FDIC
Federal Deposit Insurance Corporation
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Deputy to the Chairman and CFO

June 8, 2011

MEMORANDUM TO: The Board of Directors

FROM: Steven O. App
Deputy to the Chairman and
Chief Financial Officer

Arthur J. Murton
Director, Division of Insurance and Research

SUBJECT: *Notice of Proposed Rulemaking Regarding Calculating the Maximum Obligation the FDIC May Incur in Liquidating a Covered Financial Company*

Proposal: That the FDIC Board of Directors approves the attached joint Notice of Proposed Rulemaking (NPR) titled *Calculation of the Maximum Obligation Limitation*. If approved, the NPR would be published by the FDIC and the U.S. Department of the Treasury in the *Federal Register* for a 60-day comment period.

Discussion: Section 210(n)(7) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) requires the FDIC and the Secretary of the Treasury (Treasury), in consultation with the Financial Stability Oversight Council (FSOC), to jointly prescribe regulations governing the calculation of the maximum obligation limitation (MOL), as specified in section 210(n)(6) of the Dodd-Frank Act, which states:

> ***Maximum Obligation Limitation. -*** *The Corporation may not, in connection with the orderly liquidation of a covered financial company, issue or incur any obligation, if, after issuing or incurring the obligation, the aggregate amount of such obligations outstanding under this subsection for each covered financial company would exceed—*
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> > *(A) an amount that is equal to 10 percent of the total consolidated assets of the covered financial company, based on the most recent financial statement available, during the 30-day period immediately following the date of appointment of the Corporation as receiver (or a shorter time period if the Corporation has calculated the amount described under subparagraph (B)); and*
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> > *(B) the amount that is equal to 90 percent of the fair value of the total consolidated assets of each covered financial company that are available for repayment, after the time period described in subparagraph (A).*

As stated above, the MOL limits the total amount of obligations that the FDIC may issue or incur in connection with the orderly liquidation of a covered financial company (CFC). In accordance with Section 210(n)(7), the FDIC and Treasury have consulted with the FSOC, and FDIC staff recommends that the FDIC adopt a regulation that closely follows the statutory language for calculating the MOL, while defining certain terms referenced in the statute and seeking comment on those definitions.

More specifically, in calculating the MOL, the proposed rule provides that the term "obligation" will include--

> (i) any guarantee issued by the FDIC on behalf of each covered financial company;
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> (ii) any amount borrowed pursuant to Section 210(n)(5)(A) in connection with each covered financial company; and
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> (iii) any other obligation with respect to each covered financial company for which the FDIC has a direct or contingent liability to pay any amount.

For purposes of calculating the MOL, the FDIC would value any contingent liabilities with respect to each covered financial company, including any guarantee issued by the FDIC, at their expected cost to the FDIC.[1] The attached NPR includes questions asking whether this definition is appropriate and whether there are alternative definitions that should be considered.

The Dodd-Frank Act provides that, in calculating the MOL during the period up to 30 days after appointment of the FDIC as receiver, the amount of the total consolidated assets for each covered financial company shall be based upon the most recent financial statements available. The proposed rule stipulates that the FDIC and Treasury shall rely on: (1) the most recently filed financial statements with the Securities and Exchange Commission or any other regulatory body; (2) the most recent available financial statements audited by an independent certified public accounting firm; or (3) other available financial statements - whichever of those statements in the judgment of the FDIC and Treasury are most pertinent, taking into consideration the timeliness and reliability of the statements being considered. The NPR includes a question asking whether it is appropriate for the FDIC and Treasury to rely on internally provided financial statements if the statements are deemed more pertinent.

With respect to the Dodd-Frank Act requirement that, in determining the MOL starting no later than 30 days after the appointment of the FDIC as receiver, the total consolidated assets of each covered financial company be measured at their "fair value," the proposed rule provides that the FDIC and Treasury shall define fair value as the expected total aggregate value of each asset, or group of assets that are managed within a portfolio, of a CFC on a consolidated basis if such asset, or group of assets, was sold or otherwise disposed of in an orderly transaction. The NPR includes questions asking whether the proposed definition of fair value is appropriate and whether there are other approaches that the FDIC should consider in establishing fair value.

Finally, with respect to the term "total consolidated assets of each covered financial company that are available for repayment" in section 210(n)(6)(B) of the Dodd-Frank Act, the proposed rule defines this term to mean the difference between: (1) the total consolidated assets of the covered financial company that are available for liquidation during the operation of the

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[1] Dodd-Frank Act § 210(n)(8)(B).

receivershipTT; and (2) to the extent included in (1), all assets that are separated from, or made unavailable to, the covered financial company by a statutory or regulatory barrier that prevents the covered financial company from possessing or selling and using the proceeds from the sale of such assets. The Agencies are proposing to define the term “assets . . . available for repayment” in a manner consistent with the FDIC’s broad authority as receiver regarding the liquidation of assets of a covered financial company, and as noted in the NPR preamble, such “assets … available for repayment” includes those assets that may be released from lien encumbrances by payment in the ordinary course of business.

Recommendation: That the Board approve the attached NPR and authorize its publication in the *Federal Register* for a 60-day public comment period once Treasury has completed its review and approval procedures. Staff also recommends the Board authorize the Executive Secretary and the General Counsel, or their respective designees, to make technical, non-substantive, or conforming changes to the text of the proposed rule, including non-substantive changes to accommodate the ongoing review and approval procedures of Treasury, where necessary to ensure that the FDIC and Treasury can jointly publish the NPR, and to take such other actions and issue such other documents as they deemed necessary or appropriate to fulfill the Board’s objective.

Concur:

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