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August 13, 2012

Robert E. Feldman
Executive Secretary
Attention: Comments/Legal ESS
Federal Deposit Insurance Corporation
550 17th Street NW.,
Washington, DC 20429

Re: Supplemental Notice of Proposed Rulemaking Regarding to Amend the Definition of "Predominantly Engaged in Financial Activities" (RIN 3064-AD 73)

Dear Mr. Feldman:

Better Markets, Inc.[1] appreciates the opportunity to comment on matters identified in the above-captioned Supplemental Notice of Proposed Rulemaking of the Federal Deposit Insurance Corporation ("FDIC").

In March 2011 the Federal Deposit Insurance Corporation published a Notice of Proposed Rulemaking ("NPR") to implement the Orderly Liquidation Authority ("OLA") established in Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"). To be potentially subject to OLA resolution, a firm must be predominantly engaged in financial activities.

The NPR definition of "financial activities" referenced activities described in section 225.86 of Regulation Y, issued by the Board of Governors of the Federal Reserve ("Board"), pursuant to section 4(k) of the Bank Holding Company Act ("BHCA").

The FDIC's Supplemental Notice of Proposed Rulemaking ("SNPR") amends the definition of "financial activities" included in its earlier NPR. Instead of referring to the activity descriptions in section 225.86 of Regulation Y, it explicitly lists those activities. By doing so the SNPR makes clear that the conditions and limitations included in section 225.86 are not part of the definition of activities.

Because this amendment reduces the possibility that systemically significant financial firms would be insulated from the reach of the OLA it should be adopted.

[1] Better Markets is a nonprofit organization that promotes the public interest in the capital and commodity markets, including in particular in the rulemaking process associated with the implementation of the Dodd-Frank Act.

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**The amended definition of "financial activities" in the FDIC SNPR is necessary to make the OLA effective and therefore should be adopted in the final rule.**

Section 201(a)(11) of the Dodd-Frank Act limits application of the OLA to companies that are predominantly engaged in "activities that the Board of Governors has determined are financial in nature or incidental thereto for purposes of section 4(k) of the Bank Holding Company Act."

Therefore section 380.8 of the NPR defined the relevant financial activities to include any activity defined in section 225.86 of the Board of Governors Regulation Y, ownership or control of one or more depositories, and any other activity determined by the Board, in consultation with the Secretary of the Treasury, under section 4(k)(1)(A) of the Bank Holding Company Act to be financial in nature or incidental to a financial activity.[2]

Commentators subsequently pointed out that sections 4(k) and Regulation Y do more than identify activities. They also include conditions and limitations on the conduct of activities. These conditions are intended to prevent permitted activities from threatening the safety and soundness of holding company depositories, to prevent holding companies from controlling commercial entities, or to assure compliance with other banking laws. However, the inclusion of these conditions in section 380.8 raised the possibility that a firm could be predominantly engaged in financial activities, but immune from OLA resolution, because its activities exceeded the conditions included in Regulation Y.

Exempting companies from the OLA because, for example, they control more of an investment company than is permissible to bank holding companies under Regulation Y is potentially dangerous. The OLA was created to reduce the probability that Lehman-like failures will provoke widespread financial panic. If large financial companies were allowed to evade OLA resolution because of this regulatory loophole, the likelihood of future financial instability would increase.

To remedy this problem, the FDIC's June 2012 Supplemental Notice of Proposed Rulemaking alters section 380.8. References to section 225.86 of Regulation Y have been deleted, and section 380.8 of the SNPR now includes an explicit list of the activities described in section 225.86, without conditions related to safety and soundness or other matters.[3]

This harmonizes the FDIC's definition of financial activities with those in the Board's Supplemental Notice of Proposed Rulemaking of April 2012, which similarly amended the definition of financial activities for purposes of Title I.[4]

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[2] *See* Section 380.8, Federal Register ,Vol. 76, No. 56, 16338-16339.

[3] *See* Section 380.8, Federal Register ,Vol. 77, No. 117, 36202-36206.

[4] *See* Section 225.301, Federal Register , Vol. 77, No. 69, 21502-21503. The two lists of financial activities are not completely identical. Because section 201(a)(11) of the Dodd-Frank Act includes "proper incidents" to banking in the definition of financial activities, while section 102(a)(6) does not, the FDIC section 380.8 definition of financial activities includes "acting as a finder", while the Board section 225.301 definition does not.

Some commenters would like to retain the conditions that are part of section 4(k) and Regulation Y as part of the definition of financial activities.[5] They claim that the language of the Dodd-Frank Act prevents the FDIC and the Board from distinguishing between "financial activities" and the limits on those activities included in Regulation Y. This argument lacks merit. Under Regulation Y bank holding companies are allowed to sponsor, own, and manage mutual funds, provided they own no more than 25 percent of the equity. The financial activities are sponsorship, ownership, and management of the fund. The 25 percent limitation is designed to preserve safety and soundness of the holding company. If a nonbank owns 100 percent of a mutual fund that it manages, it is impossible to see why this larger ownership stake transforms the financial activities into nonfinancial activities.

In addition, as the Board has pointed out, the anti-evasion provision of section 113(c) of the Dodd-Frank Act explicitly rejects any attempt by companies to alter the manner in which they conduct financial activities in order to escape supervision by the Board.[6] The broader definition of financial activities, used by the FDIC in its SNPR, and by the Board in its supplemental rulemaking, is consistent with the view expressed in section 113(c).

The changes proposed by the FDIC's SNPR are consistent with the Dodd-Frank Act and produce a desirable policy result. Therefore they should be adopted.

Sincerely,

Dennis M. Kelleher by MJ

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5 *See* the comment letter of March 25, 2012 from the Center for Capital Market Competitiveness to the Board, *available at* http://www.federalreserve.gov/SECRS/2012/June/20120611/R-1405/R-1405_052512_107791_401088591625_1.pdf.

6 *See* Federal Register , Vol. 76, No. 29, 7736.