SETON HALL UNIVERSITY SCHOOL OF LAW
NEWARK, NEW JERSEY

STEPHEN J. LUBBEN
DANIEL J. MOORE PROFESSOR OF LAW

PHONE: 973 642 8857
FAX: 928 223 6234
STEPHEN.LUBBEN@SHU.EDU

Monday, October 18, 2010

VIA Email
Mr. Robert E. Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 Seventeenth Street, N.W.
Washington, D.C. 29429

Re: 12 CFR 380, Proposed Rules Implementing Dodd-Frank Orderly Liquidation Authority

Dear Mr. Feldman:

I welcome the opportunity to comment on these newly proposed rules, which will help implement the new resolution authority set forth in Title II of the recently enacted Dodd-Frank Act. I am the Daniel J. Moore Professor of Law at Seton Hall University School of Law in Newark, where I specialize in chapter 11 of the Bankruptcy Code, but also teach courses on corporate finance and financial institutions. Before academia, I practiced with a leading New York corporate law firm. However, these comments reflect my own opinions, and not those of any current or former employer or client.

The general theme of my comments will be that the FDIC could benefit from greater consideration of the already existing procedures used in large, complex chapter 11 cases. Too many of the proposed rules seek to invent new procedures that are but slightly different from those used in chapter 11, despite the Dodd-Frank Act's provisions calling for narrowing the gap between the new resolution authority and chapter 11.

It is important to remember that for most of the financial institutions subject to the new resolution authority, the background insolvency system is not the Federal Deposit Insurance Act of 1950, but rather the Bankruptcy Code, and particularly chapter 11 thereof. While the new resolution authority no doubt draws heavily on existing FDIA practices, the creation of additional gaps between chapter 11 and the resolution authority will only exacerbate the uncertainty already inherent in Dodd-Frank's decision to leave non-bank financial institutions subject to multiple resolution regimes.

My specific comments follow.

Proposed §380.2

This provision seeks to allow FDIC the ability to make payments similar to those routinely made in large chapter 11 cases under "first day" motions. These motions, typically negotiated with key constituencies before the bankruptcy filing, ask for court permission to pay employees and other important unsecured creditors, like essential trade creditors, immediately, despite the normal rule that all pre-bankruptcy creditors must wait for payment under a plan. Moreover, these motions typically seek authority to pay the favored creditors in full, even if other unsecured creditors might only receive partial payment.

Proposed §380.2(b)(4) seeks similar authority for FDIC in the new resolution authority, but does so in a way that undermines the usefulness of its chapter 11 counterpart. In chapter 11, authority to make these payments is routinely granted on the first day of the bankruptcy case, which avoids creating panic among employees and providers of key inputs for the debtor's ongoing operations.

By requiring the express approval of the Board, and prohibiting delegation of the Board's authority, proposed §380.2(b)(4) limits the ability to prepare for a resolution proceeding and avoid dissipation of the financial institution's going concern value. Application of the existing "doctrine of necessity" from chapter 11, which undergirds most existing first day motions in chapter 11, would provide a better result for the new resolution authority.

Likewise, I wonder about the wisdom of much of the rest of proposed §380.2. Subparagraph (c) seems to simply restate existing insolvency law, 11 U.S.C. §506, but such restatements are always apt to be sources of mischief. Subparts (b)(1) through (3) seem to be little more than an obvious Odysseusian effort – no chapter 11 debtor would ever seek permission to pay an investment creditor under the "necessity of payment" doctrine, as payment to such a creditor would rarely if ever be necessary to maintain ongoing operations.

Finally, I would note that the provisions of subparagraph (b) are somewhat ambiguous as drafted. Without reference to outside materials it is not clear that the "unless" clause in subpart (4) does not apply to subparts 1 through 4, inclusive. I would suggest that replacing "such holders" with "such other holders" in this subpart would clarify the provision.

Proposed §380.3

This proposed provision, save for some special provisions regarding executives, simply restates the existing law under the Bankruptcy Code, 11 U.S.C. §365 and I wonder if it would not be better to incorporate that provision by reference.

Subparagraph (e) is rather confusing. It states that subparagraph (b) does not apply to executives. This suggests that the FDIC does not have to pay for services performed by executives after initiation of proceedings. That seems problematic.

Something along the lines of "Subparagraph (b) of this section shall not apply to any senior executive or director and the Corporation shall negotiate new terms of employment and compensation for any such individual retained after the commencement of proceedings" would seem to be closer to the desired goal.

Proposed §380.4

This proposed provision would allow contingent claims based on a letter of credit, loan commitment, or other similar obligation to be filed in the resolution proceeding. As an initial matter, I wonder why this provision does not apply to all contingent creditors.

Moreover, I see no reason to develop a unique resolution authority law in this regard, especially given the relative infrequency of resolution proceedings as compared with chapter 11 bankruptcy cases. Bankruptcy Code section 101(5)(A) defines a claim to include any right whether or not such right has been "reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed,

undisputed, legal, equitable, secured, or unsecured." Thus, the federal bankruptcy courts have developed an extensive body of law regarding what a claim is and when a contingent claim may be asserted in a case, and how such claims should be valued.

Thank you for considering these comments. Please do not hesitate to contact me if I can be of further assistance.

Very truly yours,

/s/ Stephen J. Lubben
Daniel J. Moore Professor of Law.