CENTER FOR CAPITAL MARKETS COMPETITIVENESS
OF THE
UNITED STATES CHAMBER OF COMMERCE

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November 18, 2010

Federal Deposit Insurance Corporation
Attn: Robert E. Feldman
Executive Secretary
550 17th Street, NW
Washington, D.C. 20429

Re: Notice of Proposed Rulemaking Implementing Certain Orderly Liquidation Authority Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act

Dear Mr. Feldman:

The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses and organization of every size, sector and region. The Chamber created the Center for Capital Markets Competitiveness ("CCMC") to promote a modern and effective regulatory structure for capital markets to fully function in a 21st century economy.

The CCMC has concerns relating to the implementation of the Title II Orderly Liquidation Authority Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (respectively, "Orderly Liquidation" and the "Dodd-Frank Act"). The CCMC's concerns are centered upon:

1) Preserving the order of creditors and priorities of payments;
2) The definition of an "emergency"; and
3) The ability to perform emergency functions in a timely manner.

Discussion

Certainty and market discipline are essential elements for the efficient allocation of capital necessary for a growing and prosperous economy. The bankruptcy code provides an orderly process to ensure certainty if a business is in need of temporary

reorganization due to financial difficulties, or liquidation if insolvent. Under this system, the viable assets of the debtor are preserved and maximized, and creditors paid in an established order. Therefore, if a firm runs into financial straits, creditors have certainty in their treatment. These rules of the road, in a worst case scenario, allow creditors to assign risk and allocate capital.

During the debate of the Dodd-Frank Act, the CCMC supported the idea of orderly liquidation authority, but only if a firm posed a threat to the overall stability of the U.S. markets. Institutions should be allowed to fail, but in the extremely rare event that orderly liquidation authority would have to be invoked, it could only be done through a defined and transparent process with clear and specific guidelines for all market participants. Such a transparent system would allow orderly liquidation authority to act in the manner of the bankruptcy code.

Consequently, orderly liquidation authority should only be used as a last resort, and the mission of the FDIC and Bridge Company would be to maximize the assets of the failing firm and unwind it as quickly as possible. Government intervention could not and should not prop up failing firms for extended periods of time, thereby eroding market discipline and creating moral hazard.

Preservation of the Order of Creditors and Priorities of Payments

During the Dodd-Frank Act debates, the CCMC wrote to Congress expressing concerns that the final legislation enabled similarly situated creditors to be treated differently.

Under the bankruptcy code, the Company and Judge determine if the business is a going concern or if the company should be liquidated. If a company is insolvent, shareholders are wiped out and creditors absorb losses based upon the absolute priority of claims. When a company goes through reorganization, the company is recapitalized, with creditors having their debt converted into common equity, again through the absolute priority of claims. The absolute priority of claims gives creditors the ability to assign and determine risk when giving out loans.

As the bankruptcy system has been successful in unwinding financial insolvency for businesses, orderly liquidation should only be used in extreme exigent

circumstances when the failure of a company would lead to a systemic failure of the financial markets.

Accordingly, the FDIC should craft rules in a manner that provide for:

1) Certainty for creditors and establishing the absolute priority of claims;
2) Treatment of similarly situated creditors in the same manner;
3) Minimized the use of discretion; and
4) Preservation of company assets to insure a quick and orderly unwinding of a firm.

Also, specific language in the Dodd-Frank Act gives the FDIC discretion to make additional payments to certain creditors if the FDIC determines such payments are necessary to maximize value and minimize losses in liquidation. The inherently subjective nature of such determinations could create systemic instability by adding to uncertainty of how creditors will be treated. Such discretion must be rarely used and only through a defined process ending with FDIC board approval.

Accordingly, the CCMC requests that the FDIC provide additional clarity regarding the treatment of creditors and the potential use of discretion to provide certainty to the marketplace.

Definition of Emergency

The CCMC understands that the exigent circumstances triggering orderly liquidation authority will be dependent on a series of financial factors and economic conditions, as well as a loss of confidence.

Unlike bankruptcy law which requires a company to be in default before the courts assume liquidation authority, the FDIC is given the power to intervene when an institution is in default or merely in danger or default. In exercising its new authority, the FDIC must act swiftly and not allow the marketplace to panic. Creditors who know they will incur substantial losses once resolution authority is implemented will be eager to jump ship at the first signs of trouble. This, in turn, will increase market instability and paradoxically encourage the exact situation the rule was created to prevent. For this reason, CCMC believes that additional clarity is needed to

determine when an institution would fall under FDIC receivership.

Consequently, the CCMC believes that the relevant agencies and FDIC should develop rules defining an emergency and how the orderly liquidation authority will be implemented. While the CCMC understands that not every potential trigger could be identified, by creating appropriate definitions and mechanisms, the marketplace will be given the certainty needed to efficiently deploy capital.

The Ability to Perform Emergency Functions in a Timely Manner

Giving the FDIC authority to pay creditors and employees early in the insolvency process to preserve the value of a financial institution is common practice under Chapter 11 bankruptcy "first day" motions. Such payments are important to avoid panic from employees and creditors and are traditionally made on the first day of a case in bankruptcy court. However, FDIC resolution authority requires any such payment to be approved by the FDIC board of directors. This means that the FDIC must be prepared to act with nongovernmental speed so that the resolution authority is not undermined.

Accordingly, the CCMC believes that processes must be put in place for the FDIC board to act decisively and with alacrity. These decisions should not be made on a staff level, and the FDIC board is a larger entity than a bankruptcy judge. Appropriate processes will allow decisions to be made with the speed and transparency needed for the occasion.

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The CCMC is dedicated to working with the Chamber's diverse membership to provide the FDIC with broad-based input to facilitate efficient and effective resolution authority. We would be happy to discuss these issues further with you or the appropriate FDIC staff.

Sincerely,

David T. Hirschmann