

THE OPTIONS CLEARING CORPORATION

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Via Electronic Mail

Mr. Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street N.W.
Washington, DC 20429

Re: RIN 3064—AD73, Notice of Proposed Rulemaking Regarding Orderly Liquidation Authority of FDIC

Dear Mr. Feldman:

This letter is submitted by The Options Clearing Corporation (“OCC”) in response to the publication by the Federal Deposit Insurance Corporation (“FDIC”) of a notice of proposed rulemaking (the “Proposed Rules”)¹ to implement certain provisions of the FDIC’s authority to resolve covered financial companies (“Covered Institutions”) under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).² Among other things, the Proposed Rules would outline the process for making and adjudicating claims in the orderly liquidation of a Covered Entity, including claims priorities. As explained below, we respectfully request that the FDIC clarify in its final rule that the Proposed Rules are subject to the exceptions and limitations applicable to qualified financial contracts (“QFCs”) to the extent provided in the Dodd-Frank Act itself.

OCC Background

Founded in 1973, OCC is currently the world’s largest clearing organization for financial derivatives. OCC is the only clearing organization that is registered with the Securities and Exchange Commission (“SEC”) as a securities clearing agency pursuant to Section 17A of the Securities Exchange Act of 1934 and with the Commodity Futures Trading Commission (the “CFTC”) as a derivatives clearing organization under Section 5b of the Commodity Exchange Act. OCC clears securities options, security futures and other securities contracts subject to SEC jurisdiction, and commodity futures and commodity options subject to the CFTC’s jurisdiction. OCC clears derivatives for all nine U.S. securities options exchanges and five futures exchanges.³ OCC has always been operated as a non-profit market

¹ 76 Fed. Reg. 16324 (Mar. 23, 2011).

² Pub. L. 111-203.

³ The participating options exchanges are BATS Exchange, Inc., C2 Options Exchange, Inc., Chicago Board Options Exchange, Inc., International Securities Exchange, LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLX, Inc., Nasdaq Options Market, NYSE Amex LLC and NYSE Arca, Inc.. OCC clears futures products traded on CBOE Futures Exchange, LLC, NYSE Liffe US, NASDAQ OMX Futures Exchange and ELX Futures, LP, as well as

utility. Each year OCC returns to its clearing members the excess of clearing fees received over its operating costs plus an amount (if any) reasonably required to be retained as additional capital to support its clearing activities. OCC acts as the clearing organization for multiple exchanges, and identical option contracts traded on more than one exchange and cleared through OCC are fungible in clearing member accounts at OCC.

Comments on the Proposed Rules

OCC appreciates the efforts of the FDIC in continuing the task of implementing the Dodd-Frank Act. Title II of the Dodd-Frank Act creates a new insolvency regime for certain financial companies whose failure would pose a significant risk to the financial stability of the United States. This new orderly liquidation scheme is designed to mitigate risks to the financial system posed by the failure of significant financial entities, and to ensure that the consequences of such failure are appropriately allocated.⁴

The provisions of Title II therefore require careful consideration as the FDIC attempts to meld Bankruptcy Act and bank receivership concepts into a coherent whole that will reduce, rather than exacerbate, the systemic risks that may arise from the failure of a Covered Institution. Because the FDIC's implementing rules have the potential to dramatically affect the risks assumed by counterparties to Covered Institutions, it is critical that the FDIC be very clear in its promulgation of rules about how the rules relate to the underlying authorities provided by the Dodd-Frank Act. This is particularly true because the sequential nature of the FDIC's rulemaking efforts necessarily will result in a variety of issues being addressed at different stages of the rulemaking process, and some issues ultimately may be left solely to the statutory language. When the statute alone governs, whether on a temporary or long-term basis, the FDIC should clearly so indicate to avoid unintended confusion and disruption of critical financial markets.

Nowhere is this issue more clearly raised than in connection with the treatment of QFCs under the Proposed Rule. In enacting the Dodd-Frank Act, Congress recognized the special nature of QFCs and provided critical protections for counterparties to QFCs that are essential to the stability of financial markets. For example, the Dodd-Frank Act specifically provides that no person shall be prohibited from exercising any right to cause the termination, liquidation, or acceleration of any QFC with a Covered Institution that arises upon or after the appointment of the FDIC as receiver of the Covered Institution.⁵ Similarly, the orderly liquidation scheme under Title II does not prevent any person from exercising any right to offset or net out any termination value, payment amount, or other transfer obligation arising under one or more QFCs.⁶ Furthermore, if the FDIC fails to satisfy any margin, collateral, or settlement obligations under the rules of a clearing organization, the clearing organization has the immediate right to exercise all of its rights and remedies under its rules and applicable law with respect to any QFCs, including the right to liquidate all positions and collateral of the Covered Institution. This right cannot be stayed under the orderly liquidation procedures otherwise outlined under Title II.⁷

Although these clear and specific protections for QFCs are articulated in Title II of the Dodd-Frank Act, the term "qualified financial contract" does not appear anywhere in the Proposed Rule or in its accompanying Supplementary Information. Presumably, the failure to reference QFCs in the Proposed

security futures contracts traded on OneChicago Exchange and options on futures contracts traded on NYSE Liffe US.

⁴ See Dodd-Frank Act, § 204(a).

⁵ *Id.* at § 210(c)(8)(A).

⁶ *Id.*

⁷ *Id.* at § 210(c)(8)(G).

Rule is based on the FDIC's determination that either (i) QFCs will be addressed more specifically in a future rulemaking or (ii) QFCs are adequately addressed by the statute and do not require further elaboration at this time in the Proposed Rules. In either case, however, we urge the FDIC to expressly identify in the final rule that the rule is subject to the exceptions and limitations applicable to QFCs in the statute itself. Without such an express acknowledgement, there is a risk that financial markets or courts could be misled into thinking that the FDIC intended QFCs to be subject to the claims processes articulated in the Proposed Rules. This is because, among other things, the Proposed Rules define the term "claim" very broadly using the language of the statute itself. The definition of "claim" in both the statute and the Proposed Rules means "any right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."⁸ Given this expansive definition, "claims" under the Proposed Rules could be read to include QFCs, but without cross-reference to the specific protections provided for QFCs in the statute. We are concerned that such silence might be misread as an indication that these exceptions do not apply to the Proposed Rules.

Accordingly, assuming that the FDIC does not intend to address the provisions applicable to QFCs with any greater specificity at this time, we respectfully suggest that the FDIC clarify expressly in the final rules that such rules are subject to the QFC exceptions as provided in Title II of the Dodd-Frank Act. A simple statement such as the following should suffice in this regard: "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 Proposed Rules. Please do not hesitate to contact the undersigned if any aspect of this comment is unclear.

Sincerely,



William H. Navin
Executive Vice President
And General Counsel

⁸ §201(a)(4) and Proposed 12 C.F.R. § 380.31.