THE FINANCIAL SERVICES ROUNDTABLE

Financing America's Economy

1001 PENNSYLVANIA AVE., NW
SUITE 500 SOUTH
WASHINGTON, DC 20004
TEL 202-289-4322
FAX 202-628-2507

E-Mail info@fsround.org
www.fsround.org

Via e-mail

May 23, 2011

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

Re: Orderly Liquidation Authority

File Number: FR Doc. 2011-6705

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 notice of proposed rulemaking (the "Proposed 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 March 23, 2011.[2]

The Proposed Rule represents an important step in the creation of a comprehensive regulatory framework that will govern implementation of the OLA. Consistent with the OLA's goal of promoting financial stability, we believe that three basic points are important to keep in mind as the FDIC continues the rulemaking process.

First, even though the Proposed Rule represents an important initial step, the OLA implementation process is far from complete. Full implementation of the OLA will be a very complex undertaking. Recognizing the complexity of Title II implementation, we recommend that the FDIC coordinate its OLA implementation efforts with other aspects of regulatory reform to the greatest extent possible. For example, the FDIC should seek to coordinate OLA implementation with the ongoing efforts to implement Section 165(d) of the Dodd-Frank Act.[3]

Second, Title II should be implemented in a manner which to the greatest extent possible provides certainty to covered financial companies, their creditors, and the marketplace generally. We

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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 Orderly Liquidation Authority, 76 Fed. Reg. 16,324 (Mar. 23, 2011) (to be codified at 12 C.F.R. pt. 380).

3 *See* Resolution Plans and Credit Exposure Reports Required, 76 Fed. Reg. 22,648 (Apr. 22, 2011) (to be codified at 12 C.F.R. pt. 381).

believe that the FDIC can enhance certainty as to outcomes for both covered financial companies and the marketplace by creating a body of regulation that (i) is transparent, both procedurally and substantively, and (ii) appropriately limits the FDIC's discretion where doing so would minimize the destabilizing effects of uncertainty during a liquidation. Although Title II grants the FDIC significant discretion with respect to implementation and administration of the OLA, we believe that the goal of promoting financial stability will be enhanced by reducing wherever possible any uncertainty associated, for example, with the exercise of significant discretion on the part of the FDIC in handling claims or security interests.

Third, we submit that Title II should be implemented in a manner that seeks to maximize the going concern value of the business and assets of a covered financial company subject to orderly liquidation. An approach to OLA implementation that seeks to maximize going concern value is clearly consistent with, and indeed mandated by, the FDIC's duties to maximize the net present value and minimize the loss realized from the company's resolution.[4] Most importantly, maximizing the going concern value of the liquidated firm will mitigate the systemic risk consequences of any liquidation, because (i) *ex ante* expectations of the covered financial company and its creditors about the outcome of a liquidation will be favorably influenced by a policy emphasizing value preservation, and (ii) *ex post* systemic stability will be maximized where creditors of the liquidated financial company will be able to look to the maximum amount of residual value to cover existing claims against the covered financial company, thus minimizing the potential for detrimental "knock-on" effects of a liquidation.

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

1. The FDIC has proposed a two-year period for applying the 85 percent consolidated revenue test. Is there another more appropriate timeframe that the FDIC should use to determine whether a company meets the 85 percent consolidated revenue test for the purposes of Title II?

Although we believe the two-year time period for applying the 85 percent consolidated revenue test is appropriate, we believe that subsection 380.8(a)(2) of the Proposed Rule (which allows the FDIC to engage in a "facts and circumstances" analysis for purposes of determining whether a company is "predominantly engaged" in financial activities under Title II) should be deleted from the final rule. Although a facts and circumstances test may be appropriate in certain contexts, we believe this test is inappropriate in the OLA context because of the uncertainty it would create. Specifically, the retroactive effect of subsection 380.8(a)(2) would create additional uncertainty as to the potential applicability of Title II to a wide range of companies.

2. Is there a more appropriate definition of "applicable accounting standards" than that used in the Proposed Rule?

Subsection 380.8(a) of the Proposed Rule provides that a company will be deemed to be predominantly engaged in financial activities if at least 85 percent of the total consolidated revenues of the company for either of its two most recent fiscal years were derived directly or indirectly from financial activities. For purposes of this calculation, the company's revenues are determined in accordance with "applicable accounting standards." Subsection 380.8(b)(3) defines "applicable accounting standards" to be the accounting standards utilized by the company in the ordinary course of business in preparing its consolidated financial statements, provided that the standards are (i) U.S.

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[4] Subsections 210(a)(9)(E)(i) and (ii) of the Dodd-Frank Act.

generally accepted accounting principles ("GAAP"), (ii) International Financial Reporting Standards, or (iii) such other accounting standards that the FDIC determines to be appropriate. This rule is consistent with the rule proposed by the Board of Governors of the Federal Reserve System (the "Board") under Title I,[5] and we feel that it is generally appropriate.

However, certain insurance companies, including mutual and fraternal insurance companies, prepare their financial statements in accordance with Statutory Accounting Principles ("SAP") under applicable insurance law and regulation. These companies are not required by applicable insurance law or regulation to prepare financial statements in accordance with GAAP. We request that with respect to insurance companies that do not prepare financial statements in accordance with GAAP, the FDIC provide that SAP would be an "appropriate" accounting standard for purposes of determining whether a company is predominantly engaged in financial activities under subsection 380.8(a) of the Proposed Rule.

3. The Proposed Rule includes a rule of construction regarding investments that are not consolidated. Is this rule of construction appropriate?

Subsection 380.8(d)(1) of the Proposed Rule provides a rule of construction for the treatment of investments that are not consolidated for purposes of determining whether a company is predominantly engaged in financial activities. Subsection 380.8(d)(1) provides that revenues derived from an equity investment by the company in an investee company, the financial statements of which are not consolidated with those of the company under applicable accounting standards, will be treated as revenues derived from financial activities if the investee company is itself predominantly engaged in financial activities as defined in subsection 380.8(a)(1). This rule of construction is based on the approach proposed by the Board in connection with the definition of the term "predominantly engaged in financial activities" as used in Title I. We appreciate that this rule of construction is intended to avoid the need to determine the precise percentage of an investee company's activities that are financial in nature in order to determine the portion of the investing company's revenues related to the investment that should be treated as financial. Nonetheless, we submit that there will be situations in which an investing company will not have sufficient access to information about the business operations of an investee company in which it has a non-controlling minority investment to perform the required calculation. In addition, in the case of a non-controlling minority investment, the investing company will not be in a position to require the investee company to perform the required calculation. This presents an issue both with the Board's and FDIC's proposed rule. We believe it is important that the Board's rule and the FDIC's rule generally be aligned to promote consistency and to minimize administrative burden. Accordingly, we recommend that both the FDIC and the Board revise their proposed rules to provide that a company may treat an unconsolidated investment as not being financial in nature if it is unable to obtain the relevant information about the sources of revenues of the investee company, including from publicly available information, to perform the required calculation.

4. The Proposed Rule includes a rule of construction regarding *de minimis* investments. Is there a more appropriate approach to calculating and accounting for revenues that are derived from such *de minimis* investments?

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[5] *See* Definitions of "Predominantly Engaged in Financial Activities" and "Significant" Nonbank Financial Company and Bank Holding Company, 76 Fed. Reg. 7,731 (Feb. 11, 2011) (to be codified at 12 C.F.R. pt. 225).

Subsection 380.8(d)(2) of the Proposed Rule provides a rule of construction relating to the treatment of certain *de minimis* investments. Like the rule of construction discussed immediately above, this rule is based on the approach proposed by the Board in connection with the definition of the term "predominantly engaged in financial activities" in Title I. We believe that the Proposed Rule's treatment of revenues from *de minimis* investments is consistent with the Board's treatment of revenues from *de minimis* investments for purposes of determining whether a financial company is predominantly engaged in financial activities under Title I of the Dodd-Frank Act, and that this symmetry is appropriate. Symmetric treatment of *de minimis* investments under Title I and Title II will promote consistency and reduce the administrative burden on companies that could be deemed to be "predominantly engaged" in financial activities under both Title I and Title II of the Dodd-Frank Act.

5. Section 380.7 of the Proposed Rule establishes standards for a determination that a senior executive or director is substantially responsible for the failure of a covered financial company. Under the Proposed Rule, the loss to the financial condition of the covered financial company must have materially contributed to the failure of the covered financial company. The FDIC is considering the use of additional qualitative and quantitative benchmarks to establish that the loss materially contributed to the failure of the covered financial company. Financial indicators under consideration as possible benchmarks are assets, net worth and capital, and the percentage or magnitude of loss associated with these benchmarks that would establish a material loss and trigger substantial responsibility. The FDIC solicits comments on these and other potential benchmarks that may be used to effectively evaluate loss.

We believe that section 380.7 of the Proposed Rule, which establishes a presumption that certain members of a covered financial company's management team are responsible for its failure, is unwarranted, both as a matter of statutory language and as a matter of sound policy.

Title II establishes separate standards of proof for the removal of and the recoupment of compensation paid to management of a covered financial company. With respect to removal, Title II provides that if the managers or directors of a covered financial company "responsible" for the company's failed condition have not already been removed at the time that the FDIC is appointed receiver, the FDIC must ensure that "responsible" management and directors are removed.[6] By contrast, only compensation paid to senior executives or directors who are "*substantially* responsible" (emphasis added) for the failed condition of the covered financial company is subject to recoupment.[7] The language of Title II thus indicates that a senior executive or director's conduct must meet a higher standard of culpability in order for compensation to be recouped.

By presuming that a senior executive or director is "substantially responsible" for a company's failure for purposes of the compensation recoupment analysis, section 380.7 turns these separate standards on their heads. By making the burden of proof for recoupment of compensation less rigorous than the burden of proof for removal, section 380.7 is at odds with the express language of Title II, which requires a higher burden for recoupment of compensation than for removal. We thus believe that section 380.7 as drafted is inconsistent with congressional intent. In order for the final rule to accurately reflect congressional intent with respect to the removal of and recoupment of compensation from management or directors of a covered financial company, we request that section 380.7 be removed.

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[6] Section 206(4) of the Dodd-Frank Act.
[7] Section 210(s) of the Dodd-Frank Act.

We also believe as a policy matter that establishing a presumption that a senior executive or director is substantially responsible for the failure of a financial company could have several detrimental consequences at odds with Title II's goal of promoting financial stability. First, the presumption would make it difficult for a financial company in distress to recruit *or* retain executives and directors as part of a turnaround effort.[8] This difficulty likely would arise at the very time when a covered financial company will most require the skills of such executives and directors. In fact, the inability of a troubled company to attract and retain suitably skilled turnaround specialists could hasten the very failure that Title II is designed to address.

Second, because section 380.7 may create tension with the ordinary course fiduciary duties of officers and directors to the financial company, the presumption may lead to management paralysis during a crisis. While officers and directors have a fiduciary duty to act in the best interests of their shareholders, comporting oneself according to this duty would increase the probability that an officer or director would be deemed substantially responsible for the company's failure. Indeed, the Proposed Rule would seem to create a "Catch 22"-like situation for officers and directors, where inaction would be deemed a breach of fiduciary duty and initiative would increase the probability that the officer or director would be deemed responsible for the company's failure. A standard that places officers and directors between such a proverbial "rock and a hard place" risks causing paralysis of the financial company during a crisis, paralysis that would damage both the financial company itself and the wider market.

Third, by reducing the incentive for a financial company's management team to take action in the face of uncertain outcomes, section 380.7 would reduce the probability that a financial company in distress would seek to resolve its own difficulties. In situations where a financial company is in distress, but not yet insolvent, the company's management team may choose to wind down the company (the less risky choice) rather than attempt to turn the company around (the riskier choice). It is possible that when management's decision to try to turn the company around in order to increase the company's value is coupled with the possibility that management's compensation will be taken away from them, the management team will choose to wind down the company rather than risk loss of compensation. This distortion of incentives thus risks reducing the probability that a financial company will take prudent actions in the face of distress, a shift in incentives that will only serve to reduce overall systemic stability.

8. In what ways can the definition of administrative expenses under the Dodd-Frank Act be further harmonized with bankruptcy law and practice? Section 503(b)(4) of the Bankruptcy Code expressly provides for the payment of attorneys' and accountants' fees and expenses. Is there a need for a comparable provision in these rules, in light of the procedures for administration of the claims process described in the Proposed Rule?

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[8] We recognize that subsection 380.7(b)(3)(i) is intended to address at least certain of these concerns, but we question whether it will be effective. First, subsection 380.7(b)(3)(i) does not address the issues with respect to the retention of existing executives. Second, although the presumption does not apply to executives or directors hired as part of a turnaround effort, compensation paid to such executives or directors would still be subject to recoupment and the protection afforded only contemplates a two-year turnaround which may be impossible in the context of restructuring of a large, complex financial company. The potential for recoupment, even if the senior executive is performing as well as, if not better than, any other candidate, will have a significant impact on an executive or director's *ex ante* incentives to join a troubled financial company in contrast to opportunities at other troubled companies not subject to Title II.

Yes, it certainly is desirable to encourage creditor participation in maximizing the estate. This will be more likely if, similar to the rule under the Bankruptcy Code, professionals who make a substantial contribution to the resolution of the estate are entitled to compensation as an administrative expense.

9. Should "amounts due to the United States" be limited to obligations backed by the full faith and credit of the United States? To the extent that amounts due to the United States include amounts that are not obligations issued by the FDIC to the Secretary of the Department of Treasury under the Dodd-Frank Act, how will the additional assessments authorized by section 210(o) of the Act be applied?

Subsection 210(o)(1)(B) authorizes the FDIC to assess certain financial companies if such assessments are "necessary to pay in full the obligations issued by the [FDIC] to the Secretary [of the Treasury] under this title." Thus, assessments under Title II can be levied only to repay obligations issued by the FDIC to the Treasury under Title II, and not to cover other unsecured claims against the receivership, including other claims of the United States. In order to ensure consistency between the Proposed Rule and subsection 210(o)(1)(B), amounts owed to the FDIC should be accorded priority ahead of other amounts owed to the United States (*e.g.*, amounts owed to the Treasury on account of unsecured tax liabilities and unsecured debt owed to a Federal Reserve Bank).

10. How should the value of lost setoff rights be determined?

As currently drafted, the Proposed Rule's treatment of setoff rights diverges from the Bankruptcy Code. We urge the FDIC to conform its treatment of setoff rights under Title II to the Bankruptcy Code to the greatest extent possible. We also urge the FDIC to confirm that in the event that the FDIC affects the setoff rights of creditors through a transfer of an asset under subsection 210(a)(12), these creditors will be entitled to the same recovery they would have received if the covered financial company had been liquidated under Chapter 7 of the Bankruptcy Code.

We note that as currently drafted, the Proposed Rule may be read to suggest, in direct contravention of the minimum recovery requirement in subsection 210(a)(7)(B) of the Dodd-Frank Act, that setoff creditors would receive less than they otherwise would have received in a Chapter 7 liquidation. This must be clarified to confirm that, notwithstanding the distribution priorities under section 380.21, these creditors will receive no less than the minimum recovery requirement in subsection 210(a)(7)(B). In a Chapter 7 liquidation, setoff claims are the equivalent of secured claims. In a Chapter 7 liquidation, to the extent that a creditor has a claim against the debtor that is subject to setoff, such creditor can offset in full the amount it owes to the debtor against the amount the debtor owes it. In a liquidation under Title II, however, assets can be sold or otherwise transferred to the bridge financial company or another third party free and clear of setoff rights. Thus, the debtor's claim against the creditor could be sold to a third party who could collect that claim from the creditor who would have no corresponding ability to assert its setoff right. Although the creditor would continue to have its claim against the debtor as envisioned in the Proposed Rule, section 380.21 treats such claim only as a sixth priority claim. However, irrespective of this distribution priority, to comply with the requirement of subsection 210(a)(7)(B) of the Dodd-Frank Act that all creditors must receive at least as much as they would have received in a Chapter 7 liquidation, the setoff creditor would nevertheless have to receive, in a liquidation under Title II, a distribution equivalent to the value lost through sale or transfer of any assets free and clear of such creditor's setoff rights.

The treatment of setoff creditors under Title II as compared to Chapter 7 implicates other questions with respect to Title II's Chapter 7 minimum recovery requirement. For example, how will the FDIC determine what a creditor would have received if the covered financial company were subject to a Chapter 7 liquidation? The FDIC presumably is planning to address this and related questions in future rulemakings, but we wish to emphasize the importance of the FDIC: (i) providing additional clarity and specificity as to how the FDIC will determine what creditors would have received in Chapter 7 liquidation, including, *inter alia*, additional clarity and specificity on the timing of such a determination, the party responsible for making such a determination, and the availability of judicial review of such determinations, (ii) revising section 380.21 to provide that if a creditor receives a lower distribution under section 380.21 than it otherwise would have in a Chapter 7 liquidation, it will be entitled to the difference between the distributions, and (iii) explicitly confirming by rule that a creditor whose setoff rights have been affected by such a transfer will still have an absolute right to the difference between any payout under the priority provisions in section 380.21 and what the creditor would have received in a Chapter 7 liquidation.

11. How do the differences in the post insolvency interest rules contained in § 380.25 and those established under bankruptcy law and practice materially affect creditors? How would the provisions of section 506(b) of the Bankruptcy Code allowing certain fees and expenses to be paid to oversecured creditors to the extent of the value of their collateral be implemented in an orderly resolution under the Dodd-Frank Act, if it is applicable? What would be the impact on creditors if a similar rule is adopted under the Dodd-Frank Act? Or if one is not adopted?

In the Preamble to the Proposed Rule, the FDIC notes that the Dodd-Frank Act does not contain a provision similar to Section 506(b) of the Bankruptcy Code allowing interest at the contract rate and certain fees and expenses to be paid to oversecured creditors to the extent of the value of their collateral. Nonetheless, as the FDIC has previously noted,[9] there is a "direct mandate" under Section 209 for the FDIC to seek to harmonize the rules issued under Title II with the Bankruptcy Code or other insolvency laws that would otherwise apply to a covered financial company.

In order to harmonize the treatment of post-insolvency interest under Title II with the Bankruptcy Code, the FDIC should revise the provisions of the Proposed Rule relating to the payment of post-petition interest (subsection 380.25(b) of the Proposed Rule, setting the post-insolvency interest rate equal to the coupon equivalent yield of the average discount rate set on the three-month Treasury bill rather than at the contract rate) and the priority of post-petition interest (section 380.21 of the Proposed Rule, affording post-petition interest tenth priority among unsecured claims). As currently drafted, these provisions are not consistent with the Bankruptcy Code, because the Bankruptcy Code provides that to the extent that a secured creditor is oversecured by collateral, post-insolvency interest is treated as secured, and the claimant is allowed interest at the contract rate, as well as fees and expenses in respect of an oversecured claim.[10] Thus, section 380.25 of the Proposed Rule could provide a secured creditor with less of a payout than the secured creditor would have otherwise received under the Bankruptcy Code, because the Proposed Rule makes no provision for fees and because the interest the secured claimant would have received under the Bankruptcy Code will only be distributed under Title II after the full satisfaction of nine different categories of unsecured claims. In order to remedy the potential for disparate treatment of post-insolvency interest and fees, the FDIC should provide by rule that it will (i) treat interest, fees and expenses with respect to collateral to be secured, rather than unsecured, (ii) allow post-insolvency interest to be paid at the contract rate, and

[9] 76 Fed. Reg. 4,207, 4,209 (Jan. 25, 2011).
[10] 11 U.S.C. § 506 (2006).

(iii) allow for fees and expenses to be paid to oversecured creditors to the extent of the value of their collateral.

12. What, if any, additional provisions should be included in the Proposed Rule regarding the administrative process for the determination of claims?

We request the FDIC to confirm that there is a right of immediate judicial recourse as to any FDIC determination under section 380.50 of the Proposed Rule as to the (i) value of a secured claim, (ii) whether the claimant's security interest is legally enforceable and perfected, (iii) the priority of the security interest, or (iv) the fair market value of the property subject to the security interest. Similarly, we request that the FDIC confirm that there is a right of immediate judicial recourse as to any FDIC determination under section 380.51 to consent to certain actions and under section 380.54 or section 380.55 to sell property free and clear of a security interest or redeem a secured creditor by paying the secured creditor the fair market value of the property subject to the security interest. We also request that section 380.35 of the proposed rule be revised to allow for an "excusable neglect" exception for the late filing of claims. This exception is supported by judicial precedent under the Bankruptcy Code and would serve to facilitate fair administration of the claims process.

In addition to the requested changes to the claims process noted above, we also recommend that the FDIC make certain revisions to the provisions of the Proposed Rule relating to the priority and distribution of unsecured claims. The FDIC should revise the introductory clause of subsection 380.21(a) to clarify that in addition to paying all unsecured claims against the covered financial company "proved to the satisfaction of the receiver," the FDIC will also pay all unsecured claims allowed pursuant to the administrative review process or pursuant to a final, non-appealable judgment by a court. In addition, the FDIC should establish a mechanism to allow for judicial review of the prioritization of and distribution of proceeds to satisfy unsecured claims. The applicable review standard in each of these situations should be *de novo* review. Because similar mechanisms are an essential safeguard in Bankruptcy Code proceedings, such a mechanism would help to ensure the procedural and substantive transparency of the OLA.

Additionally, we request that the FDIC revise section 380.37(c) of the Proposed Rules so that a claim would be deemed allowed if the FDIC does not notify the claimant before the end of the 180-day claims determination period (or any extension thereof). Meaningful judicial review of a disallowed claim requires that the claimant be advised of the FDIC's reason for the disallowance. The rule proposed by the FDIC leaves a potential claimant in the unenviable position of having its claim disallowed without any reasoned justification from the FDIC and having to appeal with no explanation as to whether the FDIC actually had an issue with the claim in the first instance, other than that it could not get around to reviewing it in a timely manner. Moreover, the current default position of deemed disallowance risks inadvertent forfeiture of claims or rights of appeal.

Finally, we request that the FDIC clarify section 380.38(a) of the Proposed Rules to provide that the district court for the district within which the covered financial company's principal place of business is located shall be the exclusive forum for judicial review of all matters relating to the determination of claims, including disallowance, valuation, claim priority and distributions, to ensure that such matters will be heard by the same district court judge. We believe that this will ensure the application of a uniform standard, and an organized process, for the judicial review of all matters relating to determinations of claims in a given OLA proceeding, by a judge familiar with the underlying facts.

13. Proposed section 380.33 requires the FDIC to publish a notice to creditors to present their claims and specifies that the notice shall be published in one or more newspapers of general circulation where the covered financial company has its principal place or places of business. If the covered financial company is a multi-national organization, how should the principal place(s) of business be determined? Should a publication notice be published in each country in which the covered financial company does business?

With respect to a determination of the covered financial company's principal place of business, we request that the FDIC look to the following, in order of priority, when making such a determination: (i) the headquarters disclosed on the company's public securities disclosure documents, or (ii) the location where the company's executive decision-making capability is located or concentrated. With respect to such a determination for a covered financial company that does business in multiple countries, we suggest that the FDIC look to the rules of the applicable country in order to determine the appropriate procedures for providing notice.

In the event of a liquidation, the FDIC's notice procedures should seek to mirror as closely as possible the notice procedures adhered to in large and complex cases under the Bankruptcy Code. Thus, we believe that in addition to adhering to section 380.33's notice requirements, the FDIC could publish a notice to the creditors of the covered financial company (i) in every national financial news outlet (including online news outlets, such as Bloomberg), and (ii) every domestic and foreign jurisdiction where the covered financial company maintains an office.[11] For example, notice could be published in, *inter alia*, the *Financial Times International Edition*, *U.S.A. Today International Edition*, and the *Wall Street Journal International Edition*. In addition, the FDIC should post notice on the website of the covered financial company itself.

14. In the event that publication notices are published in other countries, what standards should be applied to identify appropriate "newspapers of general circulation" to satisfy this regulatory requirement?

With respect to the FDIC's determination of what constitutes an appropriate "newspaper of general circulation" for purposes of giving notice in a foreign country, we recommend that the FDIC publish notice in the most widely circulated newspaper in the city where the foreign country's primary equity exchange is located. In the event that this newspaper is published in a language other than English, we recommend that the FDIC publish notice in the newspaper with the largest circulation in that city that is published in English.

15. Should the consent provisions of subparagraphs 210(c)(13)(C) and (q)(1)(B) of the Act be interpreted as not applying to a secured creditor who has possession of or control over collateral before the appointment of the receiver pursuant to a security arrangement?

Section 380.51 of the Proposed Rule should be interpreted by the FDIC as not being applicable in cases where a secured creditor has possession of or control over collateral before the appointment of the FDIC as receiver. We request that the provisions of the Proposed Rule be amended to so reflect.

16. What, if any, additional provisions should be included in the Proposed Rule governing the treatment of secured claims and property that serves as security? Specifically, are there any additional provisions that are necessary or appropriate regarding obtaining consent from the

[11] With respect to foreign jurisdictions, publication should be in English and in the official language of the foreign jurisdiction.

receiver to exercise rights against the collateral, and the sale or redemption of the collateral by the receiver? Should collateral be valued at the time it is surrendered, sold or redeemed by the receiver, or some other time? Is it necessary to provide that after repudiation a security interest will no longer secure the contractual repayment obligation but will instead secure any claim for repudiation damages?

We believe that the provisions of the Proposed Rule relating to the treatment of secured claims should be clarified and revised in several respects.

With respect to clarifications, we ask the FDIC to clarify that sections 380.51, 380.54 and 380.55 of the Proposed Rule do not apply to qualified financial contracts ("QFCs"). Subsection 210(c)(8) of the Dodd-Frank Act provides that, subject to the provisions of subsection 210(a)(8) and paragraphs (9) and (10) of subsection 210(c), no person shall be stayed or prohibited from exercising any right to termination, liquidation, or acceleration of any QFC, any right under any security agreement, arrangement or credit enhancement related to a QFC, or any right to offset or net out any termination value, payment amount or other transfer obligation related to a QFC. In addition, subsection 210(c)(13)(C) expressly states that it does not apply to the rights of parties to QFCs.

Second, we ask the FDIC to clarify that a credit bid right attaches under section 380.55 of the Proposed Rule. Although we appreciate that section 380.54 of the Proposed Rule seems to provide for a credit bid right in the event that the FDIC as receiver sells property that is subject to a security interest, we ask the FDIC to clarify that a similar credit bid right will apply in the event that the FDIC as receiver exercises its authority under section 380.55 of the Proposed Rule to pay a secured creditor the fair market value of property subject to a security interest and retain the property free and clear of the security interest.

With respect to revisions, we ask the FDIC to revise section 380.52 of the Proposed Rule so that, with respect to implementation of subsection 210(c)(3)(D), a claim for repudiation damages will include interest at the contract rate up to the date of repudiation and that, as with section 380.55, a credit bid right attaches in the event that the FDIC as receiver repudiates a secured claim under section 380.52. We ask the FDIC to revise section 380.54 to provide that sales of collateral by the FDIC will be subject to the limitations of section 363(f) of the Bankruptcy Code. Section 363, *inter alia*, limits the sale of collateral free and clear of existing liens if the sale price is less than the aggregate amount of liens on the collateral; adhering to its requirements would provide additional certainty as to the disposition of collateral during a liquidation.

We also believe that revisions to the consent provisions of section 380.51 of the proposed rule are necessary. Subsection 380.51(c), which provides that consent may be granted "solely" at the discretion of the FDIC, could significantly reduce the incentives to provide secured credit to a covered financial company. A rule that grants the FDIC such broad powers over collateral, without appropriate protections or safeguards for the secured creditor, risks vitiating the protections that motivate the decision to provide secured credit in the first place. In order to ensure the transparency and fairness of the FDIC's exercise of authority under the consent provisions, the final rule should establish clear standards that will govern the FDIC's consent determinations; these standards should mirror those considered by bankruptcy courts in the context of a decision to lift the automatic stay under Section 362 or use, sell or lease property of the estate under Section 363.[12] In addition, to protect a secured

[12] With respect to secured claims collateralized by cash, cash collateral should only be able to be used by the FDIC if the secured creditor consents.

creditor from the continued use of the property during the period that the FDIC has refused a request to lift the stay, the FDIC should be required to provide adequate protection equivalent to what is available under the Bankruptcy Code. Section 380.51 should also be revised to require the FDIC to grant or withhold consent as expeditiously as possible and in no event later than 30 days after a request. Finally, in order to provide for effective judicial protection of secured claims, the FDIC's final rule should provide for *de novo* judicial review of a determination by the FDIC to withhold consent.

With respect to valuation, we note that sections 380.50 and 380.55 of the Proposed Rule provide for the valuation of collateral at "fair market value." We further note that subsection 380.2(c) of the Interim Final Rule provides that the fair market value of collateral will be determined "as of the date the [FDIC] was appointed receiver of the covered financial company."[13] In the Preamble to the Proposed Rule, the FDIC has requested comment on whether collateral should be valued at the time it is surrender, sold or redeemed by the receiver, or some other time. As we noted in our letter of March 28, we believe that "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 . . . In addition, the inflexibility of a universally applicable valuation date leads to the problem of the arbitrary allocation of windfalls and losses . . . [t]he Bankruptcy Code recognizes that no single date or methodology should be applied to collateral valuation in all circumstances. 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."[14]

Aside from issues related to timing of the valuation, we request that the FDIC clarify in section 380.50 of the Proposed Rule the applicable standards or methodologies to be used by the FDIC to determine the "fair market value" of the collateral. Furthermore, the FDIC's determination of "fair market value" applying such standards and methodologies must be subject to *de novo* judicial review. Under sections 380.50 and 380.55 of the Proposed Rule, the FDIC has both (i) the authority to determine "fair market value" of collateral, and (ii) the option of subsequently redeeming the collateral by paying the secured creditor "fair market value" of the collateral. Without prompt recourse to judicial review of such action, the rights of secured creditors will potentially be seriously compromised.

We also request that the FDIC clarify (i) who would be entitled to any post-filing appreciation of the collateral, and (ii) whether the collateral would be subject to a right of surcharge for costs incurred to preserve the collateral's value.

The provision of the Proposed Rule relating to the treatment of secured creditors should be revised in at least one additional respect. The FDIC should by rule specify that, as a condition to the use, sale or lease of any collateral of secured creditors, the FDIC should be required either to obtain the consent of such parties or to provide such parties with adequate protection; a necessary adjunct of this provision is that secured creditors must be entitled to seek and receive "adequate protection." Under the Bankruptcy Code, the adequate protection mechanism affords secured creditor an important

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[13] Orderly Liquidation Authority Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 Fed. Reg. 4,207, 4,215 (Jan. 25, 2011) (to be codified at 12 C.F.R. pt. 380).

[14] Letter from Richard M. Whiting, Executive Director and General Counsel, The Financial Services Roundtable, to Robert E. Feldman, Executive Secretary, Federal Deposit Insurance Corporation, March 28, 2011, *available at* http://www.fsround.org/fsr/policy_issues/regulatory/pdfs/pdfs11/OLAInterimFinalRuleCommentLetter032811.pdf.

safeguard against diminutions in the value of property that serves as collateral, and this protection should be implemented as part of the OLA.

17. What, if any, provisions should be changed or added to the expedited relief procedures for secured creditors who allege irreparable injury if the ordinary claims process is followed?

We request that the FDIC decrease the time limit in which a decision must be rendered under the expedited relief procedure. Although subsection 210(a)(5) of the Dodd-Frank Act provides for a procedure whereby secured creditors may seek expedited determination of their claims if there would be irreparable injury in having to pursue the lengthy administrative claims process, subsection 210(a)(5)(B) only provides for an *outside limit* of 90 days for the FDIC's determination of such a claim under the expedited relief procedure. To make the expedited treatment of secured claims meaningful, action must be taken in as short a time as possible. Accordingly, we recommend that section 380.53 be revised to provide that the FDIC will act within 24-48 hours, rather than 90 days, given that the "irreparable injury" test must be satisfied for the expedited relief procedure to be followed.

We further request the FDIC to clarify the content of the "irreparable injury" test, and specify whether the FDIC will follow cases applying the "irreparable injury" test in the context of a request for an injunction, or cases applying the test in the bankruptcy context to determine the necessity of adequate protection.

We also request the FDIC to clarify that immediate judicial recourse is available in the event that the FDIC determines under subsection 380.53(b)(2) of the Proposed Rule that a creditor seeking determination of its claim under the expedited relief procedure is not entitled to seek such expedited relief and instead must have its claim resolved under the normal administrative claims process. We believe that it is the FDIC's intent to provide for immediate judicial recourse if the FDIC makes an adverse determination under either subsection 380.53(b)(1) or subsection 380.53(b)(2). The Roundtable asks the FDIC to clarify this intention by specifically providing in section 380.53(d) that immediate judicial recourse is available in the event that the FDIC determines that a claimant is not entitled to relief under the expedited relief procedure.

Treatment of Fraudulent and Preferential Transfers

Section 380.9 of the Proposed Rule addresses the powers of the FDIC as receiver under section 210(a)(11) of the Dodd-Frank Act to avoid certain fraudulent and preferential transfers. In the Preamble, the FDIC notes that section 380.9 is intended to "harmonize the application of these powers with the analogous provisions of the Bankruptcy Code so that the transferees of assets will have the same treatment in a liquidation under the Dodd-Frank Act as they would in a bankruptcy proceeding." Although section 380.9 as currently drafted is helpful in this regard, further clarification is needed for completeness. For example, section 210(c)(8)(C) of the Dodd-Frank Act provides that, absent an actual intent to defraud, the receiver may not use its powers under section 210(a)(11) to avoid transfers in connection with QFCs. While this statutory language confirms that the Dodd-Frank Act, similar to the Code, exempts from avoidance certain transfers in connection with QFCs, the Proposed Rule should clarify, and thereby provide the marketplace with confirmation, that with respect to any exercise of the FDIC's powers under section 210(a)(11) of the Dodd-Frank Act, the FDIC intends to apply all of the Code's provisions that relate to such exemption, including all of the provisions of subsection 546(e). In short, section 380.9 of the Proposed Rule should be used to clarify that, as it relates to fraudulent and preferential transfers, affected parties will receive the outcome they otherwise would have received under the statutory provisions of the Bankruptcy Code and applicable case law

precedent. Inasmuch as uncertainty as to how the FDIC will exercise its powers under the fraudulent and preferential transfer provisions of Title II has already caused dislocations in the securitization market, additional certainty with respect to these provisions would be helpful to the marketplace.

Coordination with Foreign Financial Authorities

Finally, we wish to emphasize the importance of the international coordination called for by section 210(a)(1)(N) of the Dodd-Frank Act. Section 210(a)(1)(N) requires the FDIC as receiver for a covered financial company to coordinate to the maximum extent possible with the appropriate foreign financial authorities regarding the orderly liquidation of any covered financial company that has assets or operations in a country other than the United States. We think that the coordination required by section 210(a)(1)(N) should also extend as applicable to coordination with the appropriate foreign financial authorities for any foreign parent company and other significant foreign affiliates of a covered financial company. Such coordination will assist both the actions required by the FDIC as receiver for the covered financial company and the actions required by the foreign financial authorities for the foreign parent company and the foreign affiliates. Such coordination is also consistent with the general principles of comity and with the general principles reflected in section 113(g) and (i) of Title I of the Dodd-Frank Act.

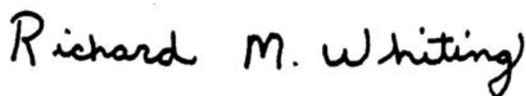
Conclusion

As discussed, the Proposed Rule represents one of the early steps in the process of creation of a comprehensive regulatory regime that will govern Title II implementation. Successful completion of this process will require ongoing collaboration between the FDIC and market participants. We embrace this collaborative role and look to continue to assist the FDIC in its OLA implementation efforts in the months ahead.

As the FDIC considers comments on and finalizes the Proposed Rule, we request that the FDIC finalize a rule that is transparent (both procedurally and substantively) to covered financial companies and their creditors and seeks to maximize the value of the company subject to orderly liquidation. Adherence to these principles should help to create a resolution regime that mitigates future systemic risk to the greatest extent possible.

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 Whiting
Executive Director and General Counsel