The Surety & Fidelity Association of America

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May 25, 2012

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corp.
550 – 17th Street, N.W.
Washington, DC 20429

Re: Comments RIN 3064 – AD94; Enforcement of Subsidiary and Affiliate Contracts by the FDIC as Receiver of a Covered Financial Company

Dear Mr. Feldman:

The Surety & Fidelity Association of America ("SFAA") is a national trade association of companies licensed to write fidelity and surety insurance in the United States. SFAA's 449 members include the vast majority of companies providing financial institution bonds to insure banks, brokers, insurers and other financial entities. As a licensed advisory and rating organization, SFAA prepares, and files with state insurance regulators, standard form financial institution bonds and collects statistics on premiums and losses for fidelity and surety insurance. We are writing to comment on the proposed 12 CFR Part 380 implementing section 210(c)(16) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), 12 U.S.C. §5390(c)(16).

The Federal Deposit Insurance Corporation (FDIC) recognizes the value of financial institution bonds in protecting banks and other institutions against loss resulting from employee dishonesty and certain other types of fraud. Indeed, banks are required to have such bonds in place, see, for example, 12 C.F.R. §7.2013(a) and 12 C.F.R. §563.190. One of the reasons these bonds are widely available and cost-effective is that they automatically terminate upon the taking over of the insured bank by a federal or state regulator. For example, the SFAA Standard Form No. 24 Financial Institution Bond (May 2011 Ed.) provides that the Bond terminates as an entirety "immediately upon the taking over of the Insured by a receiver or other liquidator or by State or Federal officials."

Both FIRREA and the Dodd-Frank Act recognize the importance of this termination provision and exempt financial institution bonds from the general power of the FDIC to enforce contracts of the failed bank notwithstanding such ipso facto clauses. FIRREA states at 12 U.S.C. §1821(e)(13)(A):

> The conservator or receiver may enforce any contract, other than a director's or officer's liability insurance contract or a depository institution bond, entered into by the depository institution notwithstanding any provision of the contract providing for termination, default, acceleration, or exercise of rights upon, or solely by reason of, insolvency or the appointment of or the exercise of rights or powers by a conservator or receiver.

Section 210(c)(13) of the Dodd-Frank Act, 12 U.S.C. §5390(c)(13), exempts financial institution bonds from both the power of the FDIC to enforce contracts of the covered financial company and the bar on termination of contracts to which the covered financial institution is a party.

SFAA recognizes that the proposed regulation implementing section 210(c)(16) of the Dodd-Frank Act is not intended to override FIRREA or section 210(c)(13) and void the termination provisions of financial institution bonds insuring covered financial companies. Nevertheless, given the very broad definition of "linked" in proposed §380.12(b)(1) and the common practice of a parent financial institution including its affiliates or subsidiaries as insureds under its financial institution bond, we believe the proposed regulation could have unintended consequences and ask that it be clarified by including a specific exemption for the financial institution bonds insuring such subsidiaries or affiliates.

If a covered financial company is the Insured on a financial institution bond and one or more of its affiliates or subsidiaries are also named as Insureds and the FDIC is appointed receiver for the covered financial company but not for the affiliate or subsidiary, the subsidiary or affiliate could make the following argument: (1) the bond is a contract of the subsidiary or affiliate; (2) the bond contains a specified financial condition clause because it terminates upon the taking over of the covered financial company; therefore (3) the ond is "linked" to the covered financial company; and (4) the subsidiary or affiliate can enforce the bond notwithstanding the appointment of the FDIC as receiver for the covered financial company.

To clarify that the regulation is not intended to apply to financial institution bonds of the covered financial institution, and to avoid the line of reasoning outlined above, SFAA requests that a new subparagraph (4) be added to paragraph (a) of §380.12 to import the exemption set forth in FIRREA and section 210(c)(13) as follows:

> (4) Paragraph (a)(1) of this section shall not apply to a director's or officer's liability insurance contract, a depository institution bond or a financial institution bond entered into by the covered financial company.

SFAA appreciates the opportunity to comment on the proposed regulation and would be glad to provide any other information required by the FDIC as it considers this important matter.

Sincerely yours,

Lynn M. Schubert
President