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March 28, 2011

Via electronic submission to *www.fdic.gov/regulations/laws/federal.*

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

Re: Comment on Interim Final Rule regarding Orderly Liquidation Authority Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank")

Dear Mr. Feldman:

We appreciate the opportunity, on behalf of a number of U.S. and non-U.S. financial institutions, to comment on the interim final rule adopted by the Board of Directors of the FDIC on January 18, 2011 regarding Title II of Dodd-Frank.[1] We applaud the FDIC's efforts to provide greater clarity regarding Orderly Liquidation Authority ("OLA") and promote its harmonization with the Bankruptcy Code. This letter addresses certain aspects of the treatment of contingent claims under OLA that, in our view, diverge from their treatment under the Bankruptcy Code.

Guarantees

In addition to addressing how contingent claims will be valued, we recommend that interim final rule § 380.4 address when a claim is not contingent. In particular, we recommend that the rule specifically provide that claims under guarantees, letters of credit, loan commitments and similar credit obligations that become due and payable before all distributions

[1] 76 Fed. Reg. 4207 (Jan. 25, 2010).

have been made in respect of creditors of the same class as the beneficiaries thereof (or any junior class) should be treated as provable in their full, drawable amount and not as contingent. We note that, in the preamble to the Notice of Proposed Rulemaking that resulted in the interim final rules, the FDIC expressed a similar view about guarantees of the obligations of obligors that become insolvent after the appointment of the receiver.[2] We believe that the FDIC has not changed its views on this matter and urge the FDIC to codify its views in the final rule. This treatment of guarantees is consistent with the Bankruptcy Code. Under the case law, the beneficiary of a guarantee of an obligation that is due and payable can prove the full amount of its claim against both the principal obligor and the guarantor.[3]

Accordingly, we recommend that the FDIC adopt new rule § 380.4(c) as follows:

> (c) A claim in respect of an obligation of the covered financial company consisting of a guarantee, letter of credit, loan commitment, or similar obligation, including upon repudiation thereof, is not a contingent claim and shall be provable to the extent of the amount due and payable thereunder if the obligation becomes due and payable prior to the final distribution on claims of creditors of the priority class to which such claim relates or any junior class.

Contingent Obligations Generally

Similarly, we recommend that contingent claims that become fixed before all distributions have been made in respect of creditors of the same class or any junior class should also be provable in full. This treatment of contingent claims that subsequently become fixed is consistent with the Bankruptcy Code treatment of such claims. Under section 502(c) of the Bankruptcy Code, a contingent claim may be estimated for purpose of determining the claim amount if the "fixing or liquidation" of the claim would "unduly delay the administration" of the bankruptcy proceeding.[4] In bankruptcy proceedings, this generally means that a claim will be treated as fixed so long as the occurrence of the contingency occurs prior to the distribution of funds to creditors, which generally occurs at the conclusion of proceedings. Thus, we recommend that the FDIC treat a claim as fixed and provable in full in OLA proceedings so long as the fixing occurs prior to the distribution of all funds with respect to the priority class of the claim or any junior class. Such an approach would address both the statutory mandate that

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[2] "In addition, the FDIC holds the view that an obligation in the form of a guarantee or letter of credit is no longer contingent if the principal obligor (*i.e.*, the party whose obligation is backed by the guarantee or letter of credit) becomes insolvent or is the subject of insolvency proceedings." 75 Fed. Reg. 64179.

[3] See, e.g., In re Gessin, 668 F.2d 1105, 1107 (9th Cir. 1982); St. Louis Union Trust Co. v. Joliffe, 74 F.2d 247 (2d Cir. 1934); Ireton v. Lincoln Nat'l Bank, 300 F. 316, 317-318 (6th Cir. 1924); In re New York Commercial Co., 233 F. 906, 909 (2d Cir. 1916); Bd. of Comm'rs v. Hurley, 169 F. 92 (8th Cir. 1909); In re Realty Assocs. Sec. Corp., 66 F. Supp. 416 (E.D.N.Y. 1946); In re F.W.D.C., Inc., 158 B.R. 523, 528 (Bankr. S.D. Fla. 1993); see also Ivanhoe Bldg. & Loan Assoc. v. Orr, 295 U.S. 243 (1935).

[4] 11 U.S.C. § 502(c)(1).

creditors receive no less than they would have in a liquidation under the Bankruptcy Code and the statutory requirements to harmonize OLA rules with analogous Bankruptcy Code provisions. We note that proposed rule § 380.35 (proposed in the latest Notice of Proposed Rulemaking, published in the Federal Register on March 23, 2011) takes important steps towards clarifying that claims which become fixed after the appointment of the receiver can be proved in full under certain circumstances. We will provide comment on proposed rule § 380.35 in a subsequent letter, as the means to implement our recommendations in regard to contingent claims generally.

Damages for Repudiation of Contingent Claims

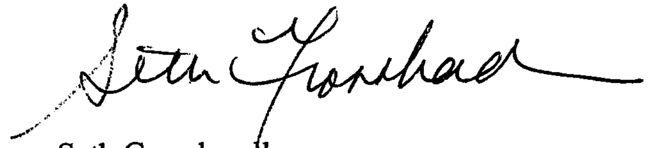
We recommend that interim final rule § 380.4(b) apply to the repudiation of all contingent obligations, and not just those consisting of a guarantee, letter of credit, loan commitment or similar credit obligation that has not become due and payable prior to the final distribution on claims. Currently, this rule addresses the statutory authority in section 210(c)(3)(E) of Dodd-Frank and specifies the method for determining damages with respect to the repudiation of this limited subset of contingent claims. However, there is no reason for a different method to be used when determining damages in respect of contingent claims generally. Accordingly, we recommend that interim final rule § 380.4(b) be revised as follows:

> If the receiver repudiates a contingent obligation of a covered financial company**, including a contingent obligation** consisting of a guarantee, letter of credit, loan commitment, or similar credit obligation **that has not become due and payable prior to the final distribution on claims of creditors of the priority class to which such obligation relates or any junior class**, the actual direct compensatory damages for repudiation shall be no less than the estimated value of the claim as of the date the Corporation was appointed receiver of the covered financial company, as such value is measured based upon the likelihood that such contingent claim would become fixed and the probable magnitude thereof.

* * *

We appreciate this opportunity to comment on the FDIC's interim final rules. If you have any questions, please do not hesitate to contact me at (212) 225-2542 or Knox L. McIlwain at (212) 225-2245.

Sincerely,



Seth Grosshandler

cc: Knox L. McIlwain, Esq.