March 28, 2012

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: *Final Rulemaking Regarding Calculating the Maximum Obligation the FDIC May Incur in Liquidating a Covered Financial Company*

Proposal: That the FDIC Board of Directors approve the attached final rule titled *Calculation of the Maximum Obligation Limitation.* If approved by both the FDIC and the U.S. Department of the Treasury, the final rule would be published in the *Federal Register* and will become effective 30 days after publication.

Introduction: 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—*
>
> *(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*

(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).

Discussion of the MOL Notice of Proposed Rulemaking: In the second quarter of 2011, in accordance with Section 210(n)(7), FDIC and Treasury staffs developed an MOL Notice of Proposing Rulemaking (NPR) and consulted with the FSOC on its terms. In the NPR, staff recommended that the agencies adopt a regulation that closely follows the statutory language for calculating the MOL, while defining certain terms referenced in the statute (notably, "fair value" and "assets available for repayment") and seeking comment on those definitions.

The MOL NPR was approved by the Board on July 6, 2011, and cleared for Treasury by the Office of Management and the Budget on October 16, 2011; the NPR subsequently received final approval by Treasury in early November and was published in the Federal Register on November 25, 2011. The comment period ended on January 24, 2012.

Two comments were received by Treasury, one of which was also received by the FDIC; the second comment received by Treasury was extraneous to the MOL NPR, relating to the handling of brokered deposits in an orderly liquidation and not at all relevant to the subject matter of the NPR. The relevant comment received by both the FDIC and Treasury supported the NPR's proposed rules and definitions, but cautioned that that it may not be possible to credibly or reasonably determine "fair value" during an extended period of financial distress. The commentator suggested that the FDIC and Treasury consider this possibility further in order to prepare appropriate responses and contingencies. The FDIC is aware of this concern and is actively considering appropriate responses and contingencies that might arise in an extended period of financial distress. In staff's view, however, these considerations do not have a bearing on how statutory terms should be defined in the MOL implementing regulation.

As there were no other comments received, staff concluded that it would recommend that the final rule's regulatory language remain unchanged from that proposed in the MOL NPR. The next section briefly reviews and discusses the four definitions that are delineated in the final rule.

MOL Final Rule: In the statute, there are four terms used that are not specifically defined. These are: "obligation"; "most recent financial statement"; "fair value"; and "assets available for repayment". The final rule defines these terms, again using the same regulatory language as in the proposed rule.

"Obligation": The final rule provides that, in calculating the MOL, the term "obligation" will include--

(i) any guarantee issued by the FDIC on behalf of each CFC;

(ii) any amount borrowed from Treasury pursuant to Section 210(n)(5)(A) in connection with each CFC; and

(iii) any other obligation with respect to each CFC for which the FDIC has a direct or contingent liability to pay any amount.

For purposes of calculating the MOL, the FDIC will value any contingent liabilities with respect to each CFC, including any guarantee issued by the FDIC, at their expected cost to the FDIC, as set out in the statute.[1]

"Most recent financial statement": 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 CFC shall be based upon the most recent financial statements available. The final 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.

"Fair Value": 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 CFC be measured at their "fair value," the final rule provides that fair value shall be 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, were sold or otherwise disposed of in an orderly transaction.

"Total consolidated assets of each covered financial company that are available for repayment": 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 final rule defines this term as the difference between: (1) the total consolidated assets of the CFC that are available for liquidation during the operation of the receivership; and (2) to the extent included in (1), all assets that are separated from, or made unavailable to, the CFC by a statutory or regulatory barrier that prevents the CFC from possessing or selling and using the proceeds from the sale of such assets. Thus, the final rule defines 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 CFC.

Recommendation: That the Board approve the MOL final rule and authorize its publication in the *Federal Register* once Treasury has completed its review and approval procedures. The rule will become effective 30 days after publication (or possibly 60 days, as discussed below). Staff also recommends that 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 final rule, including non-substantive changes to accommodate the ongoing review and approval procedures of Treasury, where necessary to

[1] Dodd-Frank Act § 210(n)(8)(B).

ensure that the FDIC and Treasury can jointly publish the final rule, and to take such other actions and issue such other documents as they deem necessary or appropriate to fulfill the Board's objective. It should be noted that before publication, the FDIC must obtain a major/minor rule determination from the U.S. Office of Management and the Budget (OMB) under the Small Business Regulatory Enforcement Fairness Act (SBREFA). If OMB were to declare the rule to be a "major" rule, this would not affect the substance or wording of the rule, but would necessitate a 60-day delay in effectiveness after publication in order to permit Congressional review; we do not anticipate that OMB will determine it to be a major rule and the preamble's reference to SBREFA is drafted accordingly. In addition, as this is a joint final rule, similar to the MOL NPR, Treasury needs to have OMB clear the rule in accordance with a Presidential executive order that all final rules by executive agencies and departments must be cleared by OMB, but we anticipate that OMB will carry out this review for Treasury in the same timeframe that it is carrying out its SBREFA review

Concur:

Michael H. Krimminger
General Counsel

Staff Contacts:

Arthur D. Murphy
Division of Finance
(703) 562-6177

Matthew Green
Division of Insurance and Research
(202) 898-3670

Henry R.F. Griffin
Legal Division
(703) 562-6404

Randy Thomas
Legal Division
(703) 562-6454