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Alert Memo

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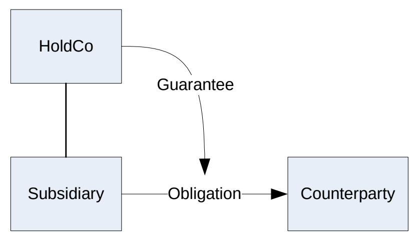
FDIC Finalizes Rule on Nullification of Subsidiary and Affiliate Cross-Defaults under OLA

On October 9, 2012, the Federal Deposit Insurance Corporation ("FDIC") finalized its rule (the "Final Rule")[1] implementing section 210(c)(16) of the Orderly Liquidation Authority provisions of the Dodd-Frank Act ("OLA"),[2] relating to the treatment of certain affiliate and subsidiary cross-defaults under OLA. The Final Rule is substantially similar to the rule proposed by the FDIC on March 20, 2012 (the "Proposed Rule").[3]



Once a company enters receivership under OLA (such company, a "covered financial company" or "CFC"), section 210(c)(16) and the Final Rule address when counterparties to contracts with subsidiaries or affiliates of the CFC may exercise contractual rights to declare a default, accelerate, terminate or take other actions based on the insolvency, financial condition or receivership of the CFC. Both the statute and the Final Rule are aimed at stabilizing a financial group during its resolution by preventing the exercise of cross-default clauses in contracts with potentially viable subsidiaries or affiliates. For example, these provisions address the situation where a subsidiary's obligations are guaranteed by its parent and can be accelerated and terminated upon the parent's insolvency. Absent section 210(c)(16) and the Final Rule making these cross-defaults unenforceable, the resulting cascade of failures would likely result in the unraveling of the financial group and in multiple subsidiaries entering insolvency proceedings, increasing the expense, complexity and potential systemic effects of such a resolution. Neither the statute nor the Final Rule interfere with a counterparty's ability to terminate or exercise other remedies if a subsidiary or affiliate itself enters insolvency proceedings, fails to perform or make a payment as required under the applicable contract.

Under the Final Rule, contracts between subsidiaries and affiliates of the CFC and third parties that are "linked to" or "supported by" the CFC cannot be terminated based on a "specified financial condition clause", as defined in the Final Rule. For example, if an ISDA Master Agreement with a subsidiary of the CFC identifies the CFC as a

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1 Notice of Final Rulemaking, Enforcement of Subsidiary and Affiliate Contracts by the FDIC as Receiver of a Covered Financial Company, 77 Fed. Reg. 200, October 16, 2012, 63205.

2 Dodd-Frank Act § 210(c)(16), codified at 12 U.S.C. § 5390(c)(16).

3 Notice of Proposed Rulemaking, Enforcement of Subsidiary and Affiliate Contracts by the FDIC as Receiver of a Covered Financial Company, 77 Fed. Reg. 59, March 27, 2012, 18127.

"Specified Entity" or "Credit Support Provider," the counterparty would not be able to close out based on a "Bankruptcy" Event of Default under Section 5(a)(vii) with respect to the CFC. If such contracts are guaranteed or otherwise "supported by" the CFC (*e.g.*, the CFC is a "Credit Support Provider" and not just a "Specified Entity"), the FDIC must do either of the following within one business day after the FDIC's appointment as receiver of the CFC in order to enforce the contracts: (i) transfer the guarantee or other support to a bridge financial company or other "qualified transferee;" or (ii) otherwise provide "adequate protection." Counterparties to enforced contracts would not be able to call for additional margin or exercise other remedies based on the insolvency of the CFC, the enforcement of the contract or other actions taken by the FDIC to resolve the CFC.

Although the power to nullify cross-defaults can help make a resolution more orderly and effective, it deprives creditors of bargained-for protections and has the potential to leave counterparties worse off than if the financial company had been resolved under ordinary insolvency law. Both the statute and Final Rule attempt to strike a balance between these two competing goals by providing certain protections for counterparties to contracts enforced under section 210(c)(16).

Section 210(c)(16) and the Final Rule

Under OLA, the FDIC may be appointed as receiver for a financial company if its failure under otherwise applicable insolvency law would pose significant risks to U.S. financial stability, including bank holding companies, broker-dealers, and other non-bank affiliates and subsidiaries. Among other powers, the receiver may transfer assets and liabilities of the CFC to a third-party acquirer or a specially chartered bridge institution, notwithstanding any contractual prohibitions or consent requirements. As under the Federal Deposit Insurance Act bank insolvency provisions on which OLA was based, provisions in contracts with the CFC that allow the counterparty to terminate the contract based on the insolvency of the CFC, so-called *ipso facto* clauses, are generally unenforceable.[4] However, the contractual termination rights of counterparties under certain swaps, repos, securities contracts, forward contracts and commodity contracts ("qualified financial contracts" or "QFCs") are specifically preserved or "safe-harbored" and may be exercised if the QFCs are not transferred to a third-party acquirer or bridge institution within one business day after the appointment of the FDIC as receiver for the CFC.[5]

Section 210(c)(16) extends certain of the limitations on the exercise of *ipso facto* clauses to contracts between subsidiaries and affiliates of the CFC that may not themselves be the subject of insolvency proceedings and third parties. This provision gives

4 Dodd-Frank Act § 210(c)(13)(C), codified at 12 U.S.C. § 5390(c)(13)(C).

5 Dodd-Frank Act § 210(c)(8)–(11), codified at 12 U.S.C. § 5390(c)(8)–(11). See Section III of our July 9, 2010 Alert Memorandum SUMMARY OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT (available at http://www.cgsh.com/summary_of_the_dodd-frank_wall_street_reform_and_consumer_protection_act/) or our OUTLINE OF THE TREATMENT OF FINANCIAL CONTRACTS UNDER U.S. INSOLVENCY LAWS (available from your regular Cleary Gottlieb contacts) for more on the OLA safe harbor regime applicable to QFCs.

the FDIC, as receiver for a CFC or a subsidiary of a CFC (including an insured depository institution), the power to enforce subsidiary and affiliate contracts that are “linked to” or “supported by” the CFC, notwithstanding any contractual rights that a counterparty may have to terminate such contracts based on the insolvency or financial condition of the CFC. However, under the statute, the receiver can enforce these contracts only if all related guarantees or other credit support are transferred to a third-party acquirer or bridge institution by 5:00 p.m. on the business day following the appointment of the FDIC as receiver for the CFC (the “statutory deadline,” which is the same deadline for transferring QFCs before counterparties may exercise termination rights) or the receiver otherwise provides adequate protection.

The Final Rule would enforce all contracts of all subsidiaries and affiliates of the CFC that are “linked to” or “supported by” the CFC, in effect exercising by rule the receiver’s statutory authority to enforce such contracts.[6] The enforcement of contracts that are “supported by” the CFC would be effective only if the FDIC also transfers the relevant credit-support obligations to a “qualified transferee” (a third party acquirer or bridge institution that is not subject to insolvency proceedings) by the statutory deadline or provides adequate protection. As described below, the Final Rule clarifies the scope of contracts that are “linked to” or “supported by” a CFC and defines “adequate protection” for purposes of section 210(c)(16).

The ability to make cross-defaults unenforceable is one of the key powers that make possible the FDIC’s single-receivership resolution strategy under OLA.[7] Under this strategy, the FDIC would place only the topmost holding company of a failing financial group into receivership under OLA. Using its power to transfer assets and liabilities of the CFC, the FDIC would then transfer the equity in the viable subsidiaries and certain senior creditor claims against the CFC to a bridge holding company. Liquidity and other support for the viable subsidiary operating companies would be provided by the FDIC drawing on funds from the Orderly Liquidation Fund. The operations of the bridge holding company could then be turned over to private ownership by creating a new company, which would be capitalized by issuing stock to left-behind creditors in satisfaction of their claims or to new investors (or to some combination thereof).[8]

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6 The Final Rule defines “subsidiary” and “affiliate” by reference to certain prongs of the Bank Holding Company Act definition of “control.” This definition includes direct or indirect ownership of, or the power to vote, 25 percent or more of any class of securities of a company or the ability to control the election of a majority of the directors of a company.

7 See, *e.g.*, the FDIC’s description of this strategy presented at the January 25, 2012 meeting of the FDIC Systemic Resolution Advisory Committee, available at http://www.fdic.gov/about/srac/2012/2012-01-25_resolution-strategy.pdf.

8 A variety of approaches have been discussed for managing this transition from a bridge financial company in resolution to a stand-alone public company, including issuing stock of the bridge to the public or left-behind creditors and simultaneously converting the charter of the bridge to that of a bank holding company under Dodd-Frank Act § 210(h)(14)(B) or, alternatively, transferring the assets of the bridge to, or merging the bridge into, a separately chartered bank holding company and issuing stock of this new holding

When Contracts Are "Linked to" a CFC

Under the Final Rule, a contract is "linked to" a CFC if it contains a "specified financial condition clause," which is any provision that grants a counterparty the right to close out or take other specified actions under the contract based on certain enumerated conditions related to the insolvency, financial condition or resolution of the CFC. The specified actions within the scope of the definition are the rights to:

(a) Terminate, accelerate, liquidate or exercise any other remedy under any contract of the subsidiary or affiliate;

(b) Obtain possession or exercise control over any property of the subsidiary or affiliate; or

(c) Affect any contractual rights of the subsidiary or affiliate.

These actions cannot be taken if the authority to do so is based on, or arises by reason of, any of the following conditions:

(i) Changes in the financial condition or insolvency of the CFC;

(ii) The appointment of the FDIC as receiver for the CFC and actions incidental to such appointment, such as regulators' recommendations that the appointment be made;

(iii) The exercise by the FDIC as receiver of powers under OLA;

(iv) The transfer of assets or liabilities of the CFC to a qualified transferee;

(v) Other actions taken by the FDIC as receiver to liquidate the CFC;

(vi) Actions taken by the FDIC as receiver to operate and terminate a bridge institution, including merging, dissolving or converting the charter of the bridge institution; or

(vii) The transfer of assets of, or interests in, a transferee bridge institution or its successor in full or partial satisfaction of creditors' claims against the CFC.[9]

The preamble explains that the term "specified financial condition clause" is intended to cover "any action or circumstance that results in or arises out of the exercise of"

company to the public. See Dodd-Frank Act § 210(h)(5)(B) addressing transfers of assets and Dodd-Frank Act § 210(5)(14)(A) addressing mergers.

9 This seventh factor was not present in the Proposed Rule, but was added to the Final Rule.

OLA. Specifically mentioned as falling within the scope of this term are ratings downgrades and changes in the control of subsidiaries due to the transfer of their stock to a bridge entity. Further, the definition is intended to address indirect linkages to the CFC: rights triggered by the default of another entity within the corporate structure may also be “linked to” the CFC if the change in financial condition or insolvency of the CFC was the “ultimate triggering event” giving rise to such right. Despite its breadth, the preamble confirms that the Final Rule does not interfere with a counterparty’s ability to exercise contractual rights premised on the CFC subsidiary’s or affiliate’s payment or performance defaults.

As in the FDIC’s Proposed Rule, the definition of “specified financial condition clause” significantly expands the FDIC’s powers beyond the specific terms of section 210(c)(16). First, the rights of counterparties affected by the Final Rule go beyond those addressed by the statute. Section 210(c)(16) addresses only rights to terminate, liquidate or accelerate contracts, while the Final Rule is drafted to apply to <u>all</u> rights under contracts premised on the conditions enumerated above (and the preamble encourages that the scope of such rights be “read expansively”). In particular, the preamble notes that, despite industry criticism on this point, margin calls against a subsidiary or affiliate premised on the insolvency or financial condition (including the ratings downgrade) of the CFC would be unenforceable until the “end of the orderly liquidation process.”

Second, the linkages to the CFC under the Final Rule go beyond those identified in the statute. Section 210(c)(16) addresses only actions that are premised on the “insolvency, financial condition, or receivership” of the CFC, while the Final Rule broadens the range of actions that fall within its scope, including actions taken with respect to a bridge qualified transferee. Two of the defined “specified financial condition clause” components are of particular interest: the prohibition on triggers based on actions taken to convert the charter or merge the bridge financial company and triggers based on the transfer of assets or interests “in full or partial satisfaction of creditors’ claims.” Both provisions go beyond the terms of other provisions of OLA that allow the FDIC to transfer assets and liabilities <u>to</u> a bridge without approval by counterparties, but do not directly address transfers <u>from</u> the bridge.[10] These additions are meant, in substantial part, to address the final stage in the FDIC’s single-receivership resolution strategy under OLA and would prohibit termination or the exercise of other rights premised on the issuance of equity in the bridge or its reentry into public ownership.

Further, the ability to exercise unconditional or discretionary rights, such as where a counterparty may demand performance, terminate or otherwise exercise rights for any, or no, reason, remains unclear. In the preamble, the FDIC appears both to be attempting to give some comfort that there are situations where counterparties can exercise such rights, while at the same time seeking to narrow those cases to only those situations where the FDIC would agree that there is no linkage. So, on the one hand, the FDIC states in the preamble that rights to, *e.g.*, demand additional margin may be exercised where there are no contractual linkages to the CFC. On the other hand, the FDIC later states that

[10] See Dodd-Frank Act §§ 210(a)(1)(G)(i)(II), 210(h)(5)(D) and 210(h)(14)(B) and (C), codified at 12 U.S.C. §§ 5390(a)(1)(G)(i)(II), 5390(h)(5)(D) and 5390(h)(14)(B) and (C), respectively.

if the exercise of such rights that are "premised on the existence of a condition that is financial in nature, such as the counterparty deeming itself insecure, and if the counterparty's demand is based upon the financial condition of the [CFC], such demand would not be permitted by the Final Rule." This raises the possibility that the FDIC may inquire into whether a counterparty's exercise of discretionary rights is related to the insolvency or resolution of the CFC and, if the FDIC determines that it is, attempt to enforce the related contract under section 210(c)(16).

The FDIC acknowledges in the preamble that the Final Rule goes beyond the literal scope of the statute, but argues that the links to the CFC and prohibited actions described under the statute are not meant to be exclusive, and that this broader definition is necessary to implement the statute's purpose.

When Contracts Are "Supported by" a CFC

A contract is "supported by" a CFC if the CFC undertakes any of the following for the purpose of supporting the obligations of a subsidiary or affiliate for the benefit of its creditors:

- To "guarantee, indemnify, undertake to make any loan or advance to or on behalf of the subsidiary or affiliate";
- To "undertake to make capital contributions to the subsidiary or affiliate"; or
- To "be contractually obligated to provide any other financial assistance to the subsidiary or affiliate."

The preamble clarifies that nonfinancial support, such as an undertaking to conduct specific performance, does not constitute "support" under the Final Rule.

Contracts "Linked to" a CFC Are Enforced Automatically

The Final Rule provides that all contracts of subsidiaries and affiliates of the CFC that are "linked to" the CFC "remain in full force and effect" and that counterparties may not exercise rights under any "specified financial condition clause." This provision applies to all contracts of subsidiaries and affiliates of the CFC and is not limited to financial contracts.

Under the Final Rule, contracts that are "linked to," but not otherwise guaranteed or supported by, the CFC remain in place and any cross-default rights contained in the contracts are unenforceable without any further action on the part of the FDIC. As described above, this would mean that a counterparty to an ISDA Master Agreement with a subsidiary or affiliate of the CFC that identifies the CFC as a "Specified Entity" would not be able to close out based on a "Bankruptcy" Event of Default under Section 5(a)(vii) with respect to the CFC.

This aspect of the Final Rule arguably goes beyond the scope of section 210(c)(16), which, by its terms, requires either the transfer of related credit support or the provision of adequate protection in order to enforce a contract of an affiliate or subsidiary.[11] In the preamble, the FDIC argues that the second prong of section 210(c)(16), which addresses adequate protection, is limited in its applicability by the scope of the first prong, which covers the transfer of credit support. Because the first prong addresses only contracts supported by the CFC, the FDIC argues, the second prong must similarly address only contracts supported by the CFC.[12] The FDIC further argues that requiring adequate protection for contracts merely "linked to" but not "supported by" the CFC "might serve to create a windfall for counterparties of subsidiaries or affiliates by requiring the creation of support when none originally existed." This contention ignores alternative means of providing adequate protection that were suggested by industry in a comment letter.[13]

Enforcing Contracts "Supported by" the CFC by Transferring Credit Support

In order to enforce contracts of a subsidiary or affiliate that are "linked to" and "supported by" a CFC, the FDIC must either transfer all such credit support to a qualified transferee or otherwise provide "adequate protection" by the statutory deadline.

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[11] (16) ENFORCEMENT OF CONTRACTS GUARANTEED BY THE COVERED FINANCIAL COMPANY—

(A) IN GENERAL—The Corporation, as receiver for a covered financial company or as receiver for a subsidiary of a covered financial company (including an insured depository institution) shall have the power 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 any 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, if—

(i) such 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) within the same period of time as the Corporation is entitled to transfer the qualified financial contracts of such covered financial company; or

(ii) the Corporation, as receiver, otherwise provides adequate protection with respect to such obligations.

Dodd-Frank Act § 210(c)(16), codified at 12 U.S.C. § 5390(c)(16) (emphasis added).

[12] "If clause (ii) were construed to apply to other linked contracts [*i.e.*, those contracts that are not also "supported by" the CFC], clause (ii) would be the only option for such contracts and would not work consistently with clause (i)." Preamble to the Final Rule, p. 11. The FDIC does not clarify why the availability of only a single option for protecting the interests of counterparties to enforced contracts that are merely "linked to" but not "supported by" the CFC should relieve the FDIC of its obligation to provide such protection.

[13] See the letter submitted by The Clearing House, The Financial Services Roundtable and the Securities Industry and Financial Markets Association, dated May 29, 2012, at page 4 (available at http://fdic.gov/regulations/laws/federal/2012/2012-ad94-c_04.PDF).

Such credit-support obligations must be transferred together with all "related assets and liabilities," including all related collateral, rights of offset and rights under master netting agreements. The preamble states that, with respect to unsecured guarantees, the transfer of the guarantee alone is sufficient. The Final Rule requires that the FDIC must provide notice of the transfer by the statutory deadline to counterparties, which may be made by a posting on the FDIC's website or the website of the CFC.

Enforcing Contracts "Supported by" the CFC by Providing "Adequate Protection"

Contracts "supported by" a CFC may also be enforced by providing "adequate protection," either in the alternative to transferring any related support or in combination with a partial transfer of such support. Under the Final Rule, "adequate protection" includes any of the following:

- Making payment or periodic payments to counterparties of enforced contracts to the extent of any losses caused by the failure to transfer related support;

- Provision by the FDIC as receiver of a guarantee of the obligations of subsidiaries or affiliates; or

- Provision of relief that would result in realization by the counterparty to the enforced contract of the "indubitable equivalent" of the CFC's support.

The preamble describes this definition as consistent with the definition of "adequate protection" under Section 361 of the Bankruptcy Code and notes in particular that "indubitable equivalent" should be read as having a meaning consistent with its use and application under the Bankruptcy Code. However, under the Bankruptcy Code, these terms are applied in the context of secured obligations, whereas here they are applied in the context of potentially unsecured credit-support obligations. Thus, any guidance on the application of these terms will come by analogy to, rather than direct application of, Bankruptcy Code precedents. Although the FDIC recognizes that treatment of these terms varies from jurisdiction to jurisdiction and from case to case, leaving the ultimate scope of these terms somewhat ambiguous, the FDIC determined that there was sufficient precedent available to guide counterparties and declined to provide further clarification of these definitions.

In the preamble to the Final Rule, the FDIC discusses the functional difference between the first and second prongs of the definition of "adequate protection" in response to comment letters requesting clarification on this issue. The commitment by the FDIC to make a payment or periodic payments in respect of an obligation would appear to be the functional equivalent to a guarantee. The FDIC explained that the option to provide cash payments "was included for cases where a full guaranty by the receiver would provide a disproportionate benefit to a counterparty" or to address other situations in which the risk of loss to the counterparty from the failure to transfer in full the CFC's support of the obligation might be increased, but still "limited in nature." For example, the preamble describes that the FDIC might prefer to use cash payments in circumstances in which the counterparty benefited from a limited guarantee or where a portion of the collateral supporting the obligation was not transferred to a bridge or successor institution.

The scenarios described in the preamble to the Final Rule raise concerns about determining when the FDIC has complied with the requirements of section 210(c)(16) and the Final Rule, and when counterparties of subsidiaries or affiliates may exercise cross-defaults because of its failure to do so. Under the Final Rule, both the transfer of credit support and the provision of "adequate protection" are subject to the statutory deadline. Clearly, a timely transfer of only part of the credit support for an obligation of a subsidiary or affiliate would be insufficient grounds by itself for the exercise of power under section 210(c)(16). However, a commitment by the FDIC to provide cash payments as necessary to satisfy or support the obligations of the subsidiary or affiliate would appear to be in the nature of a guarantee, satisfying the second prong of "adequate protection" rather than the first. In the absence of such a commitment or guarantee (or the satisfaction of the "indubitable equivalent" prong), it would appear that the counterparty would be entitled to exercise cross-default rights after the statutory deadline because the FDIC failed to satisfy the requirements of the Final Rule. It would seem inconsistent with the Final Rule's notice provision for the FDIC to be able to enforce contracts under section 210(c)(16) based merely on its unannounced intent to provide adequate protection in the form of cash payments under the first prong of the definition of "adequate protection." Further discussions with the FDIC may help to clarify the manner in which it intends to be able to provide this form of "adequate protection" and the timing of its provision.

The Final Rule does not provide an expedited means to challenge the FDIC's subjective determination that a counterparty of a subsidiary or affiliate of a CFC has received "adequate protection." The preamble states that immediate challenges would subject the FDIC as receiver to delay, which would be inconsistent with the intent of the statute and the FDIC's need to act swiftly to resolve the CFC. It remains unclear whether or how a counterparty whose contract with a subsidiary or affiliate of a CFC has been enforced may challenge such enforcement or a determination that "adequate protection" has been provided. In the context of other OLA rules, the FDIC has indicated that the only avenue for challenging determinations of the FDIC as receiver is by judicial appeal of the FDIC's final determination of a claim. However, in this situation, it is not entirely clear that a counterparty to a subsidiary or affiliate of a CFC may even file a claim against the CFC (*e.g.*, in respect of contracts "linked to," but not "supported by," the CFC, or where a counterparty merely benefited from, but was not party to, a CFC's capital contribution obligation to its subsidiary or affiliate and is arguably not a creditor of the CFC).

Concerns Remain about Cherry-Picking under Section 210(c)(16)

The application of section 210(c)(16) powers under the Final Rule in the context of a complex group of financial companies raises a number of concerns for creditors. In particular, little guidance is provided on the circumstances under which the FDIC would choose to exercise its power to nullify cross-defaults in contracts "supported by" the CFC. Further, there is no limitation under either the statute or the Final Rule on the FDIC's ability to selectively apply this power to "cherry-pick" entities, obligations or counterparties. Under certain circumstances, the application of the Final Rule could impair creditors' setoff rights, such as where a counterparty to a subsidiary or affiliate has both contracts that are merely "linked to" the CFC, and therefore automatically enforced, and contracts that are "supported by" the CFC, and the FDIC chooses not to transfer the credit support with respect to the latter.

Further consideration, both by industry and the FDIC, should be given to the impact on counterparties and markets of the selective application of this power, including the enforcement of some contracts of a subsidiary, but not others, or the enforcement of the contracts of some counterparties of a subsidiary, but not the contracts of other counterparties of the subsidiary. These issues are made all the more complex when the power to enforce contracts is exercised in respect of QFCs and the all-or-none anti-cherry-picking rules must be applied with respect to the CFC. At the very least, it would seem appropriate to apply the same all-or-none anti-cherry-picking rules to the enforcement of QFCs of subsidiaries or affiliates of the CFC in cases in which some QFCs are "supported by" the CFC but others are merely "linked to" the CFC. Notwithstanding industry requests for the FDIC to protect counterparties' setoff rights and to clarify cherry-picking issues, neither the provisions of, nor the preamble to, the Final Rule substantively address these issues.

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Please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under "Banking and Financial Institutions" or "Bankruptcy and Restructuring" in the "Practices" section of our website (http://www.cgsh.com) if you have any questions.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

Office Locations

NEW YORK
One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

WASHINGTON
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

PARIS
12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

BRUSSELS
Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

LONDON
City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

MOSCOW
Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

FRANKFURT
Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

COLOGNE
Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

ROME
Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

MILAN
Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

HONG KONG
Cleary Gottlieb Steen & Hamilton (Hong Kong)
Bank of China Tower, 39th Floor
One Garden Road
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

BEIJING
Twin Towers – West (23rd Floor)
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
T: +86 10 5920 1000
F: +86 10 5879 3902

BUENOS AIRES
CGSH International Legal Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

SÃO PAULO
Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP Brazil 04551-060
T: +55 11 2196 7200
F: +55 11 2196 7299

ABU DHABI
Al Odaid Tower
Office 1105, 11th Floor
Airport Road; PO Box 128161
Abu Dhabi, United Arab Emirates
T: +971 2 414 6628
F: +971 2 414 6600

SEOUL
19F, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 100-210, Korea
T:+82 2 6353 8000
F:+82 2 6353 8099