American Insurance Association

May 29, 2012

Via Electronic Mail (www.regulations.gov)

Mr. Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Re: Notice of Proposed Rulemaking: Enforcement of Subsidiary and Affiliate Contracts By the FDIC as Receiver of a Covered Financial Company (RIN 3064-AD-94)

Dear Mr. Feldman:

The American Insurance Association (AIA) appreciates the opportunity to comment to the Federal Deposit Insurance Corporation (FDIC) on its proposed rule (Proposed Rule) to implement section 210(c)(16) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act).[1] The Proposed Rule relates to the FDIC's authority under section 210(c)(16) to enforce subsidiary and affiliate contracts when the FDIC is receiver of a covered financial company.

AIA represents approximately 300 major U.S. insurance companies that provide all lines of property-casualty insurance to U.S. consumers and businesses, writing more than $117 billion annually in premiums. Our members have a strong, mutual interest in ensuring that implementation of the Dodd-Frank Act proceeds in a manner consistent with the Act's intent – particularly with respect to regulations like the Proposed Rule.

SUMMARY

The FDIC states that the Proposed Rule clarifies the authority of the FDIC as receiver to enforce contracts of subsidiaries and affiliates under section 210(c)(16). AIA believes that the Proposed Rule should not apply to contracts of a subsidiary or affiliate of a covered financial company where the subsidiary or affiliate is an insurance company. Moreover, AIA is concerned that in

[1] 77 Fed. Reg. 18127 (March 27, 2012).

certain respects, the FDIC has exceeded its authority by broadening the scope of section 210(c)(16) beyond the language of the statute.

STATUTORY AUTHORITY

Title II of the Dodd-Frank Act provides for the appointment of the FDIC as receiver of a covered financial company that poses a systemic risk to the nation's economic stability and outlines the process for the orderly resolution of a covered financial company following the FDIC's appointment as receiver. To facilitate the ability of a covered financial company to continue operations that will maximize the value of the firm's assets in an orderly liquidation, the Dodd-Frank Act authorizes the FDIC, as receiver for a covered financial company, to enforce contracts of subsidiaries or affiliates of the covered financial company, the obligations under which are guaranteed or otherwise supported by or linked to the covered financial company, notwithstanding the counterparty's 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. The FDIC may exercise this authority to enforce contracts of subsidiaries and affiliates only if:

> (i) the 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 p.m. (eastern time) on the business day following the date of appointment]; or
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> (ii) the FDIC, as receiver, provides adequate protection with respect to those obligations.[2]

Congress included these conditions in section 210(c)(16) to assure counterparties that their contractual rights to guarantees or other support from an affiliated covered financial company, including claims on collateral or other related assets, would be protected and maintained for the benefit of contractual counterparties. Thus, section 210(c)(16) requires, as a condition to the authority to enforce subsidiary or affiliate contracts that are linked to the covered financial company, that the FDIC as receiver transfer any guaranty or other support provided by the 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. As an 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 the receiver's ability to enforce the contract of the subsidiary or affiliate.

[2] Dodd-Frank Act § 210(c)(16); 12 U.S.C. § 5390(c)(16).

Section 210(c)(16) represents a careful balancing of the ability of counterparties to exercise contractual rights to terminate their agreements based upon the insolvency of a covered financial company and the goal of an orderly liquidation of a covered financial company by preserving the going-concern value of subsidiaries and affiliates of the covered financial company for the benefit of their parents in receivership.

COMMENTS ON PROPOSED RULE

a. The Proposed Rule Should Not Apply to Contracts of Insurance Company Subsidiaries and Affiliates

The FDIC proposes to apply the Proposed Rule to contracts of all subsidiaries and affiliates that are supported by or linked to the covered financial company. As the FDIC is aware, the orderly liquidation provisions of Title II of the Dodd-Frank Act treat insurance companies quite differently than other financial companies. For example, section 201 of the Dodd-Frank Act provides that the term "financial company" means a company that is a subsidiary of a bank holding company or a nonbank financial company supervised by the Board <u>other than a subsidiary that is an insured depository institution or an insurance company</u>.[3]

Section 203(e) provides that if an insurance company is a covered financial company, or a subsidiary or affiliate of a covered company, the liquidation or rehabilitation of the insurance company and any subsidiary or affiliate of such company that itself is not an insurance company, is to be conducted as provided under applicable state law. As a result, the FDIC would ordinarily not play a role as receiver. Moreover, even in the unlikely event that the FDIC were to stand in the shoes of the state authority and place the covered financial company into receivership, the liquidation of the insurance company is to proceed under state law.[4]

AIA believes that the Dodd-Frank Act orderly liquidation provisions recognize the primacy of state supervision and regulation of insurance companies. Under Title II, a "financial company" does not include a company that is a subsidiary of a bank holding company or a nonbank financial company supervised by the Board that is an insurance company.[5] Further, by ensuring that state law will control a receivership involving an insurance company, Congress intended that the orderly liquidation provisions of Title II should not apply to insurance companies. Congress did not authorize the FDIC to become entangled in the activities of insurance companies because such involvement could interfere with, and disrupt the state supervisory process. In this regard, the Dodd-Frank Act recognizes that the primary financial regulatory agency for insurers is the state insurance authority of the state in which an insurance company is domiciled.[6] AIA believes that the FDIC should abide by the over-arching principle established by

[3] Dodd-Frank Act § 201(a)(11). 12 U.S.C. § 5381(a)(11).
[4] Dodd-Frank Act § 203(e)(3). 12 U.S.C. § 5383(e)(3).
[5] Dodd-Frank Act § 201(a)(11)(B)(iii). 12 U.S.C. § 5381(a)(11)(B)(iii).
[6] Dodd-Frank Act § 2(12)(D). 12 U.S.C. § 5301(12)(D).

the Dodd-Frank Act by avoiding involving itself with the activities of insurance companies. To conclude otherwise runs the risk of the FDIC interfering with and disrupting the activities of insurers and possibly conflicting with the orderly supervision of an insurance company by the state insurance authority. Accordingly, AIA recommends that the FDIC state in the final rule that it will not apply section 210(c)(16) to enforce a contract of an affiliate or subsidiary of a covered financial company in receivership if the affiliate or subsidiary is an insurance company.

b. Linked Contracts

The Proposed Rule purports to identify certain contracts that are "linked to" the covered financial company within the meaning of the statute, as well as contracts that also are "supported by" the covered financial company. The FDIC suggests that under the statute, a contract is "linked to" a covered financial company if it contains a provision that provides a contractual right to cause the termination, liquidation or acceleration of such contract based solely on the insolvency, financial condition, or receivership of the covered financial company. The Proposed Rule refers to this type of provision as a "specified financial condition clause."

The FDIC states that in circumstances where a contract of a subsidiary or affiliate is linked to the financial condition of the parent company via a ''specified financial condition clause,'' but where the obligations of the subsidiary or affiliate are not supported by the covered financial company through guarantees or similar supporting obligations, the requirement to transfer support and related assets or provide adequate protection does not apply.

According to the FDIC, the existence of a specified financial condition clause does not constitute a support obligation by the covered financial company, and the Proposed Rule would make it clear that the subsidiary contract remains enforceable without any requirement to effectively create new support where none originally existed. The FDIC believes that this proposal is consistent with the effect of section 210(c)(13), which provides that ipso facto clauses in contracts of the covered financial company are unenforceable, and section 210(c)(8), which provides that walkaway clauses in qualified financial contracts of the covered financial company are unenforceable. In the case of those types of contractual provisions, the FDIC states that because there is no specified entity required to provide support, the concept of alternate support or adequate protection is inapplicable.

AIA disagrees with the FDIC's rationale and analysis. AIA believes that the FDIC's proposed definition of "linked contracts" is overly broad and is not supported by the language of section 210(c)(16). As the FDIC recognizes, section 210(c)(16) represents a balancing of the need to protect contractual rights of counterparties and the goal of promoting the orderly liquidation of a covered financial company. Section 210(c)(16) provides the FDIC with power to enforce contracts of subsidiaries and affiliates of a covered financial company only where the obligation to the counterparty is guaranteed or supported, or the FDIC otherwise provides adequate protection to the counterparty. The FDIC's reading of the provision ignores the requirement that assets and liabilities associated with obligations guaranteed or supported by the covered financial company are to be transferred to and assumed by a bridge financial company or other third party. Moreover, AIA believes that it is incorrect for the FDIC to rely upon section 210(c)(13), which relates to ipso facto clauses in contracts of the covered financial company and 210(c)(8), which provides that walkaway clauses in qualified financial contracts of the covered financial company are unenforceable. Those provisions relate exclusively to contracts of the covered financial company. If Congress intended that they should apply to subsidiaries and affiliates, it would have so stated in section 210(c)(16). Section 210(c)(16) is carefully crafted to apply solely to the circumstances described therein. The FDIC's attempt to expand its scope by contending that its action is "consistent" with other provisions of the Dodd-Frank Act is inappropriate.

Accordingly, the FDIC's view that the mere existence of a provision that provides a contractual right to cause the termination, liquidation or acceleration of such contract based solely on the insolvency, financial condition, or receivership of the covered financial company is sufficient linkage to trigger the FDIC's ability to enforce the contract of a subsidiary or an affiliate is clearly erroneous. Therefore, AIA urges the FDIC to not define a contract as linked to a covered financial company if it contains a "specified financial condition clause."

c. Definition of "Support"

The Proposed Rule's definition of "support" does not include assistance that is not financial in nature, such as an undertaking to conduct specific performance. The FDIC indicates that 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. The FDIC concludes, therefore, that other types of arrangements are beyond the scope of what was intended by the statute.

AIA disagrees with the FDIC's conclusion. There is nothing in the language of section 210(c)(16) or in the legislative history of the provision to suggest that the term "support" includes only financial obligations. Indeed, parties may bargain for specific performance as a means of assuring completion of a contract. We see no reason for limiting the clear language of the section to financial contracts. Accordingly, AIA recommends that the definition of "support" in the Proposed Rule not be limited to assistance that is financial in nature.

d. Authority to Enforce Contracts

The Proposed Rule provides that a transferee such as a bridge financial company or third-party acquirer, as well as the FDIC as receiver, and the subsidiary or affiliate, would have the authority to enforce linked contracts under section 210(c)(16). The FDIC states that 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. Again, AIA believes that the FDIC is expanding the scope of the Proposed Rule well beyond the language of the statute. The statute expressly authorizes only the FDIC to enforce contracts of subsidiaries and affiliates of covered financial companies. There is nothing in the language of the provision that authorizes a transferee such as a bridge financial company or third-party acquirer to enforce the contract. The reference in section 210(c)(16) to such parties relates solely to the transfer to and assumption of the guaranty or other support. There is no mention of empowering the transferee or third-party acquirer to enforce the contract to which the guaranty or other support relate. Accordingly, AIA recommends that the FDIC not authorize a transferee such as a bridge financial company or third-party acquirer to enforce linked contracts under section 210(c)(16).

e. Notice of Transfer

The Proposed Rule provides that if the FDIC transfers any support and related assets and liabilities of the covered financial company or decides to provide adequate protection, it will take steps to notify counterparties of such transfer or provision of adequate protection, in recognition of the fact that counterparties need to know whether they may exercise their remedies under the contract. The Proposed Rule provides that the FDIC 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. The FDIC also states that while it will endeavor to provide notice in a manner reasonably calculated to provide timely notification to the parties, the provision of actual notice is not a condition precedent to enforcing such contracts.

AIA believes that while notice posted on a website may be helpful in providing information to counterparties, such notice should not substitute for providing actual written notice to counterparties. Navigation of websites is often difficult. Moreover, counterparties may not be aware that the parent financial company has been placed into receivership by the FDIC. Given the significance and impact of the FDIC's action to enforce contracts of the company's subsidiaries and affiliates, AIA believes that the FDIC should adopt a notice provision that ensures that the FDIC or the subsidiary or affiliates will provide prompt written notice to the counterparty if the FDIC determines to enforce the contract.

CONCLUSION

AIA appreciates the opportunity to provide comments on the Proposed Rule.

Sincerely,

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