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May 20, 2011

Via electronic submission to *www.fdic.gov/regulations/laws/federal.*

Mr. Robert Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, D.C. 20429

Re: Comment on Notice of Proposed Rulemaking regarding Orderly Liquidation Authority ("OLA") Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank")

Dear Mr. Feldman:

We appreciate the opportunity, on behalf of The Depository Trust & Clearing Corporation ("DTCC"),[1] to comment on the notice of proposed rulemaking released by the Board of Directors and published in the Federal Register of the FDIC on March 23, 2011 regarding Title II of Dodd-Frank (the "NPR").[2]

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[1] DTCC's family of companies helps automate, centralize, standardize and streamline processes that are critical to the safety and soundness of capital markets. DTCC, through its subsidiaries, provides clearing, settlement and information services for equities, corporate and municipal bonds, government and mortgage-backed securities, money market instruments and over-the-counter derivatives. DTCC's clearing subsidiaries include The Depository Trust Company, Fixed Income Clearing Corporation and National Securities Clearing Corporation. DTCC's depository provides custody and asset servicing for 3.6 million securities issues from the United States and 121 other countries and territories, valued at almost $34 trillion. In 2010, DTCC settled more than $1.66 quadrillion in securities transactions.

[2] 76 Fed. Reg. 16324 (Mar. 23, 2011).

This letter seeks to clarify the treatment of qualified financial contracts ("QFCs") under Dodd-Frank and the proposed rules, particularly as applied to clearing organizations. Like other creditors, DTCC relies on the enforceability of rights with respect to QFCs as contracts that are "safe harbored" as to closeout, netting and the exercise of remedies on collateral upon the insolvency of a counterparty. The enforceability of these safe harbors is particularly important to DTCC, because they allow the clearing organizations to immediately terminate and net any amounts owing to and from an insolvent clearing member and to crystallize exposures, which protects both the clearing organization and its members from further losses arising from market movements. Safety and soundness could be put at risk by a clearing organization's inability to undertake these actions as a result of a stay. For example, the safe harbors help ensure that a clearing organization's exposure to an insolvent clearing member does not increase post-insolvency such that it exceeds any margin posted by the insolvent party, which could impair the clearing organization's ability to perform on the contra-side, which in turn could lead to a cascade of defaults.

We urge the FDIC to clarify that, consistent with the text of Dodd-Frank and Congressional intent, the statutory provisions of Dodd-Frank regarding the treatment of QFCs govern notwithstanding any rules purportedly to the contrary. Congress has on numerous occasions recognized the importance to financial market stability of protecting counterparties to a failed financial company under QFCs as a means of containing financial contagion and protecting financial markets generally. Under the Bankruptcy Code, such counterparties are permitted to terminate such contracts immediately upon the insolvency of a counterparty, net exposures and liquidate any available collateral.[3] Under the bank insolvency provisions of the Federal Deposit Insurance Act (the "FDIA")[4] and the Orderly Liquidation Authority provisions of Dodd-Frank (the "QFC provisions"),[5] the FDIC as receiver is generally permitted to transfer the QFCs of a failed financial company to one or more solvent third parties in order to avoid such closeouts; in the absence of such a transfer, counterparties are likewise permitted to terminate, net and liquidate collateral. The provisions protecting closeout apply "notwithstanding . . . any other provision of Federal law, or the law of any State . . . ."[6] In addition, clearing organizations have certain additional rights in an insolvency under OLA.[7]

Certain rules proposed in the NPR, although not specifically stated to override the QFC provisions of OLA, do not state that they are subject to the QFC provisions, and could be

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[3] 11 U.S.C. §§ 362(b), 555, 556, 559, 560 and 561.

[4] 12 U.S.C. § 1821(e)(8)-(10).

[5] 12 U.S.C. § 5390(c)(8)-(10).

[6] 12 U.S.C. § 5390(c)(8)(A).

[7] *See, e.g.*, 12 U.S.C. § 5390(c)(8)(G).

construed to limit or condition the exercise of rights with respect to QFCs.[8] However, we believe the FDIC shares the view that the QFC provisions of Dodd-Frank govern notwithstanding any other provisions of state or federal law, including rules promulgated under Dodd-Frank. We urge the FDIC to clarify this view by adopting the following rule:

> Nothing in this Part shall modify in any way the treatment of qualified financial contracts, or the rights of clearing organizations or any other person with respect thereto, under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

* * *

We appreciate this opportunity to comment on the FDIC's notice of proposed rulemaking. If you have any questions, please do not hesitate to contact me at (212) 225-2542, Knox L. McIlwain at (212) 225-2245, Peter Petraro at (212) 225-2714, Larry E. Thompson at (212) 855-3240 or Nikki Poulos at (212) 855-7633.

Sincerely,

Seth Grosshandler

cc: Larry E. Thompson, Esq., Managing Director, DTCC General Counsel
Nikki Poulos, Esq., Managing Director, FICC General Counsel
Knox L. McIlwain, Esq.
Peter Petraro, Esq.

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[8] *E.g.*, proposed rule § 380.9 (providing standards for the avoidance of preferential transfers and fraudulent conveyances); proposed rule § 380.24 (providing that the FDIC may transfer assets free and clear of a creditor's setoff rights); proposed rule § 380.50 (requiring the FDIC to determine the amount and enforceability of a creditor's security interest); proposed rule § 380.51 (requiring FDIC consent before exercising contractual rights or remedies with respect to collateral); and proposed rules § 380.54 and § 380.55 (allowing the FDIC to sell or redeem a secured creditor's collateral). Each of these provisions should apply <u>subject to</u> the QFC provisions of Dodd-Frank.