THE FINANCIAL SERVICES ROUNDTABLE
Financing America's Economy

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March 28, 2011

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

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

File Number: FR Doc. 2011-1379

Dear Mr. Feldman:

The Financial Services Roundtable (the "Roundtable"[1]) appreciates the opportunity to provide the Federal Deposit Insurance Corporation (the "FDIC") with its comments on the interim final rule (the "Interim Final Rule") implementing certain orderly liquidation authority ("OLA") provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), as published in the Federal Register on January 25, 2011 (the "Interim Final Rule Comment Request"[2]).

Re-emphasizing the point made in the Roundtable's November 18, 2010 letter responding to the first set of questions (the "First Response"[3]) posed in the FDIC's October 19, 2010 Notice of Proposed Rulemaking (the "Proposed Rule"[4]) and its January 18, 2011 letter responding to

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1 The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for $92.7 trillion in managed assets, $1.2 trillion in revenue, and 2.3 million jobs.

2 76 Fed. Reg. 4207 (January 25, 2011).

3 Letter from Richard M. Whiting, Executive Director and General Counsel, The Financial Services Roundtable, to Robert Feldman, Executive Secretary, Federal Deposit Insurance Corporation, November 18, 2010, *available at* http://www.fdic.gov/regulations/laws/federal/2010/10c24Orderliq.PDF.

4 75 Fed. Reg. 64173 (October 19, 2010).

the second set of questions posed in the Proposed Rule (the "Second Response"[5]), the Roundtable fully supports the FDIC's goals of issuing regulations under Title II that provide transparency, market certainty and appropriate flexibility to address the "Too Big to Fail" dilemma and achieve financial stability. As the FDIC proceeds with its rulemaking process, the Roundtable asks the FDIC to remain cognizant of the fact that effective implementation of the OLA can only be achieved through comprehensive, coordinated analysis by both the FDIC and market participants of how OLA implementation will affect the creditors of systemically important financial institutions ("SIFIs"). Because the effect of Title II on creditors of SIFIs will likely determine whether the OLA in fact reduces systemic risk, mitigates moral hazard and enhances market discipline, the FDIC should implement the OLA in a manner that offers creditors of SIFIs maximum possible clarity on both substantive and procedural outcomes in the event of a liquidation.

With that in mind, our responses to the specific questions follow.

1. Are there additional ways to reduce moral hazard and increase market discipline and to clarify that all creditors should assume that they will receive no additional payments and that their recovery will be limited to what will be paid according to the order of priorities established under section 210(b)?

Although the FDIC has focused its OLA implementation efforts almost entirely on issues relating to moral hazard and market discipline, the Roundtable asks the FDIC to remain cognizant of its other mandate under Title II, namely, to implement Title II in a manner that mitigates systemic risk. To that end, the Roundtable asks the FDIC to provide additional clarification on bridge financial companies ("BFCs"). Because a BFC is likely to be an essential mechanism for the orderly liquidation of any covered financial company, providing creditors with additional clarity as to how their claims will be treated during the process of BFC creation and implementation is essential. To this end, the Roundtable believes that information on (i) procedures governing the transfer of claims to the BFC,[6] (ii) procedures governing the valuation of assets transferred to the BFC, (iii) procedures governing the treatment of claims that are not transferred to the BFC, and (iv) procedures for implementing the assessment process on creditors of the BFC that receive "additional payments" would all serve to enhance market discipline by reducing uncertainty among market participants.

In addition, the Roundtable asks the FDIC to recognize the importance of Section 210(a)(7)(B), which guarantees creditors of a covered financial company a recovery no less than what those creditors would have received in a Chapter 7 liquidation under the Bankruptcy Code. Because 210(a)(7)(B) effectively serves as a "floor" on creditor recovery, rules that recognize

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[5] Letter from Richard M. Whiting, Executive Director and General Counsel, The Financial Services Roundtable, to Robert Feldman, Executive Secretary, Federal Deposit Insurance Corporation, January 18, 2011, *available at* http://www.fsround.org/policy/regulatory/pdf2011/FINAL-CommentLetteronFDICOLA90-DayQuestions1.18.11.pdf.

[6] The Roundtable notes that on March 15, 2011, the FDIC issued a notice of proposed rulemaking under Title II which includes a provision relating to the effect of a transfer of an obligation of a covered financial company to a bridge financial company. The Roundtable intends to provide comments on this provision and the other provisions in the notice of proposed rulemaking as part of the comment process on the notice of proposed rulemaking.

and reinforce the importance of 210(a)(7)(B) will greatly aid in maximizing creditor certainty with respect to implementation of the OLA. As the OLA implementation process continues, the *Roundtable requests* that the FDIC seek to provide maximum possible clarity to the market on how 210(a)(7)(B) will be implemented and how creditor rights to the minimum recovery under 210(a)(7)(B) will be protected.

2. Subsection 380.2 precludes any "additional payments" under the statute to holders of long term debt, which is defined as debt in excess of 360 days. What are the positive and negative consequences that this may have for market stability? What effect might this have on long term debt and its role in funding for financial companies? Is additional flexibility needed? Are there additional ways to counteract any impression that shorter term debt is not at risk? Does using a term of 360 days adequately distinguish longer term from shorter term debt? Should a different period be used?

The Roundtable continues to urge the FDIC to retain the flexibility to provide additional payments to creditors if the circumstances surrounding an orderly liquidation warrant such payments. In the words of our First Response:

> "The Roundtable believes it is crucial that the FDIC avoid creating a bright line that will both distort credit markets and potentially restrain the FDIC from taking desirable and even necessary actions in a crisis. A rule categorically ruling out additional payments to longer-term debt holders could discourage such debt, which might otherwise reduce systemic risk and enhance liquidity."[7]

Flexibility will be crucial to the successful resolution of a failing financial company under Title II. Flexibility allows for appropriate action by the FDIC in the face of unanticipated circumstances, for the FDIC to utilize appropriate discretion when the situation demands it, and for the FDIC to act in a manner that maximizes the value of the covered financial institution being resolved, no matter what the future circumstances might be. Rather than mitigate systemic risk during an orderly liquidation, as the FDIC is mandated to do under Title II, the FDIC's adoption of a bright-line rule that distinguishes between debt instruments that may receive additional payments and debt instruments that will never receive additional payments may serve to distort the incentives of SIFI creditors in a manner that creates systemic risk. To avoid this result, the *Roundtable reiterates its recommendation* that the FDIC not explicitly distinguish between debt instruments based on the instrument's term, and instead recommends that the FDIC withdraw section 380.2 of the Interim Final Rule. If the FDIC chooses to distinguish between different categories of debt instruments, it should nonetheless do so based on either (i) whether the debt instrument qualifies as regulatory capital, or (ii) the debt instrument's remaining time to maturity.

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7 *Supra* note 3 at 3.

3. What additional guidelines would be useful in creating additional certainty with respect to establishment of fair market value of various types of collateral for secured claims?

The FDIC should assure consistency with existing methods and procedures for valuing collateral employed in proceedings under the Bankruptcy Code. Adopting guidelines that could lead to significantly different valuations of the same type of collateral in proceedings under Title II and proceedings under the Bankruptcy Code could artificially affect the market for the collateral in question and have unpredictable and possibly detrimental effects on SIFIs. In particular, and consistent both with comments made in our Second Response and the FDIC's mandate under Section 209 to harmonize Title II with the Bankruptcy Code, the *Roundtable requests that the FDIC promulgate guidelines* that permit secured creditors to "credit bid" up to the amount of their claims in connection with dispositions or redemptions of their collateral by the FDIC as receiver.[8]

4. Should the date of appointment of the receiver be used as the valuation date for all types of collateral, or only government securities or other publicly traded securities?

The FDIC should **not** use the date of appointment or any other single reference date as the mandatory valuation date for any type of collateral. To do so would be an inadvisable departure from practice in proceedings under the Bankruptcy Code of the sort we have cautioned against above. In addition, the inflexibility of a universally applicable valuation date leads to the problem of the arbitrary allocation of windfalls and losses that gives rise to question 5 below. The Bankruptcy Code recognizes that no single date or methodology should be applied to collateral valuation in all circumstances.[9] Even more generally, the Bankruptcy Code does not key liquidation distributions to values available in an instantaneous disposition of a debtor's properties on the commencement date of a case, but rather recognizes that the liquidation of these properties in an orderly manner is a process itself which maximizes recoveries. Both of these concepts should be implemented in the FDIC's interpretation of OLA.

5. Who should receive the benefit or burden of market fluctuation between the date of appointment of the receiver and the date of payment of a claim? For example, if a claim is for $100, and the collateral is valued at $98 on the date of appointment of the receiver, and at $102 at the date of payment of the claim, should a claimant receive $98 plus an unsecured claim of $2, should they receive the full value of their secured claim of $100, or should they receive the full value of the collateral, i.e., $102?

As noted above, the problem of arbitrary windfalls and losses arises from application of a single rigidly applied valuation date without regard to the context of an overall scheme addressing the rights of secured creditors.

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8 The Roundtable notes that the notice of proposed rulemaking issued by the FDIC on March 15, 2011 includes provisions relating to the sale or redemption of collateral by the FDIC as receiver for a covered financial company. The Roundtable intends to provide comments on these provisions and other provisions in the notice of proposed rulemaking as part of the comment process on the notice of proposed rulemaking.

9 *See* 11 U.S.C. § 506(a)(1) ("[Collateral] value shall be determined in light of the purpose of the valuation and the propose disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.").

The Bankruptcy Code combines a more flexible approach to valuation with a variety of protections for the secured creditor and the bankruptcy debtor. For example, secured creditors are generally entitled to some form of "adequate protection" against the decline in collateral value resulting from the debtor's continued possession or use[10] and, when adequate protection cannot be provided or the debtor's continued possession can no longer be justified, relief from the stay on the exercise of foreclosure remedies.[11] Where disposition of the collateral follows, the actual sale proceeds will generally be used to fixed the value of the creditors secured claim and, thus, the amount of any unsecured deficiency claim.[12] In these and other ways, the Bankruptcy Code recognizes that collateral values will fluctuate and provides an equitable approach for allocating gain and loss in a non-arbitrary way.

We also believe that the FDIC should address the issues relating to collateral valuation in the context of a broader rulemaking process under Title II that addresses the rights of secured creditors generally.

6. Should the FDIC designate a specific time during the term of the receivership to estimate contingent claims?

Rather than designate a specific date to estimate contingent claims, the FDIC should treat contingent claims in a manner consistent with the Bankruptcy Code. Section 502(c) of the Bankruptcy Code states that:

> There shall be estimated for purpose of allowance under this section—
>
> (1) any contingent or unliquidated claim, **the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case**;

Section 502(c) indicates that a contingent claim should only be estimated in cases where waiting for the claim to become fixed would delay the administration of the bankruptcy case. The FDIC should adopt the approach of 502(c) in its final rule, and remain flexible as to the length of time that may be allowed for a specific contingent claim to become fixed based on the specific facts of the claim in question and the circumstances of the liquidation proceeding in which it is being addressed.

Conclusion

Again, the Roundtable expresses its appreciation for the favorable clarifications in the Interim Final Rule. These clarifications illustrate how cooperation and coordination between the FDIC and market participants can serve to enhance clarity and certainty in the financial system.

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10 A creditor may be entitled to adequate protection (a) where the automatic stay prohibits foreclosure, *see* 11 U.S.C. § 362(d), (b) in connection with the debtor's use, sale or lease of collateral, *see* 11 U.S.C. § 363(e), (c) where the collateral is subjected to an equal ranking or more senior lien to secure financing in bankruptcy, *see* 11 U.S.C. § 364(d). Adequate protection may take a variety of forms, *see* 11 U.S.C. § 361.

11 *See* 11 U.S.C. § 362(d), (e).

12 *See* Collier on Bankruptcy ¶ 506.03[6][b] (2010) ("if an actual sale (or equivalent disposition) is to occur, the value of the collateral should be based on the consideration").

The Roundtable hopes that the FDIC will continue to look to market participants for feedback as it continues the OLA implementation process, and looks forward to making a positive contribution to the ongoing discussion on how best to mitigate systemic risk and promote financial stability in the months ahead.

The Roundtable thanks the FDIC for the opportunity to comment. If you have any questions, please feel free to contact me or Brian Tate at (202) 289-4322.

Sincerely,

Richard M. Whiting

Richard M. Whiting
Executive Director and General Counsel