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May 23, 2011

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

Re: Notice of Proposed Rulemaking Implementing Certain Orderly Liquidation Authority Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (RIN 3064-AD73)

Dear Mr. Feldman:

The Independent Community Bankers of America[1] (ICBA) welcomes the opportunity to comment on the Federal Deposit Insurance Corporation's (the "FDIC") notice of proposed rulemaking on the "Orderly Liquidation Authority," dated March 23, 2011 (the "Proposed Rule"). Among other things, the Proposed Rule addresses the definition of the term "financial company" subject to resolution under Title II by establishing the criteria for determining whether a company is "predominantly engaged in activities that are financial in nature or incidental thereto" for purposes of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act"). The Proposed Rule also covers the priorities of expenses and unsecured claims in the receivership of a covered financial company and clarifies how creditors can file claims against the receivership estate.

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[1] The Independent Community Bankers of America represents nearly 5,000 community banks of all sizes and charter types throughout the United States and is dedicated exclusively to representing the interests of the community banking industry and the communities and customers we serve. ICBA aggregates the power of its members to provide a voice for community banking interests in Washington, resources to enhance community bank education and marketability, and profitability options to help community banks compete in an ever-changing marketplace.

With nearly 5,000 members, representing more than 20,000 locations nationwide and employing nearly 300,000 Americans, ICBA members hold $1 trillion in assets, $800 billion in deposits, and $700 billion in loans to consumers, small businesses and the agricultural community. For more information, visit ICBA's website at www.icba.org.

**ICBA's Comments**

***Predominantly Engaged in Financial Activities***

Section 380.8 of the Proposed Rule establishes standards for determining if a company is predominantly engaged in financial activities. If a company is determined to be predominantly engaged in such activities for purposes of the definition of "financial company" under Title II of the Dodd-Frank Act, it may be subject to the orderly liquidation provisions of Title II.

In our letter to the Federal Reserve concerning the definitions of "Predominantly Engaged in Financial Activities" and "Significant Nonbank Financial Company", ICBA stated that it strongly believes that certain large nonbank financial companies should be subject to enhanced prudential standards including higher capital, leverage, and liquidity standards, concentration limits and contingent resolution plans.

Just as ICBA supported a broad Financial Stability Oversight Council (FSOC) process for determining which nonbank financial institutions should be considered systemically important, ICBA also supports a broad FDIC process for determining the same thing. The inquiry should include as many large or interconnected nonbank financial firms that pose systemic risk to the financial system and the economy as possible. The list should include, but not necessarily be limited to, large investment banks, insurance companies, hedge funds, private equity funds, venture capital firms, mutual funds (particularly money market mutual funds), industrial loan companies, special purpose vehicles, and nonbank mortgage origination companies. Any company that is "predominantly engaged in financial activities" as the Dodd-Frank Act defines that term should be considered a covered financial company if its failure or material financial distress could cause financial instability in the United States.

Building upon Section 210(a)(11) and (b) of the Dodd-Frank Act, Section 380.8 of the Proposed Rule establishes two tests for determining if a company is "predominantly engaged" in financial activities and therefore subject to the orderly liquidation provisions of Title II of the Dodd-Frank Act. Under the first test, referred to as the "Two-Year Test," a company would be considered predominantly engaged in financial activities if in either of its two most recently completed fiscal years, the company's annual gross financial revenues or consolidated financial assets equal or exceed 85 percent of its total consolidated annual gross revenues or total consolidated assets, respectively. The second test, which is a case-by-case method, would allow the FDIC to subjectively determine, based on facts and circumstances, whether 85 percent or more of a company's annual gross revenues or consolidated assets are financial in nature. Furthermore, the FDIC would allow companies to use their consolidated, year-end financial statements prepared in accordance with U.S. generally accepted accounting principles ("GAAP") or a

functional equivalent as the basis for determining their annual gross revenue and consolidated assets.

ICBA agrees that both tests carry out the statutory mandates of Title II of the Dodd-Frank Act and at the same time, are flexible enough not to impose an unnecessary regulatory burden. The Two-Year Test would, for example allow the FDIC to designate a systemically important firm whose financial assets and revenues traditionally have met or exceeded the required 85 percent threshold, but that experienced a temporary decline in financial revenue or assets during its last fiscal year. Also, the Two-Year Test would provide the FDIC a period of time to reevaluate an existing designation with respect to a systemically important nonbank financial company should the company's level of financial revenues or assets fall below the 85 percent threshold at the end of a single year. Allowing companies to use their consolidated year-end financial statements prepared in accordance with GAAP or its functional equivalent as the basis for determining their annual gross revenue and consolidated assets also provides a way for the FDIC to compare such amounts across a broad spectrum of companies and should also facilitate the ability of companies to determine whether they are a nonbank financial company for purposes of the Dodd-Frank Act.

The Dodd-Frank Act also defines financial activities by reference to those activities that have been determined to be financial in nature under Section 4(k) of the Bank Holding Company Act. ICBA agrees with the FDIC that the activities that should be considered "financial" are listed in Section 225.86 of Federal Reserve System's Regulation Y. This list of financial activities would also include those that have been considered by the Board of Governors of the Federal Reserve System as "closely related to banking" and that are listed in Sections 225.28(b) and 225.86(a)(2) of Regulation Y.

ICBA agrees with the FDIC that the Proposed Rule should broadly define "financial activities" to include all activities that have been, or may be, determined to be financial in nature under Section 4(k). This should be defined broadly to all financial activities, regardless of where the activity is conducted by a company, regardless of whether a bank holding company or a foreign banking organization could conduct the activity under some legal authority other than Section 4(k) of the Bank Holding Company Act, and regardless of whether any federal or state law other than Section 4(k) of the Bank Holding Company Act may prohibit or restrict the conduct of the activity by a bank holding company. For instance, all securities underwriting and dealing activities should be considered financial activities for purposes of the Proposed Rule even if a bank holding company or other company affiliated with a depository institution may be limited in the amount of such activity it may conduct under the "Volcker Rule."

***Receivership and Claims Process***

Section 210(a)(2)-(5) of the Dodd-Frank Act provides for the resolution of claims against a covered financial company through an administrative process conducted by the FDIC as receiver. Generally, this process calls for creditors to file their claims with the FDIC by a claims bar date. The FDIC will determine whether to allow or disallow a claim. If the

claim is disallowed, the claimant may seek *de novo* judicial review of the claim by filing a lawsuit within a prescribed sixty-day time period. Sections 380.30-39 and 380.50–55 of the Proposed Rule clarify how creditors can file claims against the receivership estate, how the FDIC as receiver will determine those claims, and how creditors can pursue their claims in federal court. The FDIC has considerable authority to assess claims and make valuations, however neither the Dodd-Frank Act nor the Proposed Rule adequately explain the process the FDIC will use to allow a claim or to value a claim. Further, neither the Dodd-Frank Act nor the Proposed Rule allows a creditor to challenge an FDIC claim valuation.

ICBA strongly supports an efficient liquidation process under the "Orderly Liquidation Authority" and suggests that the Proposed Rule i) include procedures that the FDIC as receiver will follow in claim determinations and valuations, and ii) consider providing an appeals procedure for claim valuations if that can be provided for without unreasonably slowing the resolution process down.

Otherwise, ICBA generally supports the Proposed Rule and agrees that it would provide clarity and some certainty to the financial industry and will help ensure that the liquidation process under Title II of the Dodd-Frank Act is both orderly and transparent. It is important that the proposal carry out the goals of the Act which is to provide a way of liquidating failed financial companies that pose a significant risk to the financial stability of the United States in a manner that mitigates such risk and minimizes moral hazard.

**Conclusion**

ICBA believes that certain large nonbank financial companies should be subject to enhanced prudential standards including higher capital, leverage, and liquidity standards, concentration limits and contingent resolution plans. ICBA agrees that both the Two-Year Test and the subjective case-by-case method carry out the statutory mandates of the Dodd-Frank Act and at the same time, are flexible enough not to impose an unnecessary regulatory burden. Further, ICBA supports the Proposed Rule's definition of "financial activities" to include all activities that have been, or may be, determined to be financial in nature under Section 4(k) of the Bank Holding Company Act.

ICBA suggests that the Proposed Rule i) include procedures that the FDIC as receiver will follow in claim determinations and valuations, ii) consider providing an appeals procedure for claim valuations. Otherwise, ICBA generally supports the Proposed Rule and agrees that it would provide clarity and some certainty to the financial industry.

ICBA appreciates the opportunity to comment on the FDIC's notice of proposed rulemaking on the "Orderly Liquidation Authority" under the Dodd-Frank Act. If you have any questions or need additional information, please do not hesitate to contact me at my email address (Chris.Cole@icba.org) or at 202-659-8111.

Sincerely,
/s/ Christopher Cole

Christopher Cole
Senior Vice President and Senior Regulatory Counsel