MANAGED FUNDS ASSOCIATION
The Voice of the Global Alternative Investment Industry
WASHINGTON, DC | NEW YORK

January 18, 2011

Via Electronic Filing

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, DC 20429

Re: Responses to Questions Concerning the FDIC's Exercise of Orderly Liquidation Authority

Dear Mr. Feldman:

Managed Funds Association ("MFA")[1] appreciates the opportunity to respond to the questions posed by the Federal Deposit Insurance Corporation (the "FDIC") in connection with its notice of proposed rulemaking (the "Proposed Rule") on the implementation of certain provisions in Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act" or "Dodd-Frank") providing an orderly liquidation authority ("OLA") for financial firms whose failure threatens the financial stability of the United States. MFA previously responded to the FDIC's earlier questions concerning its Proposed Rule (the "November 18 Letter").[2] This letter supplements MFA's November 18 Letter and, in particular, addresses the additional questions for which the FDIC asked for responses by January 18, 2011.

In Section I below, we discuss a few overall themes and policies that we believe should animate the FDIC's rulemaking process under Title II and that underlie our responses to the FDIC's specific questions. In Section II below, we respond to those questions. For the sake of convenience, we have copied the questions from the Proposed Rule in the letter and our responses follow each bolded question.

[1] MFA is the voice of the global alternative investment industry. Its members are professionals in hedge funds, funds of funds and managed futures funds, as well as industry service providers. Established in 1991, MFA is the primary source of information for policy makers and the media and the leading advocate for sound business practices and industry growth. MFA members include the vast majority of the largest hedge fund groups in the world who manage a substantial portion of the approximately $1.7 trillion invested in absolute return strategies. MFA is headquartered in Washington, D.C., with an office in New York.
[2] The November 18 Letter is available on MFA's website: www.managedfunds.org.

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I. To Achieve Congress's Goals, the OLA Must Be Implemented in a Way That Maximizes Creditor Confidence, Participation and Recoveries.

As stated in its November 18 Letter, MFA supports an OLA that is designed to achieve Congress's goal to unwind failing firms that truly pose a threat to the stability of this country's financial system in a manner that is fair, efficient, transparent, and predictable and that maximizes value and minimizes creditor (and, if possible, shareholder) losses.[3] As the FDIC stated in the Proposed Rule, the Dodd-Frank Act mandates "transparency" in the liquidation process and "incorporates procedural and other protections for creditors to ensure that they are treated fairly."[4]

These goals are admirable, but the FDIC faces a difficult task in achieving them. The lack of detail regarding the use of the FDIC's various powers, the absence of judicial interpretations of the statute, and the limited judicial review expressly granted under the Dodd-Frank Act for parties affected by the liquidation create confusion and uncertainty that could undermine the creditor and investor confidence that is critical to the successful liquidation of a large, systemically important financial firm.

In addition, we are deeply concerned that the broad discretion given to the FDIC to assign contracts and selectively pick-and-choose the assets and liabilities that survive a liquidation has the potential to further destabilize markets at a time when those markets are already rattled by the pending failure of a systemically important firm. Without clearly established rules regarding such decisions, market participants may have the impression that the FDIC is subject to non-statutory considerations, particularly to the extent that certain market participants are considered "winners" or "losers" as compared to liquidation under the Bankruptcy Code. This concern would undermine market confidence in the OLA, which would inhibit the FDIC's ability to liquidate firms in a manner that reduces systemic risk.

Accordingly, MFA believes it is critical that the FDIC establish clear rules and processes that, to the fullest extent possible, mirror those under existing bankruptcy law and provide for the maximum transparency and participation of affected parties practicable under the circumstances. We encourage the FDIC to base its rulemaking on the following principles:

- Harmonizing Title II with the Bankruptcy Code. To the closest extent possible, the rules for OLA should be brought in line with the United States Bankruptcy Code (the "Bankruptcy Code" or the "Code"),[5] the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and related case law. The only exceptions to this guideline should be those limited features of OLA that allow the FDIC to avert an imminent threat of a financial market meltdown.

  This not only will foster confidence in the OLA process, but it is also Congress's express intent. Congress gave the FDIC broad authority to adopt appropriate rules and

[3] Dodd-Frank Act § 204(a), 12 U.S.C. § 5384(a).
[4] 75 Fed. Reg. 64173, 64175 (Oct. 19, 2010) (to be codified at 12 C.F.R. pt. 380).
[5] 11 U.S.C. §§ 101, et seq.

regulations in connection with the liquidation of a covered financial institution but specified that, "[t]o the extent possible," the FDIC "shall seek to harmonize" any such rules and regulations with "the insolvency laws that would otherwise apply to a covered financial company."[6]

The Bankruptcy Code contains extensive, well-understood provisions that have been refined and amended numerous times over several decades. The Code is supplemented by detailed procedural rules (the Federal Rules of Bankruptcy Procedure) and a well developed body of case law. This process has cemented many legal principles and increased predictability for all parties in interest. As a result, investors and others in the financial community—including members of the MFA—are sufficiently comfortable with the bankruptcy process that they are willing, both in advance of and during a possible insolvency proceeding, to provide the financing and liquidity that are critical to the stable functioning of the markets.[7]

Accordingly, the FDIC's rules should make clear that the FDIC will seek to follow the text of the Bankruptcy Code and the well-established body of case law and practice used to interpret and implement the Code. Indeed, as described more fully below in Section II, we believe the most significant and effective step the FDIC can take at this juncture is simply to indicate, by rule, that whenever possible it will look to the Bankruptcy Code, the Bankruptcy Rules and related case law for guidance.

- Targeted and Limited Use of Title II. The Dodd-Frank Act authorizes appointment of the FDIC as receiver only where doing so is truly necessary to preserve the "financial stability of the United States."[8] Congress has directed the FDIC to allow a company to enter normal bankruptcy proceedings in all other cases, and the Bankruptcy Code has been highly successful in resolving insolvencies in a fair and transparent manner. The FDIC therefore should clarify in its rulemaking that it will recommend its appointment under OLA only where it must do so to avoid genuine and manifest "systemic risk."

- Transparency. Bankruptcy is a transparent, public process in which trustees must: (1) publicly file periodic reports outlining the financial condition of the estate (including detailed accounts of revenues and expenditures); (2) provide a final accounting when they close the estate; and (3) generally seek bankruptcy court approval—following notice to affected creditors and an opportunity for a hearing—for most significant actions, including sales of assets out of the ordinary course of the debtor's business and for approval of settlements of litigation and other disputes. We encourage the FDIC to adopt similar processes and procedures under the OLA to ensure a transparent process.

- Creditor Participation. Creditor involvement in the bankruptcy process is not only permitted but highly encouraged. In complex proceedings, creditors committees are

[6] Dodd-Frank Act § 209, 12 U.S.C. § 5389.
[7] *See* our November 18 Letter at 2.
[8] Dodd-Frank Act §§ 203(b)(2), 206(1), 12 U.S.C. §§ 5383(b)(2), 5386(1).

typically formed, and they, along with other creditor groups, participate actively. The FDIC should adopt rules that permit similar creditor participation in liquidations under the OLA.

- Disclosure and Review. Virtually all actions taken by the FDIC over the course of an orderly liquidation can vitally affect the rights of creditors. However, only in limited instances, including disputes regarding claim disallowance, does the statute expressly afford creditors judicial review.[9] We strongly encourage the FDIC to adopt rules to provide creditors an opportunity to obtain judicial review except where Title II expressly bars it.[10] Without robust rights of judicial review, creditors of the covered financial company will have little interest in holding claims against a firm in OLA. Such creditors are likely to sell their claims the moment they believe a "systemically important" firm is experiencing distress. This behavior would actually exacerbate volatility in financial markets, contravening the entire purpose of the OLA.

  Promoting judicial review to the greatest extent possible under the Dodd-Frank Act would help achieve the statutory goal of harmonizing the OLA with bankruptcy law. In that regard, we note that even the Federal Deposit Insurance Act ("FDIA") has been interpreted to permit judicial review, provided that the creditor seeking review has first exhausted available administrative remedies. At a minimum, we believe that the FDIC should interpret Title II in a way that would provide the same level of judicial review, and the FDIC should adopt rules that make this clear. Furthermore, we encourage the FDIC to explore the use of mediators that are approved by both the agency and creditors.

- Proceeding Gradually and in an Iterative Process. There is no way for the FDIC, or anyone else, to anticipate all issues that will arise in the liquidation of a massive financial firm whose failure threatens the financial stability of the United States. The Bankruptcy Code has generally proven to be successful because it evolved and was strengthened over a long period of time, incorporating the experience of thousands of liquidations and restructurings. We recognize that the current comment period is the start, not the end, of the rulemaking process and we look forward to participating in an ongoing dialogue with the FDIC about the most effective and beneficial ways for the FDIC to implement its authority under Title II.

With these opening remarks as background, we now turn to the specific questions that the FDIC has asked and for which it has sought responses by January 18, 2011.

[9] Dodd-Frank Act § 210(a)(3)-(5), 12 U.S.C. § 5390(a)(3)-(5).
[10] Dodd-Frank Act §§ 202(a), 205(c), 12 U.S.C. §§ 5382(a), 5385(c).

II. The Questions the FDIC Has Posed Provide Real Opportunities to Begin to Shape and Clarify OLA in a Manner that Furthers Congress's Goals.

Q1. What other specific areas relating to the FDIC's orderly liquidation authority under Title II would benefit from additional rulemaking?

Appropriate Use of Orderly Liquidation Authority

The appointment of the FDIC as receiver is a complex, yet fast-paced process. The FDIC and the Board of Governors of the Federal Reserve Board must each, by a two-thirds vote, recommend the FDIC's appointment as receiver to the Secretary of the Treasury. In turn, the Secretary, in consultation with the President, must determine whether to accept that recommendation.[11] Congress specified that any recommendation must be in writing and address a series of factors.[12] Congress also anticipated that the entire recommendation process might need to occur within a day or two and therefore sought to strike a balance between what could be an extremely accelerated time schedule and the need for appropriate deliberation and examination.

For this reason, the process for determining when the FDIC should exercise its OLA requires clarity through additional rulemaking. Considering the importance of the decision to a covered company's shareholders, creditors, and counterparties, the FDIC should address the following areas at a minimum:

- How does the FDIC define "systemic risk" (per Section 203), and what is the formal process the agency intends to employ when deciding whether to make a recommendation to the Secretary?
- What are the characteristics of a company and its relationship to the financial system that would lead the agency to seize a covered company? (A process that presumes regulators will "know it when they see it" does not provide sufficient clarity to the marketplace.)
- How will the FDIC determine that a covered financial company is "in danger of default?"[13] This is a vague standard that should be clarified to provide greater clarity to market participants.
- In connection with a decision whether or not to put a covered financial company into receivership under Title II, what factors will the FDIC consider in determining whether the Bankruptcy Code (or other insolvency regime) is insufficient to handle the failure of the seized company?

We also suggest that the FDIC promulgate a rule that states it will recommend that a company enter OLA only if (i) the financial company at issue is of such size and importance that its failure would present "systemic risk" and (ii) the agency has determined that the financial

[11] Dodd-Frank Act § 203(a)-(b), 12 U.S.C. § 5383(a)-(b).
[12] Dodd-Frank Act § 203(a)(2), 12 U.S.C. § 5383(a)(2).
[13] Dodd-Frank Act § 203(a)(2)(A), 12 U.S.C. § 5383(a)(2)(A).

system would face significant instability if the failing covered company filed for bankruptcy.[14] This would create more certainty among market participants regarding the use of OLA and ensure that, as Congress intended, Title II is invoked rarely and only as a matter of last resort. It is also consistent with the statutory criteria that the FDIC determine "the effect that the default of the financial company would have on financial stability in the United States."[15]

Finally, the FDIC should adopt rules specifying that, before recommending its appointment, it will document its determination that the financial company at issue is "systemically significant" and otherwise satisfies the required criteria. The FDIC should also provide that, if the Secretary of the Treasury agrees with the FDIC's recommendation, the FDIC's documented recommendation will be available for public consumption.[16]

If the FDIC declines to adopt rules along these lines, the broad reach of Title II could have a destabilizing effect upon the financial markets and the nation's leading financial institutions, particularly in uncertain economic times, widening the circle of entities that will enter OLA, and potentially yielding a self-fulfilling prophecy.

Additional Payments to Creditors, and Claw-Back of Additional Payments

As MFA noted in its November 18 Letter (and as underscored in the response to Question 9 below), we believe that the FDIC, as receiver, should be highly circumspect in using its authority to make "additional payments" under Section 210(b)(4) of Dodd-Frank. When the FDIC nevertheless authorizes such payments, it should also be circumspect in exercising its authority later to assess recipients of additional payments.

The Dodd-Frank Act permits the FDIC to assess recipients of "additional payments" if the FDIC experiences losses in liquidating a covered financial company.[17] Because there are no similar recoupment provisions in the FDIA, the assessment mechanism interjects an unprecedented form of uncertainty that could disrupt the normal functioning of credit markets.

In the case of open-ended investment funds (including mutual funds and hedge funds), the uncertainty could be especially problematic. Because the investor base in such funds changes over time, it would not be practical for a fund to make distributions to its investors from an additional payment by the FDIC and to later recoup those distributions from those investors if there is a claw-back by the FDIC.

The possibility of a subsequent assessment could harm existing fund investors and deter future investors, and also deter utility providers and "critical vendors" from continuing to do business with the company in receivership (or a bridge company that is created), defeating the very reason for permitting additional payments. The FDIC should consider rules and regulations

[14] Dodd-Frank Act § 203, 12 U.S.C. § 5383.
[15] Dodd-Frank Act § 203(a)(2), 12 U.S.C. § 5383(a)(2).
[16] Dodd-Frank Act § 203(b)(3), 12 U.S.C. § 5383(b)(3).
[17] Dodd-Frank Act § 210(o)(1)(D), 12 U.S.C. § 5390(o)(1)(D).

that would carefully limit the circumstances in which it could later claw-back an additional payment that the FDIC itself determined to make.

Treatment of Assumed Qualified Financial Contracts

If the FDIC elects not to transfer a counterparty's qualified financial contracts ("QFCs"), the counterparty may terminate or liquidate those QFCs at its discretion, or the FDIC may repudiate or disaffirm the QFCs within a "reasonable" time of its appointment.[18] The FDIC should provide greater clarity as to the timeframe in which it will make such a determination.

Need for Greater Transparency

As the FDIC has noted, Title II of Dodd-Frank mandates a "transparent" liquidation process.[19] We believe transparency is vital because it makes investors comfortable with the OLA process and, hence, prevents further destabilization of markets. In addition, we believe that regular interaction between regulators and market participants is crucial to a smooth liquidation. If investors are well-informed about the state of the seized financial company, they will be able to share their constructive ideas with the FDIC. Transparency inevitably creates a positive feedback loop that maximizes value by ensuring that the most productive ideas are employed to resolve an institution.

In our response to Question No. 2 below, we discuss how the FDIC could adopt processes and procedures that currently exist in the bankruptcy regime to enhance transparency. In addition, we suggest that the FDIC consider adopting rules that: (1) provide for the FDIC, as receiver, to hold periodic, public administrative hearings or meetings and engage in a robust dialogue with creditors (and other parties in interest) about the most productive ways to liquidate the firm; (2) develop other procedural protections that allow interested parties an opportunity to obtain contemporaneous notice of any decisions to make additional payments to creditors, with accompanying reasons for such payments; (3) create a public website—along the lines that Congress contemplated[20]—that will provide information about the receivership and, in particular, the claims process; (4) ensure that if the covered financial company is subject to the Securities Exchange Act of 1934 before it was put into receivership, the FDIC as receiver will continue to file the periodic reports with the SEC (10Qs, 10Ks, etc.), as is contemplated under Title II[21] for any bridge financial company that the FDIC may establish; and (5) as described more fully in our response to Question No. 2 below, provide monthly or other periodic reports on the financial and operating status of the estate as occurs in bankruptcy proceedings. With respect to (3), it would be very helpful if the website contained a "claims register," which the FDIC (or a claims agent or other professional it retained) could periodically update, listing all claims filed against the receivership including claim amount and status (*e.g.,* has the FDIC allowed or disallowed the claim?; if the latter, has the claimant commenced litigation to challenge the disallowance?; if so, where is the litigation pending and what is the case name and docket number?).

[18] Dodd-Frank Act, §§ 210(c)(8)(A), (E), 12 U.S.C. §§ 5390(c)(8)(A), (E).
[19] 75 Fed. Reg. 64173, 64177 (Oct. 19, 2010) (to be codified at 12 C.F.R. pt. 380).
[20] Dodd-Frank Act § 203(c)(3)(A)(vii), 12 U.S.C. § 5383(c)(3)(A)(vii).
[21] Dodd-Frank Act § 210(h)(2)(H)(i), 12 U.S.C. § 5390(h)(2)(H)(i).

Q2. Section 209 of the Dodd-Frank Act requires the FDIC, ''[t]o the extent possible,'' ''to harmonize applicable rules and regulations promulgated under this section with the insolvency laws that would otherwise apply to a covered financial company.'' What are the key areas of Title II that may require additional rules or regulations in order to harmonize them with otherwise applicable insolvency laws? In your answer, please specify the source of insolvency laws to which you are making reference.

In our responses to several other questions posed by the FDIC, we discuss ways in which we believe the FDIC should seek to harmonize Title II of Dodd-Frank with the Bankruptcy Code. In addition to those suggestions, we urge the FDIC to consider the following:

Ensure Free Transferability of Claims Post-FDIC Receivership

The right of creditors to transfer and assign their claims after a debtor files for bankruptcy is well-established under the Bankruptcy Code. Indeed, the Federal Rules of Bankruptcy Procedure include a specific provision addressing the steps a claims purchaser may take to document its purchase so that any distributions on the claim from the bankruptcy estate are made to the claims purchaser.[22]

There is currently no comparable provision, either in Title II or in the FDIC's Proposed Rule. Even more fundamentally, there is no provision recognizing the right of creditors to sell, and purchasers to acquire, claims against a covered financial company. It would harmonize Title II with the Bankruptcy Code, and reduce uncertainty for claims sellers and buyers, if the FDIC would adopt a provision by rulemaking that makes clear that buyers of claims can, just like in bankruptcy, "step into the shoes" of sellers of those claims and obtain all rights the seller had.

If creditors of a financial company fear that they will be unable to liquidate and transfer their holdings to a buyer during the receivership, creditors will be further incentivized to sell their holdings at the first sign that the debtors are experiencing any form of distress. Such capital flight on a mass scale will only accelerate the financial distress of the troubled entity and in turn heighten systemic risk.

Creditors' Committees

A critical feature of the Bankruptcy Code is that it encourages creditor participation in the liquidation or reorganization proceedings. In both Chapter 7 liquidations and Chapter 11 reorganizations, the Bankruptcy Code authorizes the formation of a committee of unsecured creditors.[23] Such committees do not displace the trustee in a liquidation (or a reorganization), but they can "consult with the trustee . . . in connection with the administration of the estate, make recommendations to the trustee . . . respecting the performance of the trustee's duties, and submit . . . questions affecting the administration of the estate."[24] Creditors' committees

[22] FED. R. BANKR. P. 3001(e).
[23] 11 U.S.C. §§ 705, 1102.
[24] 11 U.S.C. § 705(b).

typically consist of a cross-section of the largest creditors of the debtor and have a fiduciary duty to enhance the value of the debtor's estate *for the benefit of all creditors*. As a voice for all unsecured creditors, committees (as well as individual creditors) provide assistance to the debtor or trustee regarding: (1) the valuation of the debtor's assets and liabilities and how they can be best unwound; (2) market conditions and the potential range of market prices when the trustee is considering asset sales; (3) the complex operating relationships between a debtor's outside creditors and counterparties, on the one hand, and the debtor and its affiliates, on the other, including the debtor's role as counterparty, prime broker, or broker-dealer; (4) how the complex web of guarantees of the debtor holding company and its operating subsidiaries functioned pre-bankruptcy; and (5) how the debtors' QFCs function.

Title II of Dodd-Frank does not contain any provision specifically addressing whether creditors' committees may be formed, but it certainly does not explicitly preclude them. Encouraging the formation of committees would not only help to harmonize Title II with the Bankruptcy Code, but would also enhance the transparency of the process and fulfill Title II's mandate that "the Corporation shall, to the greatest extent practicable, conduct its operations in a manner that—(i) maximizes the net present value return from the sale or disposition of . . . assets[, and] (ii) minimizes the amount of any loss realized in the resolution of cases."[25] In addition, consultation with a creditors' committee would also be consistent with Dodd-Frank's authorization for the FDIC to "consult with . . . any outside experts, as appropriate to inform and aid the Corporation in the orderly liquidation process."[26] A covered financial company's creditors will likely include large financial institutions and other sophisticated market participants that not only will have familiarity with the covered financial company (having extended credit to it), but that will also have considerable market expertise. They can bring an important perspective to the FDIC that can help "inform and aid" the FDIC as receiver.

Accordingly, we urge the FDIC to adopt rules that permit, in appropriate cases, the formation of creditors committees. We also urge, as is common in bankruptcy proceedings, that the FDIC permit, where appropriate, the payment of reasonable compensation to professionals retained by such committees as administrative expenses of the receivership estate.

Submission of Periodic Financial and Operating Reports

In large Chapter 11 bankruptcy cases, trustees and debtors-in-possession must file with the bankruptcy court, and make publicly available, "monthly operating reports" specifying the money received and expended by the estate and otherwise provide an accounting of the estate's finances and operations.[27] Similarly, in Chapter 7 liquidations, trustees must, among other duties: (1) "be accountable for all property received;" (2) "furnish such information concerning

[25] Dodd-Frank Act § 210(a)(9)(E), 12 U.S.C. § 5390(a)(9)(E).
[26] Dodd-Frank Act § 204(c)(2), 12 U.S.C. § 5384(c)(2).
[27] These reports are required by the Office of the United States Trustee, part of the Department of Justice. *See, e.g.*, *United States v. Brennan*, 326 F.3d 176, 193-94 (3d Cir. 2003) (debtor-in-possession "was obligated to file monthly operating reports with the Bankruptcy Court from the time he declared bankruptcy"); Instructions for Preparation of Debtor's Chapter 11 Post-Confirmation Quarterly Operating Report, U.S. Department of Justice, Office of the U.S. Trustee (outlining the filing requirements for quarterly and monthly operating reports), *available at* http://www.justice.gov/ust/r21/docs/general/chapter11/mor_post_confirmation.pdf.

the estate and the estate's administration as is requested by a party in interest" (unless the bankruptcy court orders otherwise); (3) "if the business of the debtor is authorized to be operated, file . . . periodic reports and summaries of the operation of such business;" and (4) "make a final report and file a final account of the administration of the estate."[28] The FDIC should adopt rules providing that it, as receiver, will prepare, and make publicly available, monthly or other periodic reports regarding the receivership's and a bridge financial company's financial performance (including assets and liabilities, income statement, statement of cash flow, balance sheet, etc.) and material developments in the receivership and bridge company (pending litigation, claims resolved or disputed, assets sold, recoveries obtained, etc.). The FDIC should provide more extensive quarterly disclosures about financial assets (including derivative positions), financing positions as well as off-balance sheet transactions. After creditors persuaded the court to require such disclosures in the Lehman case, they have been subsequently adopted in other financial company bankruptcies, like Capmark, to a more limited extent. A consistent flow of important information will provide necessary transparency and help harmonize Title II with the Bankruptcy Code. It will also further Congress' expressed desire that the FDIC provide meaningful reporting on any Title II receivership.[29]

Retention of Professionals by the FDIC

Trustees in large, complicated bankruptcy proceedings frequently retain financial advisors to help maximize value in the liquidation or reorganization of the debtor. The Bankruptcy Code expressly authorizes the trustee to seek such assistance.[30] As noted above, Title II contains a similar authorization, permitting the FDIC to "consult with, or . . . acquire the services of, any outside experts, as appropriate to inform and aid the Corporation in the orderly liquidation process."[31] Given the complexity of all covered financial companies, the retention of sophisticated advisors will be important to the OLA process.

Creditor Meetings

The Bankruptcy Code requires a "meeting of creditors" shortly after the bankruptcy filing so that the debtor can be examined on the record.[32] To promote the "transparency" that Congress mandated in Title II, we urge the FDIC to provide periodic, public or other forums (independent of meetings of creditors' committees) for creditors to discuss key issues related to the OLA receivership and bridge company.

Opportunity for Judicial Review

Title II expressly subjects certain FDIC actions to judicial review and does not specifically address whether other actions may or may not be reviewed. An opportunity for parties to seek judicial review of agency action is a fundamental element of due process. In

[28] 11 U.S.C. § 704(a)..
[29] Dodd-Frank Act § 203(c), 12 U.S.C. § 5383(c).
[30] 11 U.S.C. § 327.
[31] Dodd-Frank Act § 204(c)(2), 12 U.S.C. § 5384(c)(2).
[32] 11 U.S.C. § 341.

bankruptcy, judicial review is routinely available—indeed, the trustee generally cannot take an action outside the ordinary course of business without obtaining a court order on notice and after affording an opportunity for a hearing.[33]

We urge the FDIC to confirm, by rulemaking that, except in the limited circumstances where the statute expressly prohibits judicial review, creditors and other parties whose rights may be affected will have the opportunity to seek judicial review of actions taken by the FDIC as receiver. This would harmonize Title II with the Bankruptcy Code, promote the goals of Title II, and engender confidence in the liquidation process. By way of example, Title II specifies that all creditors must receive distributions at least equal to the amount that they would have received had the covered financial company been liquidated under Chapter 7 of the Bankruptcy Code (or other applicable insolvency law).[34] The FDIC will therefore be required to determine the "liquidation value" of the company—how much could have been realized, net of administrative expenses—and how the proceeds would have been distributed to creditors under a Chapter 7 bankruptcy. These determinations will affect the rights of creditors and should be subject to judicial review if an affected creditor believes it has been aggrieved. In particular, we urge the FDIC to adopt rules that specify that, early in a Title II receivership, and in any event before it makes any additional payment to any creditor in a liquidation, it will (after consulting with any creditors' committee and other leading creditors, as well as legal and financial consultants): (1) perform the equivalent of a "best interests of creditors" analysis in a Chapter 11 bankruptcy proceeding;[35] (2) publish the analysis; and (3) allow creditors whose rights are affected and that disagree with the analysis to seek judicial review of that analysis.

Investigative, Discovery Powers

In bankruptcy, an examiner is often appointed to investigate affairs of the debtor and potential causes of action the bankruptcy estate can pursue to minimize creditor losses.[36] Accordingly, the Bankruptcy Rules allow such an examiner, the trustee, or other party in interest to seek broad discovery of third parties, even before the trustee commences litigation.[37] The FDIC should consider, by rulemaking, adopting a provision comparable to Bankruptcy Rule

[33] *See, e.g.,* 11 U.S.C. § 363.
[34] Dodd-Frank Act §§ 210(a)(7), (d)(2), 12 U.S.C. §§ 5390(a)(7), (d)(2).
[35] One of the requirements for confirmation of a plan of reorganization under Chapter 11 of the Bankruptcy Code is that each objecting creditor receive under the plan at least as much as it would if the debtor were liquidated under Chapter 7. 11 U.S.C. § 1129(a)(7). This is commonly described as "the best interests of creditors" test. To satisfy this test, trustees or other plan proponents typically do a detailed financial analysis of what the likely creditor recoveries would be in a Chapter 7 proceeding; the analysis is made available to all creditors, and they can challenge it in bankruptcy court as party of the hearing on confirmation of the plan.
[36] 11 U.S.C. § 1104.
[37] Fed. R. Bankr. P. 2004. In the interest of maximizing the value of the bankruptcy estate, the courts have interpreted this rule to permit broad "fishing expedition" discovery by the trustee. *See, e.g., In re Washington Mut., Inc.*, 408 B.R. 45, 49-50 (Bankr. D. Del. 2009) (recognizing that the scope of Rule 2004 examinations are "unfettered and broad," and that such examinations are "more in the nature of a 'fishing expedition'" in order to enable the discovery of the nature and extent of a bankruptcy estate); *In re Countrywide Home Loans, Inc.*, 384 B.R. 373, 401 (Bankr. W.D.Pa. 2008) ("The scope of Rule 2004 examinations is recognized as broad, unfettered and in the nature of a 'fishing expedition'"); *In re Bennett Funding Group, Inc.,* 203 B.R. 24, 28 (Bankr. N.D.N.Y. 1996) (Rule 2004 examinations are unfettered and broad in scope and resemble a fishing expedition into the bankruptcy estate).

2004 (while providing, as that rule does, for the target to be able to object to the discovery and to seek court review).

Q3. With the exception of the special provisions governing the liquidation of covered brokers and dealers (*see* section 205), are there different types of covered financial companies that require different rules and regulations in the application of the FDIC's powers and duties?

One set of covered financial companies that may require special rules and regulations are bank holding companies. In particular, it is important for the FDIC to address how it will handle potential conflicts of interest that may arise when the FDIC serves as receiver of a bank holding company under Title II and as receiver of the holding company's bank subsidiary under the FDIA. The FDIC's statutory responsibilities to each of the receiverships will likely be at odds in certain circumstances and investors need to understand how the FDIC plans to resolve those tensions. We urge the FDIC to provide greater clarity regarding these issues through the promulgation of comprehensive rules.

Q4. Section 210 specifies the powers and duties of the FDIC acting as receiver under Title II. Are regulations necessary to define how these specific powers should be applied in the liquidation of a covered company?

See Response to Question No. 1.

Q5. Should the FDIC adopt regulations to define how claims against the covered financial company and the receiver are determined under section 210(a)(2)? What specific elements of this process require clarification?

Bases for Allowance and Disallowance

Title II requires the FDIC, as receiver, to allow any timely-submitted claim that "is proven to the satisfaction of the receiver."[38] The Bankruptcy Code provides for the disallowance of a claim that is "unenforceable against the debtor . . . under any agreement or applicable law" (unless the claim is contingent).[39] It also provides a handful of grounds for disallowing, in whole or in part, a claim in bankruptcy that would not necessarily provide a basis for the disallowance of the claim outside of bankruptcy.[40] The FDIC should adopt a rule stating it will follow a similar approach, in determining both whether a claim is allowed at all and, if so, in what amount. Implicit in the Dodd-Frank Act is that the FDIC will not disallow a claim based on administrative discretion. The FDIC should state that it will evaluate whether a claim would have been allowed by a bankruptcy court were the covered financial company in bankruptcy and that the FDIC will not assert any defense to a claim that the company or its trustee would have been unable to assert in bankruptcy.

[38] Dodd-Frank Act § 210(a)(3)(B), 12 U.S.C. § 5390(a)(3)(B).
[39] 11 U.S.C. § 502(b)(1).
[40] 11 U.S.C. §§ 502(b)(2)-(9).

Need for and Timing of Filing of Claims

Title II generally requires creditors to file their claims by a date specified in a notice that is published and mailed by the FDIC to known creditors.[41] We generally support this approach, but we believe that the FDIC should adopt rules under these provisions that will facilitate the claims management process. First, if the covered financial company issued bonds or other public debt, it would be impractical, and would cause unnecessary multiplication of paper, to require each bondholder to file its own proof of claim. As is common in bankruptcy proceedings,[42] the indenture trustee (if one exists) for the bond issue should be permitted to file a claim for all holders of the bonds.[43] Second, a creditor's claim may not arise until after the general deadline for filing claims if, for example, the FDIC repudiates a contract (or lease) with the creditor subsequent to the deadline. Similarly, if the FDIC obtains a preference or possibly even a fraudulent transfer judgment against a creditor, and the creditor pays the judgment, it may then have a claim against the receivership estate for the money it has been forced to repay. In comparable situations in bankruptcy proceedings, affected creditors are afforded additional time (often, 30 days after the rejection of the contract or lease or after the payment of the judgment) to file their claims.[44] The FDIC should consider adopting comparable rules for Title II liquidations and it should also evaluate whether a claim would be allowed—and the claim amount—under bankruptcy law.

Valuation of an Under-secured Creditor's Deficiency Claim

Like the Bankruptcy Code,[45] the Dodd-Frank Act treats any portion of a secured claim that exceeds the fair market value of the underlying collateral as an unsecured claim, to be paid in the same manner as other general unsecured claims.[46] Dodd-Frank does not define the term "fair market value." The Proposed Rule contemplates that the FDIC will establish a fixed valuation for U.S. government securities, and the FDIC has asked whether valuations should be fixed for other forms of collateral.

As discussed more fully in our November 18 Letter, and as other commentators have also noted,[47] assigning fixed valuations for certain types of assets, as the Proposed Rule contemplates for Treasury and other U.S. government securities, could lead to valuations that are inconsistent with the statutory standard of fair market value and to distortions in market activity. We encourage the FDIC, after providing opportunity for public comment, to develop valuation rules and procedures that allow it to establish a fair, transparent and predictable process to determine

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[41] Dodd-Frank Act §§ 202(a)(2), (3), 12 U.S.C. §§ 5382(a)(2), (3).
[42] *See* FED. R. BANKR. P. 3003(c)(1).
[43] In the rare instance when there is no indentured trustee, the FDIC could specify that no proof of claim is required for the bond issue as it did in the FDIC receivership of Washington Mutual Bank.
[44] *See* FED. R. BANKR. P. 3002(c)(3), (4).
[45] 11 U.S.C. § 506(a)(1).
[46] Dodd-Frank Act § 210(a)(3)(D)(ii)(I), 12 U.S.C. § 5390(a)(3)(D)(ii)(I).
[47] *See, e.g.,* Letter from Kenneth E. Bentsen, Jr., Executive Vice President, Public Policy and Advocacy, Securities Industry and Financial Markets Association, to Robert E. Feldman, Executive Secretary, Federal Deposit Insurance Corporation (Nov. 18, 2010); Memorandum to Public Comment File, from R. Penfield Starke, Senior Counsel, Legal Division, Federal Deposit Insurance Corporation (Oct. 29, 2010) (memorandum of staff meeting with representatives of the financial services industry).

fair market value for all assets subject to OLA. In this regard, we believe that the best test for "fair market value" is often the market itself. For example, in appropriate cases, the FDIC could seek to sell the collateral and allow the secured creditor to credit bid for the asset, thereby obtaining a true market valuation for the asset and, concomitantly, for the creditor's unsecured deficiency claim. In addition, the FDIC could look to appropriate mid-market values for derivatives and similar financial assets.

Q6. Should the FDIC adopt regulations governing the avoidable transfer provisions of section 210(a)(11)? What are the most important issues to address for the fraudulent transfer provisions? What are the most important issues to address for the preferential transfers provisions? How should these issues be addressed?

In general, the "avoidance" provisions of Title II appear to mirror those under the Bankruptcy Code, and we do not believe extensive, additional rules and regulations are needed.

Q7. What are the key issues that should be addressed to clarify the application of the setoff provisions in section 210(a)(12)? How should these issues be addressed?

Like the avoidance provisions, the setoff provisions of Title II appear to largely mirror those found in the Bankruptcy Code.[48] One issue that the FDIC may wish to address is whether creditors (other than counterparties under QFCs) should be stayed in the exercise of setoff rights pending a determination whether their alleged claims are valid and whether their asserted setoff is permitted under section 210(a)(12). The Bankruptcy Code provides for such a stay, as part of its "automatic stay" against various creditor collection actions.[49] For its part, Title II authorizes the FDIC to "disallow any . . . claim of . . . setoff . . . which is not proved to the satisfaction of the Corporation."[50] But it is not clear how the FDIC can enforce any such disallowance if the creditor has already purported to setoff (other than to sue the creditor for payment of its debt to the covered financial company that it purported to setoff).

Q8. Do the provisions governing the priority of payments of expenses and claims in section 210(b) and other sections require clarification? If so, what are the key issues to clarify in any regulations?

Two of the priority provisions—those granting priority to certain wage/salary and employee benefit claims—largely mirror those found in the Bankruptcy Code.[51] It would be useful for the FDIC to clarify that in general it will look to the jurisprudence developed under the Bankruptcy Code in construing these priority claims and that, as the courts have done in

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[48] *See* 11 U.S.C. § 553.
[49] *See* 11 U.S.C. § 362(a)(7).
[50] Dodd-Frank Act § 210(a)(3)(D)(i), 12 U.S.C. § 5390(a)(3)(D)(i).
[51] Dodd-Frank Act §§ 210(b)(1)(C), (D), 12 U.S.C. §§ 5390(b)(1)(C), (D); 11 U.S.C. §§ 507(a)(4), (5).

interpreting the Bankruptcy Code, it will construe these and the other claim priorities narrowly so as to foster the general policy of treating all unsecured creditors equitably.[52]

Title II grants second priority to "[a]ny amounts owed to the United States, unless the United States agrees or consents otherwise."[53] Dodd-Frank does not define "the United States" for purposes of this provision. Consistent with the well-established principle in bankruptcy that priorities should be construed narrowly to foster the basic policy—also embodied in Dodd-Frank—that all unsecured creditors should be treated equitably, the FDIC should adopt rules specifying that it will not construe this priority to extend to claims of quasi-governmental entities (*e.g.,* the Pension Benefit Guaranty Corporation) or of federal agencies, but rather will be limited to monies owed to the United States Treasury.

Q9. Section 210(b)(4), (d)(4), and (h)(5)(E) address potential payments to creditors ''similarly situated'' that are addressed in this Proposed Rule. Are there additional issues on the application of this provision, or related provisions, that require clarification in a regulation?

The FDIC should remain faithful to Dodd-Frank's directive that similarly situated creditors should be treated the same and that the exception to this rule—the circumstances in which the FDIC can make additional payments to particular creditors—should be narrow and invoked only when "necessary" either to "maximize . . . value" in the receivership or to continue operations that are "essential" to the receivership or to a bridge financial company.[54] We encourage the FDIC to eliminate its proposal that creditors are eligible for additional payments if the contracts underlying their claims have a term of less than a year. This proposed rule is overinclusive and should be limited to necessary service providers and those parties to financial contracts that the FDIC requires to continue to perform under the contract (but only to the extent of their compelled performance). We believe it is important for the FDIC to provide further explanation as to why it established the one year threshold, a seemingly arbitrary line in the sand, to determine who may or may not receive these critical additional payments.

We believe this approach is important to comply with two of Dodd-Frank's important mandates—that similarly situated creditors should generally be treated the same and that the FDIC should "harmonize" Title II with the Bankruptcy Code. Indeed, on this very issue, Congress provided the safeguard that additional payments to preferred creditors can occur only if all similarly situated creditors are assured that they will receive at least as much in the receivership as they would if the covered financial company had been liquidated under Chapter 7 of the Bankruptcy Code.[55] In bankruptcy, the policy of "equality of distribution among

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[52] *See, e.g., In re Healthco Int'l, Inc.*, 310 F.3d 9, 12 (1st Cir. 2002) (recognizing "the general policy that Bankruptcy Code priority designations are to be construed narrowly in order to honor the 'traditional presumption favoring ratable distribution among all holders of unsecured claims'") (citation omitted); *In re Liberty Fibers Corp.*, 383 B.R. 713, 719 (Bankr. E.D. Tenn. 2008) (recognizing that priorities are construed narrowly under the applicable provisions of the Bankruptcy Code); *In re Rocor Int'l, Inc.*, 352 B.R. 319, 330 (Bankr. W.D. Okla. 2006) (Bankruptcy Code requires that priorities are narrowly construed).
[53] Dodd-Frank Act § 210(b)(1)(B), 12 U.S.C. § 5390(b)(1)(B).
[54] Dodd-Frank Act § 210(b)(4), 12 U.S.C. § 5390(b)(4).
[55] Dodd-Frank Act §§ 210(b)(4)(B), (d)(2)(B), 12 U.S.C. §§ 5390(b)(4)(B), (d)(2)(B).

creditors" is "fundamental"[56] and accomplished without regard to arbitrary considerations such as the term of the contract underlying a creditor's claim. While bankruptcy courts have sometimes permitted in Chapter 11 reorganizations additional payments to "critical vendors" under a judge-made "doctrine of necessity," the statutorily-mandated priority scheme in Chapter 7 liquidations calls for all general unsecured creditors to be paid ratably.[57] Furthermore, if the FDIC allows some creditors to receive additional payments beyond those afforded other, similarly situated creditors, it will be difficult for the FDIC to ensure that all such creditors receive at least the amount they would have received in a Chapter 7 liquidation, unless it is demonstrably clear that the additional payments to the favored creditors brought value to the receivership estate that, on a net basis, increased the payments to all unsecured creditors. The FDIC should therefore not only rarely invoke its authority to make additional payments to any creditors, but it should require that prior to making an additional payment to a creditor, the agency must document, on a quantitative and qualitative basis, how the additional payment to the creditor will benefit the estate and enable all creditors (including those not receiving the additional payments) to receive at least as much as they would in a Chapter 7 liquidation in which all general unsecured creditors would received the same ratable payments. *See* Response to Question No. 2 above.

We urge the FDIC, when serving as receiver, to carefully examine requests for additional payments by creditors that claim they provide essential services or financing to the receivership. The experience in bankruptcy has at times been that so-called "critical" vendors have not been all that critical, and debtors have permitted their payment ahead of other similarly-situated creditors without the necessary proof that the preferred vendors really are critical to the debtor's ongoing operations and their payment will benefit all creditors. Preferential treatment should be proven to be necessary to maximize the value of the estate for all creditors, and "preferential payments to a class of creditors are proper only if the record shows the prospect of benefit to the other creditors."[58]

Accordingly, and as also discussed in the Response to Question No. 2, we encourage the FDIC to propose regulations (after providing opportunities for comment) setting forth mechanisms as to how the FDIC, as receiver, will ensure that all creditors will receive at least as much in the receivership as they would in a Chapter 7 bankruptcy liquidation. This is a critical protection for creditors, and in each case the determination of the liquidation value for the covered financial company must be made with great care, with an opportunity for creditor input, and also with maximum opportunity for judicial review at the request of creditors.

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[56] *See In re Combustion Eng'g*, 391 F.3d 190, 239, 241, 248 (3d Cir. 2004) ("The Bankruptcy Code furthers the policy of 'equality of distribution among creditors' by requiring that a plan of reorganization provide similar treatment to similarly situated claims. . . . Several sections of the Code are designed to ensure equality of distribution from the time the bankruptcy petition is filed."); *see also Union Bank v. Wolas*, 502 U.S. 151, 161 (1991) (noting, "[P]reference provisions facilitate the prime bankruptcy policy of equality of distribution among creditors of the debtor.") (citation omitted).

[57] 11 U.S.C. § 726.

[58] *See In re Kmart Corp.*, 359 F.3d 866, 873-74 (7th Cir. 2004) (finding that in order to receive preferential payments ahead of similarly-situated creditors, there must be proof that a creditor is critical; to discriminate among unsecured creditors, discrimination must be necessary to facilitate a reorganization).

Q10. Section 210(h) provides the FDIC with authority to charter a bridge financial company to facilitate the liquidation of a covered financial company. What issues surrounding the chartering, operation, and termination of a bridge company would benefit from a regulation? How should those issues be addressed?

The procedures for chartering, transferring assets and liabilities to, and operating and terminating a bridge financial company should all be developed through rulemaking and subject to public comment. This will increase the transparency, predictability and public confidence in the use of a bridge financial company.

The FDIC should clarify whether the estate of the covered financial company will in all circumstances obtain/retain any equity value that may exist in the bridge company, or whether creditors of the covered financial company could benefit from that residual value. Title II contemplates that the bridge financial company will be solvent by specifying that the liabilities transferred to it from the covered financial company "may not exceed the aggregate amount of the assets" transferred to the bridge.[59] Accordingly, it is possible that, during its lifetime, the bridge financial company will generate profits or, at a minimum, will have remaining cash or other assets at the time it otherwise would be wound down. Any such profits or value should be made available to satisfy the unpaid claims of creditors of the covered financial company, either by granting direct interests in the bridge financial company to such creditors or by providing for any such profits to be remitted to the FDIC as receiver for the covered financial company.

The FDIC should also promulgate a rule regarding the selection process for the board of directors of a bridge financial company.[60] Selection of board and management personnel is tied to the maximization of value for the receivership. We recognize, of course, that the FDIC may need to establish the bridge company at the very beginning of the receivership and there may be little opportunity in advance of that determination for consultation with creditors. However, the liquidation will continue over time, and the FDIC should adopt a rule giving creditors an ability to participate in the selection process after a designated period of time, possibly three or six months.

Finally, the FDIC should make clear that the directors and officers of a bridge company will be held to the same fiduciary duties that all corporate managers are, as well as to the same statutory standard prescribed in Title II for the FDIC as receiver. Dodd-Frank specifies that the FDIC, as receiver, shall, "to the greatest extent practicable," conduct the receivership in a manner that (among other things) "maximizes the net present value return from the sale or disposition of . . . assets" and "minimizes the amount of any loss realized in the resolution of cases."[61] These same standards should apply to the operation of any bridge financial company.

In bankruptcy proceedings, circumstances occasionally arise that could lead to management and/or professional entrenchment. In OLA proceedings under Dodd-Frank, the

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[59] Dodd-Frank Act § 210(h)(5)(F), 12 U.S.C. § 5390(h)(5)(F).
[60] Dodd-Frank Act § 210(h)(2)(B), 12 U.S.C. § 5390(h)(2)(B).
[61] Dodd-Frank Act § 210(a)(9)(E)(ii), 12 U.S.C. § 5390(a)(9)(E)(ii).

FDIC should be aware of the possibility of entrenchment in supervising directors and managers of bridge financial companies. Because creditors are incentivized to maximize value, they play a useful role in minimizing expenses and increasing oversight. In the Lehman case, for example, the objections of creditors led to the appointment of Ken Feinberg as a fee examiner to provide oversight and protection against unreasonable professional advisor fees. Accordingly, the FDIC should provide ample opportunity for creditors to respond to information about administration of the estate and to propose measures that would maximize its net present value.

Q11. Regarding actual direct compensatory damages for the repudiation of a contingent obligation in the form of a guarantee, letter of credit, loan commitment, or similar credit obligation, should the Proposed Rule be amended to specifically provide a method for determining the estimated value of the claim? In addition to the statutory considerations in valuation, including the likelihood that the contingent claim would become fixed and its probable magnitude, what other factors are appropriate? If so, what methods for determining such estimated value would be appropriate? Should the regulation provide more detail on when a claim is contingent?

Dodd-Frank contemplates that the allowed amount of a claim for damages arising from the repudiation by a covered financial company of a contingent obligation will be determined, as of the date the FDIC is appointed the receiver, based on two factors: (1) "the likelihood that [the] contingent claim [will] become fixed" and (2) if the claim does become fixed, "the probable magnitude thereof."[62] We believe these are useful guideposts consistent with how contingent obligations are typically valued for financial reporting and others purposes. As with other value determinations (*e.g.,* the value of collateral partially securing an undersecured claim), we believe that adoption of fixed rules in advance determining how each and every contingent claim will be estimated (a) would be inconsistent with bankruptcy law (rather than helping to harmonize the statutory regimes), and (b) could lead to skewed determinations not tied to the facts and circumstances of a particular claim. We think this issue should be left to a case-by-case determination based on the facts presented.

In addition, MFA supports the FDIC's stated position that a claim against the receivership should be provable, and not deemed to remain contingent, if it is a claim on a guarantee or letter of credit and the principal obligor has become insolvent.[63]

Q.12 Are the provisions of the Dodd-Frank Act relating to the classification of claims as administrative expenses of the receiver sufficiently clear, or is additional rulemaking necessary clarify such classification?

Title II provides for "[a]dministrative expenses of the receiver" to enjoy first priority among unsecured claims,[64] but it does not define the term "administrative expenses." In

[62] Dodd-Frank Act § 210(c)(3)(E), 12 U.S.C. § 5390(c)(3)(E).
[63] 75 Fed. Reg. 64173, 64179 (Oct. 19, 2010) (to be codified at 12 C.F.R. pt. 380).
[64] Dodd-Frank Act § 210(b)(1)(A), 12 U.S.C. § 5390(b)(1)(A).

contrast, the Bankruptcy Code contains a lengthy, non-exclusive exposition of that term.[65] It would bring clarity, and help harmonize Title II with the Bankruptcy Code, were the FDIC to make clear that it will limit administrative expenses in Title II receiverships to "the actual, necessary costs and expenses of preserving the estate"[66]—the principal category of administrative expenses under the Bankruptcy Code—and reasonable compensation for experts retained to assist in the receivership. We also think it would be helpful for the FDIC to announce that it will generally look to the extensive jurisprudence developed under the Bankruptcy Code in determining and circumscribing what claims qualify as administrative expenses. To that end, the FDIC should specify that for a claim to so qualify it will generally need to arise out of a transaction undertaken by the FDIC after its appointment as receiver that benefits the receivership estate, and that, in accordance with bankruptcy case law, the FDIC will construe administrative expenses and other priority claims narrowly.[67]

Q13. Should the Proposed Rule's definition of ''long-term senior debt'' be clarified or amended?

See Response to Question No. 9.

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[65] *See* 11 U.S.C. § 503(b).
[66] 11 U.S.C. § 503(b)(1)(A).
[67] *See, e.g., In re LandAmerica Fin. Grp.,* 435 B.R. 343, 350 (Bankr. E.D.Va. 2010) ("narrow construction is necessary given the fact that claimed administrative expenses can involve large sums of money such that liberal construction could render a debtor unable to reorganize or administratively insolvent, with unsecured creditors receiving nothing"); *In re Colortex Indus., Inc.*, 19 F.3d 1371, 1377 (11th Cir. 1994) (administrative expense priorities "should be narrowly construed in order to maximize the value of the estate preserved for the benefit of all creditors"); *In re Massetti*, 95 B.R. 360, 363 (Bankr. E.D.Pa. 1989) ("Since the allowance of priority claims reduces the amount of the estate available to prepetition creditors, what constitutes an administrative expense is narrowly construed.").

CONCLUSION

MFA appreciates the opportunity to respond to the FDIC's questions on this crucial set of topics. As we stated in our November 18 Letter, we recognize the importance of developing an effective liquidation framework for those financial firms whose failure could otherwise pose a real threat to the financial stability of the country. Because Title II of the Dodd-Frank Act establishes a new liquidation framework for financial firms whose importance cannot be overstated, investors now face a significant amount of uncertainty, potential confusion and fear with respect to the implementation and consequences of this new framework. As described above, we believe that it is critical for the proper functioning of our capital markets and the reduction of systemic risk that the FDIC create clear, objective, pragmatic and equitable rules regarding the implementation of the OLA. To this end, we hope that our comments have been helpful, and we are committed to continuing to work with the FDIC as it develops rules to implement the OLA.

If you have any questions regarding any of these comments, or if we can provide further information with respect to these or other regulatory issues, please do not hesitate to contact Stuart J. Kaswell or me at (202) 730-2600.

Respectfully submitted,

/s/ Richard H. Baker

Richard H. Baker
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