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FDIC Proposes Derivatives Recordkeeping Rule for Troubled Institutions

On July 28, 2008, the Federal Deposit Insurance Corporation ("FDIC") published for comment a proposed rule that would require certain troubled depository institutions to maintain records of their qualified financial contracts ("QFCs") in order to provide the FDIC with basic information when the agency is appointed as receiver. 73 Fed. Reg. 43635. Comments on the proposed rule must be received by the FDIC by September 26, 2008.

QFCs include securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements and other agreements that the FDIC so defines by regulation or order. Balancing the needs of the capital markets and of the FDIC as receiver, the Federal Deposit Insurance Act gives the FDIC only until 5 p.m. (Eastern Time) on the business day following the date on which it is appointed as receiver to retain, transfer or as a practical matter repudiate a failed institution's QFCs. Thereafter, the counterparties of a failed institution may exercise any contractual right they may have. In the interest of preserving netting arrangements, if the FDIC decides as receiver or conservator to transfer or repudiate a QFC, it must take the same action simultaneously with respect to all other QFCs between the failed institution and the counterparty or its affiliates.

The proposed rule would ensure that basic information about a failed institution's QFCs is available to the receiver or conservator when it is appointed. The recordkeeping requirements would apply only to banks and thrifts that are considered to be in "troubled condition," based on a proposed expanded definition of that term. The FDIC estimates that 150 institutions would fall into this category. The required records would cover three general areas: (i) position data regarding the rights and obligations of the institution under each QFC; (ii) counterparty data regarding the institution's netted and aggregate positions; and (iii) additional contract information. An institution in troubled condition must demonstrate its ability to produce the information immediately at the close of processing for a business day, for a period of time determined by the FDIC.

The restrictions imposed on a receiver or conservator with regard to QFCs are extremely important to financial institutions that access the capital markets. These restrictions are exceptions to the general authority of the FDIC to repudiate contracts at a more leisurely pace, and they promote access to the capital markets, help banks and thrifts to maintain liquidity and enable them to provide financial intermediary services to their customers. The FDIC noted that the absence of adequate information regarding QFCs increases the likelihood that QFCs will be left in a receivership or repudiated instead of transferred to another financial institution, and that additional information would assist the FDIC in carrying out its responsibilities.

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Interested parties should carefully consider the implications of the proposed rule for both depository institutions and QFC counterparties. Depository institutions, in particular, may wish to respond to the FDIC's request for comments regarding the scope of institutions covered, and to consider the implications of applying a single recordkeeping requirement to all institutions regardless of their size or their volume of QFC activity.

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