in the Proposed Regulation.

The Office of Complex Financial Institutions recommends that the Board of Directors approve and adopt the NPR and authorize its publication in the *Federal Register* with a 60-day comment period. The General Counsel concurs in such recommendation.

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