May 23, 2011

VIA E-MAIL (comments@FDIC.gov)

Robert E. Feldman
Executive Secretary
Federal Deposit Insurance Corporation
550 17th Street, N.W.
Washington, D.C. 20429

Re: ***Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act") - Title II (Orderly Liquidation Authority)***

Dear Mr. Feldman,

The Capital Markets Committee (the "***Committee***") of the National Bankruptcy Conference (the "***Conference***") is responding to the request by the Federal Deposit Insurance Corporation (the "***FDIC***"), made in its Notice of Proposed Rulemaking (the "***NPR***") contained in the Federal Register, Volume 76, No. 56 (March 23, 2011), for comments as to specific matters addressed in the NPR. We make our comments with a view to facilitating the harmonization of certain key areas of Title II of the Act with otherwise applicable insolvency laws.

The Conference is a voluntary, non-profit, non-partisan, self-supporting organization of approximately sixty lawyers, law professors and bankruptcy judges who are leading scholars and practitioners in the field of bankruptcy law. Its primary purpose is to advise Congress on the operation of bankruptcy and related laws and any proposed changes to those laws.

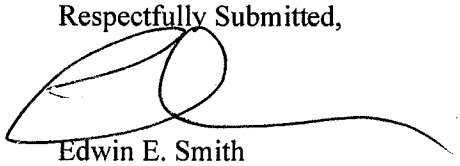
The Committee is one of several committees of the Conference. The Committee focuses upon the operation of bankruptcy and related laws in relation to the capital markets and the Uniform Commercial Code. The Committee is comprised of the individuals listed on Exhibit A.

In formulating its comments, the Committee has been guided by the core principles of the Conference. As a non-profit, non-partisan and self-supporting organization, the Conference is able to take impartial, principled positions on issues implicating bankruptcy law and policy. The Conference does not act on behalf of any specific client, organization or interest group, but rather seeks to reach consensus among its members (who represent a broad spectrum of political and economic perspectives) based on their knowledge and experience as leading bankruptcy practitioners, judges and scholars. The Committee's comments are submitted by the members of the Committee and not by the Conference as a whole.

The Committee offers its comments on Exhibit B. The Exhibit sets forth each question raised by the FDIC in the NPR on which it desired comment and which the Committee believed to raise issues relating to the harmonization of provisions of Title II of the Act with otherwise applicable insolvency laws. The Committee offers at the end of the Exhibit an additional comment that does not relate to any of the questions asked.

The Committee appreciates this opportunity to provide its comments. We remain available to address any questions relating to the comments or to explain them in further detail. Moreover, we are willing, as a general matter, to offer further assistance in this important process.

Respectfully Submitted,



Edwin E. Smith
Chair

Exhibit A

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Exhibit B

ORDERLY LIQUIDATION AUTHORITY
UNDER THE DODD-FRANK ACT

The following comments are made in response to selected questions posed by the FDIC:

***Question 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 attorney's 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?*

Because Section 503(b)(4) of the Bankruptcy Code is limited to expenses related to filing an involuntary petition or fraudulent transfer action and the like, proceedings that do not have an obvious parallel in the Title II context, it is not clear that there is a compelling need to add a specific rule provision covering these administrative expenses. In any event, if the FDIC wished to allow these expenses as administrative expenses, it could do so by determining the expenses to be "necessary and appropriate to facilitate the orderly liquidation" of the covered financial company. Doing so would qualify the expenses as administrative expenses under §380.22 and thus give them priority §380.21(a)(2).

***Question 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?*

In order to eliminate any confusion, it would be helpful if there were an explicit statement in the rule excluding any and all sums due to the United States from §380.21(a)(1) and (a)(2). Alternatively, if it were determined that, at least with respect to post-receiver loans by the United States, the rule is not designed to lower the priority of post-receiver United States advances, perhaps §380.23 could indicate that its broad description of the third priority includes advances by the United States "except to the extent such advances have priority under §380.21(a)(1)."

The proposed rule also asks for comments on how the additional assessments authorized by §210(o) of the Act will be applied to the extent that amounts due to the United States are not obligations issued by the FDIC to the Treasury. However, the assessments authorized by §210(o) are limited to repay obligations that the FDIC has issued to the Treasury, reflecting funds borrowed to operate or liquidate the covered financial company. Obligations owing to the United States (such as taxes incurred by the covered financial company) which are unrelated to FDIC loans to the covered financial company do not appear to be covered by the assessment provisions of the Act.

We suggest that the proposed rules provide examples of what amounts would qualify as amounts due to the United States. Market participants may not be anticipating that amounts due to the United States might, if that is what is intended, include environmental cleanup costs incurred by the Environmental Protection Agency, claims for reimbursements of unfunded pension fund costs guaranteed by the Pension Benefit Guaranty Corporation, or fines and penalties assessed against the covered financial company by the Securities and Exchange Commission or other governmental agencies. Since the claims for amounts due to the United States will be elevated in a Title II receivership over general unsecured claims in a manner inconsistent with the Bankruptcy Code and could be quite large, highlighting in the rules the full potential breadth of these claims would be informative.

***Question 10**: How should the value of lost setoff rights be determined?*

Section 380.24 empowers the FDIC, when acting as a receiver for a covered financial company, to transfer assets free and clear of setoff rights. To compensate for the loss of setoff rights, the rule provides that the holder of a lost setoff right will receive a "a claim against the receiver in the amount of the value of such setoff established as of the date of the sale or transfer of such assets." That formulation in and of itself appears to establish the amount of the lost setoff claim.

As to actual payment of the claim, §380.21 sets forth a priority rule for unsecured claims to be paid by the FDIC when acting as a receiver. Claims are ranked in priority from 1 to 11, and the substitute claim for the lost setoff claim is ranked sixth, above general unsecured claims but below a variety of claims, including amounts owed to administrative claimants, amounts owed to the United States, and below certain employee-related claims.

In the discussion of the proposed setoff rules, the FDIC suggests that the scheme established by the rules "should normally provide value to setoff claimants equivalent to the value of setoff under the Bankruptcy Code." However, setoff claims in bankruptcy are typically treated analogous to secured claims. Indeed, Section 506 of the Bankruptcy Code specifically provides holders of Section 553 setoff rights with secured status. The FDIC's approach of sixth-ranked substitute claims does not seem to achieve that outcome. If the FDIC is asking whether the suggested rules will achieve the equivalent for lost setoff rights of secured status in bankruptcy, we think that it will not and that it would be preferable to treat such a claim as secured to the extent of the value of the setoff rights.

***Question 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?*

The post-insolvency interest rules contained in §380.25 generally should not materially affect creditors. Payment of post-petition-interest on general unsecured claims in a bankruptcy case is not a normal event since interest would be payable only after all general unsecured claims are paid in full. We would expect that the payment of interest on general unsecured claims would be unusual in a Title II receivership for the same reason. As a result, as a general matter we do not see that the post-insolvency interest rules contained in §380.25 would materially affect creditor behavior ex ante.

Even so, we would think that, consistent with the treatment of interest on unsecured claims under the Bankruptcy Code in circumstances in which interest is payable, a creditor whose contract provides for interest at a particular rate should be entitled to the benefit of the contract rate, at least the no-default contract rate, if the rate is enforceable under applicable non-insolvency law. We have no objection to the FDIC setting a uniform federal interest rate on unsecured claims where no contractual interest rates are specified.

We have similar views with respect to post-insolvency interest on the secured claim of an oversecured creditor. Consider the simple case of a lender who has taken a perfected security interest in collateral of a value that exceeds the amount of the loan. Under Section 506(b) of the Bankruptcy Code, the lender would be entitled to receive post-petition interest and, if provided for in the relevant contract or statute reasonable attorneys' fees, up to the amount of the lender's "equity cushion" in the collateral. The interest would typically be calculated at the contract rate, although perhaps at the non-default contract rate rather than the default contract rate depending on the circumstances. We do not see any reason why in a

Title II receivership the secured creditor should not be entitled, consistent with Section 506(b), to post-insolvency interest at least at the non-default contract rate.

Moreover, we would think that in a Title II receivership an oversecured creditor should be treated consistently with Section 506(b) as to its general entitlement to post-insolvency interest and reasonable attorneys' fees up to the amount of its "equity cushion". Title II does not negate such treatment. Section 210(c)(3)(D) of the Act, which at first appears to cut off post-insolvency interest at the date of the FDIC's repudiation of the secured claim of an oversecured creditor, actually merely provides only a statutory floor when it uses the words "no less than". Moreover, Section 210(a)(7)(B) of the Act requires that the secured creditor receive in a Title II receivership no less than it would have received in a chapter 7 bankruptcy case of the covered financial company. In a chapter 7 bankruptcy case the secured creditor would be entitled to the benefit of Section 506(b).

We would urge that the FDIC treat an oversecured creditor in a Title II receivership in a manner equivalent to how the creditor would be treated under Section 506(b). We are concerned that, if an oversecured creditor's secured claim is treated less favorably in a Title II receivership than under the Bankruptcy Code, the creditor would ex ante determine the availability and cost of credit to the financial company based on treatment under Title II rather than under the Bankruptcy Code. This would be because the creditor would not be able to ignore the possibility that its debtor would be resolved under Title II rather than the Bankruptcy Code. This disparate treatment in our judgment would create uncertainty in the market place and may well result in less credit being available to the financial company or, if available, the credit being more expensive.

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

The treatment of claimants discovered after the initial notice is sent out under §380.33(d) appears to be arbitrary. If the claimant is discovered before the bar date, the receiver has 30 days to notify the claimant of the bar date, but the claim must still be filed before the bar date. This construct might afford the claimant little or no time to file a claim before the bar date. For example, a claimant could be discovered 25 days before the bar date and notice of the bar date could be sent to the claimant 5 days before the bar date. In contrast, a claimant discovered after the bar date is entitled to a period of 90 days to file a claim. Why is there such a difference?

There is also a question about the filing of the claim in relation to the timing of distributions. While §380.35(b)(2) may protect a claimant discovered before the bar date and who files its claim in time to permit payment, it is not clear what happens to a claimant discovered after the bar date and who files a claim within 90 days after it gets the notice but not before a final distribution.

Under Section 726(a) of the Bankruptcy Code, late filed claims take priority over claims for post-petition interest on unsecured claims and distributions to holders of equity interests. We would suggest that, consistent with the Bankruptcy Code, an additional exception should be created in §380.35(b) so that late claims can be paid ahead of priority categories (10) and (11) in §380.21.

***Question 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 publication notice be published in each country in which the covered financial company does business? AND*

***Question 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?*

Section 380.33 provides for a notice to creditors "published in one or more newspapers of general circulation where the covered financial company has its principal place or places of business." It seems unlikely that publishing in one country would accomplish the goal of publication notice for a corporation with meaningful business activity in multiple countries. That would suggest that publication should be effected in each country where the covered financial company operates in a substantial way. In determining where to publish in those countries, the FDIC should follow the local norms in identifying newspapers of general circulation.

***Question 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? AND*

***Question 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 receiver to exercise rights against the collateral, and the sale or redemption of 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 claims for repudiation damages? AND*

***Question 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?*

Proposed §380.53(a) allows secured creditors to seek "expedited relief." Among other things, a creditor must allege that "irreparable injury will occur if the claims procedure established under this subpart is followed." The proposed rule does not offer guidance to creditors on how they should make this allegation. For example, the proposed rule does not describe the kinds of injuries that may be deemed "irreparable." This is problematic not only for creditors, but also for judges, who are given authority to review the FDIC's decision to deny expedited relief. See §380.53(d). The term "irreparable injury" should be defined or at least illustrated through examples.

Moreover, the absence of any standards for the granting of consent by the FDIC as receiver to a request by a secured creditor to realize on its collateral will likely be a matter of substantial concern to secured creditors, particularly in the absence of any avenue for meaningful judicial relief.

The proposed rules, and the Act generally, allow the FDIC to wait many days before:

- Allowing or disallowing claims (at least 180 days; see, e.g., proposed §380.36),
- Granting or denying a petition for expedited determination of a claim (90 days under proposed §380.53),
- Determining whether a secured claim exceeds the fair market value of the collateral (no deadline has been proposed yet),
- Choosing whether to assume or reject a contract (within a "reasonable period of time;" see §210(a)(4)),
- Selling property encumbered by security interest (no deadline has been proposed yet), and

- Distributing the proceeds from sale of property free and clear of preexisting security interests (proceeds should be distributed to the secured creditor "within a reasonable time after the sale;" see proposed §380.54(a)).

As a result of these delays, secured creditors may wait many days or months before their rights and expected recoveries are established. Even if collateral is sold, creditors may wait days or months to receive the proceeds.

At the least, the FDIC should provide through its proposed rule that it will grant consent for the secured creditor to exercise is non-insolvency law remedies against the collateral if

- the receiver has no equity in the property and the property is not required for some ongoing operations of the covered financial company, or is not complying with the otherwise enforceable provisions of the security agreement relating to the maintenance and preservation of the value of the collateral, or

- the secured creditor is able to demonstrate that its collateral is suffering a diminution in value and the receiver is unable to adequately protect the secured creditor's interest in the collateral.

As a matter of "rough justice," interpreting the proposed rule not to cover situations in which the secured creditor is in possession of or has control over the collateral will eliminate some potentially egregious situations where the possibility of a refused or delayed consent might be expected to impair the ability of the financial company to enter into normal transactions, *i.e.* a creditor who has bargained for possession or control may not be willing to enter into such transaction if it could be subject to a remedies bar of indefinite duration with no standards for obtaining relief.

Section 380.51 of the proposed rule should provide adequate protection remedies to a secured creditor who is precluded by the FDIC from realizing on its collateral and suffers a diminution in the value of its collateral. Under these circumstances, the secured creditor should receive replacement liens or superpriority claims that would be senior in priority to all unsecured claims and administrative expenses of the receivership. Such provisions should create an incentive for the receiver to promptly evaluate requests by secured creditors to exercise remedies against their collateral and to consent to such remedies if the collateral is diminishing in value. We also recommend including judicial remedies for a secured creditor whose collateral is diminishing in value and whose interests in the collateral would not be adequately protected even if it received replacement liens or superpriority claims.

Section 380.50 authorizes the FDIC to determine the amount of a claim secured by property of a covered financial company, assess the "fair market value of the property that is subject to the security interest," and treat the claim as secured up to the fair market value of the property and unsecured for the remainder. The proposed section does not articulate a standard for measuring fair market value, which is particularly problematic for financial collateral, the value of which is highly volatile. Additionally, although §380.2(c) states that "fair market value shall be determined as of the date the FDIC was appointed receiver of the covered financial company," Question 16 of the proposed rule implies that the FDIC is unsure whether fair market value would be measured as of that date: "Should collateral be valued at the time it is surrendered, sold, or redeemed by the receiver, or some other time?" For these reasons, §380.50 generates uncertainty for secured creditors as well as judges, who presumably would have power to review the fair market value calculation either pursuant to (i) judicial determination of claims authorized by Section 210(a)(4) of the Dodd-Frank Act or (ii) judicial determination of secured claims authorized by §380.53(d). The proposed rules should articulate a standard for measuring fair market value. For financial collateral, fair market value could be measured relative to market prices, perhaps prices measured on the day before the receivership commenced. For non-financial collateral, the proposed rules could adopt the standard set out in Section 506(a)(1) of the Bankruptcy Code and related case law.

Although the secured creditor's secured claim may be determined on the date on which the FDIC is appointed as receiver, Section 210(b)(5) of the Act suggests that, if the collateral is sold, the secured claim is to be determined by reference to "the amount realized" from the collateral. It is always possible, of course, that the amount realized from the collateral on its ultimate sale will be a different amount than the amount of the secured claim determined on the date of the FDIC's appointment as receiver by reference to the collateral's then fair market value. The proposed rules do not appear to address this circumstance. One possible approach is for the secured claim to be adjusted for the amount actually realized on sale of the collateral, with the secured creditor (as indicated above) receiving adequate protection for any actual diminution in the value of the collateral during the receivership. Another possible approach would be for the secured creditor to receive a superpriority administrative claim to the extent that the fair market value of the collateral as determined when the FDIC was appointed exceeds the amount ultimately realized from the collateral; and, conversely, if the amount realized from the collateral exceeds the secured claim as determined when the FDIC was appointed receiver, the excess might be paid to the receivership estate. If the FDIC is required to provide adequate protection to protect the secured creditor from diminution in collateral value following the FDIC's appointment, a symmetrical approach would require that the FDIC as receiver receive the benefit of any appreciation in collateral value following its appointment.

Section 380.54(a) permits the FDIC to "sell property of the covered financial company that is subject to a security interest." The purchaser of the collateral "shall take free and clear of the security interest." The proposed section should identify standards, perhaps along the lines of §363(n) of the Bankruptcy Code, which will guide the FDIC in conducting sales of collateral. The section should also provide an avenue by which the affected secured creditor can contest the sale procedures.

We suggest that §380.54 should be clarified to specify that the maximum amount of the offset in a credit bid is the full amount of the claim, including all unpaid interest and fees, not just the bifurcated portion allowable as a secured claim. This would be consistent with the substantial majority of the cases decided under the Bankruptcy Code, and would give secured creditors a practical remedy if they believe that their collateral is worth more than the value attributed to it by the receiver. Section 380.54 should also be revised to provide that the proceeds from the sale of the collateral, up to the allowed amount of the secured claim, should be remitted to the secured creditor "promptly after the sale" rather than "within a reasonable time after the sale." Section 380.54 should also be clarified to provide for certain minimum notice periods with respect to any sale of a secured creditor's collateral and to require that the secured creditor receive notice of the sale. Perhaps the rule should permit the receiver to sell the collateral for less than the amount of the secured claim only in exigent circumstances or where the collateral is being sold as an integral part of a sale with other property in which the receivership has an interest.

The second part of §380.53(e), which provides for automatic disallowance of a secured claim unless the secured creditor seeking expedited relief from the FDIC files a lawsuit in accordance with §380.53(d), should be deleted. We question the need to disallow the secured claim merely because expedited relief is denied and the secured creditor chooses not to contest the denial of expedited relief.

We think that §380.52, by which a security interest attaches to the repudiation damages claim after repudiation of the secured obligations, is a useful clarification as to the effect of repudiation of a contract secured by a security interest.

Treatment of fraudulent transfers and preferences. We applaud the FDIC's proposed rules in §380.9 to apply a lien creditor test to determine the time of transfer of personal property and fixtures for preference purposes and the added grace periods for post-attachment perfection.

We do have one comment on these rules. Section 380.9(b)(2) provides that the term "fixture" shall be interpreted in accordance with federal bankruptcy law. Actually, a bankruptcy court would look to applicable non-insolvency law to determine what a fixture is. Typically under non-insolvency law what a fixture is would be governed by the law of the state in which the fixture is located. What constitutes a fixture under state law may vary from state to state. We see no reason for the FDIC to apply a federal rule to determine what a fixture is for preference purposes.