

DRAFT

June 30, 2011

MEMORANDUM TO: The Board of Directors

FROM: James R. Wigand *JRW*
Director
Office of Complex Financial Institutions

Michael H. Krimminger *Michael Krimminger*
General Counsel

SUBJECT: Final Rule Amending 12 C.F.R. Pt. 380, "Orderly Liquidation Authority" Under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act

RECOMMENDATION

Staff recommends that the Board of Directors ("Board") issue a final rule ("Final Rule") amending part 380 of the FDIC's rules and regulations, which addresses the FDIC's rights and powers as receiver of a nonviable systemic financial company under the orderly liquidation authority provisions of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Act" or "Dodd-Frank Act"). The Final Rule will adopt with certain changes the proposed rule ("Proposed Rule") set forth in the Notice of Proposed Rulemaking ("NPR") approved by the Board on March 15, 2011 and also will incorporate, with certain changes, the Interim Final Rule ("IFR") issued by the Board on January 18, 2011. The Final Rule will establish a more comprehensive framework for the implementation of the orderly liquidation authority and will provide greater transparency to the process for the orderly liquidation of a systemically important financial institution under the Dodd-Frank Act.

EXECUTIVE SUMMARY

If adopted by the Board, the Final Rule will divide Part 380 into three subparts. Subpart A includes several general provisions of the IFR and provisions concerning recoupment of compensation from senior executives and directors and the receiver's power to avoid fraudulent and preferential transfers. Subpart B addresses the priority of claims, including administrative expenses, amounts owed to the United States, post-insolvency interest, and the treatment of similarly situated creditors. Subpart C addresses the receivership administrative claims process and also procedures related to secured claims.

In addition to § 380.1 that sets forth definitions of terms of general applicability throughout part 380, subpart A includes the following provisions: (1) Section 380.3 provides that services rendered by employees to the FDIC as receiver for a covered financial company or during any period where some or all of the operations of the covered financial company are continued by a bridge financial company, will be compensated according to the terms and conditions of any applicable personal service agreements, and that such payments will be treated as an administrative expense; (2) Section 380.5 provides that in the event that the FDIC acts as receiver for a direct or indirect subsidiary of an insurance company and that subsidiary is not an insured depository institution or an insurance company itself, the value realized from the liquidation of the subsidiary will be distributed according to the order of priorities set forth in the Dodd-Frank Act; (3) Section 380.6 provides that the FDIC will avoid taking a lien on some or all of the assets of a covered financial company that is an insurance company or a subsidiary that is an insurance company unless it determines that taking

such a lien is necessary for the orderly liquidation of the covered financial company and will not unduly impede or delay the liquidation or rehabilitation of the insurance company or the recovery by its policyholders; (4) Section 380.7 provides that the FDIC as receiver of a covered financial company may recover from senior executives and directors who were substantially responsible for the failed condition of the company any compensation they received during the two-year period preceding the date on which the FDIC was appointed as receiver, or for an unlimited period in the case of fraud; and (5) Section 380.9 clarifies the interpretation of provisions of the Act authorizing the FDIC as receiver of a covered financial company to avoid fraudulent or preferential transfers in a manner comparable to the relevant provisions of the Bankruptcy Code so that transferees will have the same treatment in a liquidation under the Act as they would have in a bankruptcy proceeding.

Subpart B integrates and harmonizes the various provisions of the Dodd-Frank Act that determine the nature and priority of payments. In particular, the subpart integrates the various statutory references to administrative expenses throughout the Act. It provides additional context and definition with respect to claims arising out of “amounts owed to the United States.” Subpart B includes § 380.24 that confirms the statutory treatment of claims arising out of the loss of setoff rights at a priority ahead of other general unsecured creditors if the loss of the setoff is due to the receiver’s sale or transfer of an asset. Section 380.25 would finalize provisions addressing the determination of post-insolvency interest on unsecured claims. Section 380.26 clarifies the payment of obligations of bridge financial companies and the rights of receivership creditors to any remaining value upon termination of a bridge financial company. For a

more logical organizational flow, subpart B also now includes at § 380.27 the rule originally found at § 380.2 of the IFR, clarifying that FDIC would not use its discretion to differentiate among similarly situated creditors under section 210 of the Dodd-Frank Act to give preferential treatment to certain long-term senior debt with a term longer than 360 days and that subordinated debt and equity never will qualify for preferential treatment.

Subpart C sets forth the administrative process for the determination of claims against a covered financial company by the receiver as required by the Act. This process will not apply to any liabilities or obligations assumed by a bridge financial company or other entity or to any extension of credit from a Federal reserve bank or the FDIC to a covered financial company. Similarly, the claims process will not modify any of the provisions of the Dodd-Frank Act regarding qualified financial contracts.

Under the claims procedures, the receiver will publish and mail a notice advising creditors to file their claims by a bar date that is not less than 90 days after the date of the initial publication. Upon receipt, the receiver will have up to 180 days to determine whether to allow or disallow the claim, subject to any extension agreed to by the claimant. The claimant will have 60 days from the earlier of any disallowance of the claim or the end of the 180-day period (or any agreed extension) to file a lawsuit in federal court for a judicial determination. No court has jurisdiction over any claim, however, unless the claimant has complied with the requirements of the claims process.

Subpart C also includes provisions concerning contingent claims and secured claims. With respect to claims based on a contingent obligation of a covered financial company, the receiver will estimate the value of the contingent claim at the end of either the 180-day claim determination period or any agreed extension. If the claim becomes

fixed before it has been estimated, it may be allowed in the fixed amount; otherwise, the estimated value will be used to calculate the claimant's pro rata distribution. With respect to secured claims, subpart C will provide that property of a covered financial company that secures a claim will be valued at the time of the proposed use or disposition of the property. Secured claimants may request the consent of the receiver to obtain possession of or exercise control over their collateral. The Final Rule provides that the receiver will grant consent unless it decides to use, sell or lease the property, in which case it must provide adequate protection of the claimant's interest in the property. This provision will not apply in a case where the receiver repudiates or disaffirms a secured contract, however.

SUMMARY OF CHANGES FROM THE IFR AND THE PROPOSED RULE

The Final Rule contains substantive revisions and technical corrections to the provisions of the IFR and the Proposed Rule responsive to the comments received. The proposed changes are discussed in more detail in the section of this memorandum providing a complete analysis of the provisions of the Final Rule. In summary, the substantive revisions in the Final Rule are as follows:

(1) In the Proposed Rule, § 380.2(c) provided that collateral securing debt of the covered financial company would be valued as of the date of the appointment of the receiver. This provision has been moved to § 380.50(b) of the Final Rule, which states that such property will be valued at the time of the proposed use or disposition of the property. This approach to the valuation of collateral follows the comparable provision of the Bankruptcy Code.

(2) Section 380.4 of the IFR concerning contingent claims has been moved to § 380.39 of the Final Rule. The original text of this section has been retained and new provisions have been added to provide that the receiver will estimate the value of a contingent claim no later than 180 days after the claim is filed or any extended period agreed to by the claimant.

(3) Section 380.7 addresses the recoupment of compensation from former and current senior executives and directors who are substantially responsible for the condition of the covered financial company. The Proposed Rule provided a standard of conduct in which, among other things, a senior executive or director would be deemed “substantially responsible” if he or she failed to conduct his or her responsibilities with the requisite degree of skill and care required by that position. The Final Rule clarifies the standard and provides that a senior executive or director would be deemed “substantially responsible” if he or she failed to conduct his or her responsibilities with the degree of skill and care an ordinarily prudent person in a like position would exercise under similar circumstances. The revision clarifies that the standard of care that will trigger section 210(s) is a negligence standard; a higher standard, such as gross negligence, is not required. The Final Rule was also revised to reflect that the FDIC as receiver may seek recoupment in any civil action for the benefit of the FDIC as receiver and has a “savings clause” to preserve the rights of the FDIC as receiver to recoup compensation under all applicable laws.

(4) The Proposed Rule included § 380.8 implementing section 201(b) of the Act. Section 201(b) of the Act requires the Corporation, in consultation with the Secretary of the Treasury, to establish by regulation criteria for determining, for the purposes of Title

II, if a company is predominantly engaged in activities that are financial in nature or incidental thereto as determined by the Board of Governors of the Federal Reserve System (FRB) under section 4(k) of the Bank Holding Company Act (BHC Act). A company that is predominantly engaged in such activities is a “financial company” under Title II (unless expressly excluded by section 201(a)(11)(C) of the Act) and may be subject to the orderly liquidation provisions of the Dodd-Frank Act. On February 11, 2011, the FRB published a notice of proposed rulemaking entitled “Definitions of ‘Predominantly Engaged in Financial Activities’ and ‘Significant’ Nonbank Financial Company and Bank Holding Company” (76 FR 7731 (February 11, 2011)) (“Board of Governors’ NPR”). The Board of Governors’ NPR proposed criteria for determining whether a company is “predominantly engaged in financial activities” for purposes of determining if the company is a nonbank financial company under Title I of the Act. There are substantial similarities between the provisions in Title I of the Act, which the Board of Governors’ NPR implements, and section 201(b) of the Act, which § 380.8 of the FDIC’s Proposed Rule would implement. In light of those similarities, FDIC staff coordinated with staff at the FRB, to the extent practicable, on the proposed criteria in § 380.8. Staff is continuing to coordinate with the staff at the FRB on this issue and intends to finalize the criteria for determining whether a company is predominantly engaged in activities that are financial in nature or incidental thereto through a separate notice within the *Federal Register*. Consequently, § 380.8 is reserved in the Final Rule.

(5) Section 380.21 of the Proposed Rule enumerates the priorities of payments to unsecured creditors. A new sentence is added to the Final Rule that provides the

contractual subordination agreements will be respected, which is consistent with the practice in bankruptcy.

(6) The Proposed Rule contained a definition of “amounts owed to the United States” entitled to the priority of claims immediately following administrative expenses, that included all amounts of any kind owed to any department, agency or instrumentality of the United States. Under the recommended Final Rule, the definition of “amounts owed to the United States” in § 380.23 has been revised to clarify that the obligations entitled to the priority afforded to amounts owed to the United States include only amounts advanced to the covered financial company to promote the orderly resolution of the covered financial company or to avoid or mitigate adverse effects on the financial stability of the United States in the resolution of the covered financial company. Consistent with the goal of the Dodd-Frank Act to end any taxpayer bail-out of a nonviable financial company, unpaid unsecured federal income tax obligations will also be repaid at the priority afforded to amounts owed to the United States. In response to comments, this section also sets forth a non-exclusive list of included types of advances, as well as a non-exclusive list of excluded types of advances to provide clearer guidance on this issue. The level of priority afforded to amounts owed to the United States is not applicable to administrative expenses, which are dealt with in § 380.22 nor to secured obligations which are dealt with in §§ 380.50-53 regarding secured claims.

(7) Section 380.24, which addresses the priority granted to creditors who have lost setoff rights due to the exercise of the receiver’s right to sell or transfer assets free and clear of such rights, has been modified to make clear that the provisions of that section do

not affect the provisions of the Dodd-Frank Act relating to rights of netting with respect to qualified financial contracts.

(8) Section 380.31 addresses the scope and applicability of the receivership administrative claims process by providing that the claims process does not apply to claims against a bridge financial company or involving its assets or liabilities or any extension of credit from a Federal reserve bank or the FDIC to a covered financial company. The definitions of terms that appeared in § 380.31 of the Proposed Rule have been moved into § 380.1, which sets forth all definitions of terms used in Part 380.

(9) Section 380.35(b)(2)(i) provides a revision to the exception for late-filed claims that is different from the one in the Proposed Rule in order to conform it to the provision for contingent claims. Under the late-filed claim exception, the receiver may consider a claim filed after the claims bar date if the claimant did not have notice of the appointment of the receiver in time to file its claim before such date. The Proposed Rule supplemented this exception to address claims that did not accrue until after the claims bar date. Staff now has determined that this provision was too broad because it could encompass contingent claims, which are addressed elsewhere. The additional basis for qualifying for the late-filed claim exception has been revised to encompass claims based upon acts or omissions of the receiver that occur after the claims bar date.

(10) Sections 380.50 – 380.53 of the Proposed Rule have been extensively modified in order to more fully protect the rights of secured claimants and more closely follow the comparable provisions of the Bankruptcy Code. The property of a covered financial company that secures a claim will be valued at the time of the proposed use or disposition of the property. Secured claimants may request the consent of the receiver to

obtain possession of or exercise control over their collateral. The Final Rule provides that the receiver will grant consent unless it decides to use, sell or lease the property, in which case it must provide adequate protection of the claimant's interest in the property. This provision will not apply in a case where the receiver repudiates or disaffirms a secured contract, however

DISCUSSION

Background

The Dodd-Frank Act was enacted on July 21, 2010. Title II of the Act provides for the appointment of the FDIC as receiver for a financial company for which a determination has been made in accordance with the Act that the company's failure would pose a significant risk to the financial stability of the United States (a "covered financial company"). While it is not expected that the FDIC will be appointed as receiver for a covered financial company in the near future, it is important for the FDIC to have rules in place in a timely manner in order to address any uncertainty in the financial system as to how the orderly liquidation process would be implemented.

Following consideration of comments on the original proposed rule published in the Federal Register on October 19, 2010, the Board issued the IFR on January 18, 2011 to initially implement certain key components of the orderly liquidation authority. In addition to setting forth certain definitions that parallel defined terms set forth in the Act the IFR contains five sections: Section 380.2 defines certain categories of creditors who shall not receive preferential treatment as compared to similarly situated creditors; § 380.3 addresses the payment of employees that provide services to a covered financial

company or a bridge financial company following a failure; § 380.4 addresses the treatment of contingent claims; § 380.5 addresses the application of proceeds from the liquidation of subsidiaries of a covered financial company that is an insurance company; and § 380.5 imposes certain limitations on the authority to take a lien on assets of a covered entity that is an insurance company.

The Notice of Interim Final Rule published in the Federal Register sought additional public comments on these provisions and other matters. The comment period for the IFR expired on March 28, 2011. The Final Rule will finalize the IFR.

On March 15, 2011, the Board issued for public comment a second Proposed Rule that built on the framework begun with the IFR. This Proposed Rule, which also would be finalized in the subject Final Rule, addresses additional components of the orderly liquidation authority, including the recoupment of compensation from senior executives and directors of a covered financial company, the definition of a “financial company,” the receiver’s authority to avoid preferential or fraudulent transfers, the order of priority for the payment of claims, and the receivership administrative claims process. The comment period for the Proposed Rule closed on May 23, 2011.

If approved by the Board, the Final Rule would be promulgated under section 209 of the Act, which authorizes the FDIC, in consultation with the Financial Stability Oversight Counsel (“FSOC”), to prescribe such rules and regulations as the FDIC considers necessary or appropriate to implement the orderly liquidation authority provisions of Title II, as well as pursuant to section 210(a)(7)(D) (with respect to the establishment of a post-insolvency interest rate), section 210(b)(1)(C) and (D) (with respect to the index for inflation applied to certain employee compensation and benefit

claims) and section 210(s)(3) (with respect to the authority to recoup compensation from certain senior executives).

Summary of Comments

The FDIC received 10 comments in response to the IFR and 21 comments in response to the Proposed Rule. Most of the comments were submitted by financial industry trade associations, with others submitted by insurance trade associations, clearing and settlement companies, a foundation for research and advocacy, a committee of bankruptcy attorneys, a group of law and business school faculty, and a group of law school students.

The general themes of comments that did not directly relate to the text of the IFR and Proposed Rule were wide ranging. Commenters simultaneously urged prompt and comprehensive rulemaking to increase transparency with respect to the implementation of the orderly liquidation authority and certainty in the implementation of ongoing and future financial transactions, while counseling a deliberate pace to allow input from industry representatives and the benefit of the review of resolution plans prior to the implementation of rules governing the orderly liquidation process.

Many comments urged the greatest possible harmony with bankruptcy laws, rules and processes. These comments sought, among other things: increased input from creditors and creditor committees, deference to bankruptcy caselaw, adoption of bankruptcy reporting processes, and earlier and broader judicial input and review. In this connection, comments requested greater clarity with respect to the procedures that the FDIC will follow in determining claims and valuations of collateral and assets, as well as an appeals procedure for disputed valuations of property. Commenters also strenuously

and repeatedly urged clarification with respect to the implementation of the so-called “Chapter 7 minimum” payment to creditors pursuant to section 210(a)(7)(B)¹ of the Act.

Commenters from the insurance industry similarly urged the greatest possible deference to state regulators and to state laws, rules and regulations governing insurance companies. One commenter has repeatedly requested clarification that mutual insurance holding companies will be treated as insurance companies for the purposes of the Dodd-Frank Act.

Comments emphasized the importance of maximizing the going concern value of the business and assets of the covered financial company and suggested establishment of standards for the conduct of sales of assets and collateral. A specific concern was the need for clarification of the treatment of custodial assets held by non-banks in an orderly liquidation.

Another broad theme was the importance of clarifying the process and criteria for designating systemically important financial companies that may be subject to orderly liquidation. These comments generally sought to limit the scope of such a designation. In addition to general comments on this theme, one commenter took the position that money managers should never be considered systemically important. Another commenter took the same position with respect to money funds. Additional clarification also was sought with respect to the process for the designation of covered financial companies and the appointment of the receiver.

The implementation of special assessments, and the clawback of preferential payments made to similarly situated creditors was a recurring subject of comments to the

¹ Section 210(a)(7)(B) of the Act provides that “a creditor shall, in no event, receive less than the amount that such creditor is entitled to receive under” a chapter 7 liquidation of such covered financial company in bankruptcy.

IFR and the Proposed Rule. Commenters sought clarity with respect to the designation of preferential payments that might be deemed necessary to essential operations and, as such, would be exempt from the clawback under section 210(o). Other comments urged restraint in making preferential payments and suggested additional procedural safeguards with respect to this process. Commenters urged that care should be taken to avoid the need for special assessments to the industry to avoid undue burden on well-run companies.

Commenters requested additional clarification of the implementation of the authority to create bridge financial companies, including the processes and procedures for creating and terminating bridge financial companies, the treatment of assets transferred to bridge financial companies, and the treatment of claims against bridge financial companies. One commenter suggested a rule clarifying that all qualified financial contracts will be transferred to a bridge financial company.

Concern about the process for resolving an international financial company was expressed, and the need for international cooperation and coordination was stressed in several comments.

Finally, one commenter argued that both the NPR and the IFR are unconstitutionally broad and represent a usurping of the legislative function constitutionally delegated to Congress.

Comments relating to specific provisions of the IFR and Proposed Rule are discussed below in the analysis of the relevant sections of the Final Rule.

Analysis of the Provisions of the Final Rule

In an effort to provide greater logical cohesion to Part 380, the Final Rule reorganizes certain of the provisions of the IFR and the NPR. First, matters of general applicability and certain matters that are not properly categorized in the discussion of priorities in Subpart B or the discussion of the claims process and secured claims in Subpart C now are grouped together in Subpart A. Provisions of the IFR that relate to priorities (most of former IFR § 380.2) and claims (portions of former IFR § 380.2 as well as former § 380.4) have been moved to subparts B and C, respectively. All definitions of general applicability were moved to Subpart A, in § 380.1.

Subpart A – General Provisions

Definitions

Section 380.1 contains definitions of terms of general applicability to part 380. Some are new terms that were not specifically defined in the IFR or the NPR, and some have been moved to § 380.1 from other sections of the IFR or NPR because those terms are, or may be, used on more than one occasion throughout the Final Rule. All of the definitions are consistent with the language of the Dodd-Frank Act.

By and large, the definitions included in the Proposed Rule and the IFR have not been changed. The terms “Board of Governors,” “Dodd-Frank Act” and “employee benefits plan” have been added for ease of reference and clarity. A clarifying change was made to the definition of “director” to make clear that it includes individuals serving entities that may have a different legal form than a corporation, such as a limited liability company, in a capacity similar to a director for a corporation.

One commenter argued that the definition for “compensation” should use only the language of the statute and not include any additional terms defining compensation. The Proposed Rule provided more clarity to the industry by providing a non-exclusive list of the types of compensation that would be subject to recoupment. No change to this definition is recommended in the Final Rule.

Personal service agreements

Section 380.3 of the IFR states that employees who provide services to the covered financial company after the appointment of the receiver, or to the related bridge financial company, shall be paid for such services according the terms of any applicable personal service agreement and that such payment shall be treated as an administrative expense of the receiver. The IFR does not restrict the receiver’s ability to repudiate a personal services agreement, nor does it impair the ability of the receiver to negotiate different terms of employment by mutual agreement. The Final Rule does not apply to senior executives or directors of a covered financial company, and it does not limit the power to recover compensation previously paid to senior executives or directors under section 210(s) of the Dodd-Frank Act and the regulations promulgated thereunder.

There was only one comment that addressed the treatment of personal service agreements in § 380.3 of the IFR. That comment pointed out that the reference to covered subsidiaries in the IFR is confusing, as covered subsidiaries are, by definition, not in receivership and therefore contracts to which the covered subsidiary is a party cannot be repudiated pursuant to section 210(c) of the Dodd-Frank Act by the FDIC as receiver for the covered financial company. Section 380.3 as set forth in the IFR was intended to address the possibility that an agreement entered into by a parent company

may cover employees of an affiliate or subsidiary of the covered financial company. It is the intent of the Final Rule that employees be paid for work performed under a personal services contract with a covered financial company or, if applicable, a bridge financial company, at the terms provided for in the agreement until such time as the contract is assumed by a third party or repudiated by the receiver. To the extent that the receiver for the covered financial company has the power to exercise control over a subsidiary, it will ensure that employees of the subsidiary continue to be paid in accordance with the personal services contract. However, the reference to covered subsidiaries has been deleted from the Final Rule to clarify that this section does not imply that the receiver for a covered financial company has the power to repudiate a contract entered into by a subsidiary nor does it have the power to enforce the terms of such a contract except by virtue of its role as parent to such subsidiary, unless or until the Corporation is appointed as receiver of a subsidiary.

Paragraph (b)(2) of § 380.3, which defines the term “senior executive,” has been moved to § 380.1, which contains definitions of general applicability to Part 380. Finally, reference is made in the last sentence of § 380.3(c) to the rules regarding recoupment of executive compensation included in this Final Rule at § 380.7.

Insurance company subsidiaries

Section 380.5 of the IFR provides that where the FDIC acts as receiver for a direct or indirect subsidiary of an insurance company, the value realized from the liquidation of the subsidiary will be distributed according to the priorities established in the Dodd-Frank Act and will be available to the policy holders of the parent insurance company.

No comments were received recommending changes to § 380.5 of the Interim Final Rule. The sole revision to that section is to include reference to the regulations promulgated under section 210(b)(1) of the Dodd-Frank Act that are included in Subpart B of this Final Rule.

Liens on insurance company assets

Section 380.6 of the IFR limits the ability of the FDIC to take liens on insurance company assets and assets of the insurance company's covered subsidiaries under certain circumstances. As discussed in the preamble to the notice of proposed rulemaking with respect to the Interim Final Rule, section 204 of the Dodd-Frank Act provides that in the event that the FDIC as receiver of a covered financial company determines it to be necessary or appropriate, it may provide funding for the orderly liquidation of covered financial companies and covered subsidiaries by, among other things, making loans, acquiring debt, purchasing assets or guaranteeing them against loss, assuming or guaranteeing obligations, making payments, or entering into certain transactions. In particular, pursuant to section 204(d)(4), the FDIC is authorized to take liens "on any or all assets of the covered financial company or any covered subsidiary, including a first priority lien on all unencumbered assets of the covered financial company or any covered subsidiary to secure repayment" of any advances made.

Commenters to the IFR raised a question about the reference to liens on assets of an affiliate of a covered financial company as well as assets of a covered subsidiary. The Dodd-Frank Act clearly provides authority under section 204(d)(4) to take a lien on the "assets of the covered financial company or any covered subsidiary to secure repayment of any transactions conducted" under that section. While section 203(e) of the Act

contemplates that the FDIC could be appointed as receiver for an affiliate of an insurance company that is not itself a subsidiary, it is clear that upon appointment, the affiliate would become a covered financial company, rendering the reference to “affiliates” in § 380.6 superfluous. The Final Rule has accordingly been revised to eliminate the reference to “affiliates” of the covered financial company.

Recoupment of compensation.

Section 380.7 of the Proposed Rule implemented section 210(s) of the Dodd-Frank Act, which authorizes the FDIC as receiver to recoup compensation when a current or former senior executive or director is “substantially responsible” for the failed condition of a covered financial company. The Proposed Rule provided, in pertinent part, that a senior executive or director would be deemed “substantially responsible” if he or she failed to conduct his or her responsibilities with the degree of skill and care required by that position. Comments received on § 380.7 sought clarification or made recommendations regarding this standard. Some comments took the position that substantial responsibility should be based on state law or already established legal standards. One comment took the position that substantial responsibility should exist based solely on the failure of the covered financial company with no inquiry into conduct. In response to the comments, the Final Rule clarifies that the standard of care and provides that a senior executive or director would be deemed “substantially responsible” if he or she failed to conduct his or her responsibilities with the degree of skill and care an ordinarily prudent person in a like position would exercise under similar circumstances. The revision clarifies that the standard of care that will trigger section 210(s) is a negligence standard; a showing of a more egregious breach of care, such as

gross negligence, is not required. In the event that a covered financial company is liquidated under Title II of the Dodd-Frank Act, the FDIC as receiver will undertake an analysis of whether the individual has breached his or her duty of care, including an assessment of whether the individual exercised his or her business judgment. The burden of proof, however, is on the senior executive or director to establish that he or she exercised his or her business judgment. State “business judgment rules” and “insulating statutes” will not shift the burden of proof to the FDIC or increase the standard of care under which the FDIC as receiver may recoup compensation.

The Proposed Rule provided that, in certain limited circumstances, a senior executive or director would be presumed to be substantially responsible for the failed condition of the covered financial company. Some commenters objected to the use of the rebuttable presumption of substantial responsibility that was based on the position or the duties of the current or former senior executive or director. Those commenters argued that a presumption based solely on an individual’s position in a company would be a disincentive for any individual to take that position and would be detrimental to the financial industry. Other commenters objected to the presumption of substantial responsibility that was based on an individual’s removal from his or her position under section 206 of the Act. One commenter argued that the presumption exception for “white knights” was too narrow and would serve as a disincentive for individuals to take positions with financially impaired companies. The language of the Dodd-Frank Act provides for the recoupment of compensation from current or former senior executives or directors of covered financial companies who were responsible for the failure. The use of rebuttable presumptions for those individuals under the limited circumstances in the Final

Rule is aligned with the intent shown in the statutory language; thus, the presumptions remain unchanged in the Final Rule.

Some comments requested clarification of the procedure that would be used for pursuing recoupment of compensation. The FDIC anticipates that it will seek recoupment of compensation through the court system using a procedure similar to the procedure that it currently uses when it seeks recovery from individuals whose negligent actions have caused losses to failed financial institutions. In those situations, the FDIC as receiver undertakes an investigation to determine if there are meritorious and cost-effective claims and, if so, staff requests authority to sue from the Board or the appropriate delegated authority. Similarly, under section 210(s), the FDIC anticipates that it will investigate whether the statutory criteria for compensation recoupment are met, and, if so, staff will request authorization of a suit for recoupment. The Final Rule reflects this procedure by indicating that the FDIC as receiver may file an action to seek recoupment of compensation.

The Final Rule has a “savings clause” to preserve the rights of the FDIC as receiver to recoup compensation under all applicable laws.

Treatment of fraudulent and preferential transfers

Section 380.9 of the Proposed Rule addressed the powers granted to the FDIC as receiver in section 210(a)(11) of the Dodd-Frank Act to avoid certain fraudulent and preferential transfers and seeks 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.

One commenter noted that § 380.9(b)(2) of the Proposed Rule provided that the term “fixture” shall be interpreted in accordance with federal bankruptcy law, and stated that in determining what constitutes a fixture a bankruptcy court would look to applicable non-insolvency law. The commenter pointed out that typically under non-insolvency law, the law of the state in which a fixture is located would govern the determination of what constitutes a fixture and suggested that the FDIC need not apply a federal rule to determine what a fixture is for preference purposes. In providing in the Final Rule that “fixture” is to be interpreted in accordance with federal bankruptcy law, it is intended that the term be interpreted in the same manner as under federal bankruptcy law and thus, to the extent that bankruptcy courts continue to define “fixture” by reference to applicable non-insolvency law, including state law, that such law will be applied to define “fixture” under § 380.9. The provision does not create a new federal rule in order to define “fixture,” and no clarifying change to the Final Rule is recommended.

Subpart B – Priorities

Subpart B of the Final Rule generally addresses the priority scheme established under section 210(b) of the Dodd-Frank Act. It organizes and clarifies provisions throughout the Act dealing with the relative priorities of various creditors with claims against a covered financial company.

Priorities

Section 380.21 lists each of the eleven priority classes of claims established under the Dodd-Frank Act in the order of its relative priority. In addition to the specified priorities listed in section 210(b), the Final Rule integrates additional levels of priority

established under section 210(b)(2) (certain post-receivership debt); section 210(a)(13) (claims for loss of setoff rights); and section 210(a)(7)(D) (post insolvency interest).

Paragraph (b) of §380.21 conforms the method of adjusting certain payments for inflation to the similar provisions of the Bankruptcy Code. Paragraph (c) provides that each class will be paid in full before payment of the next priority, and that if funds are insufficient to pay any class of creditors, the funds will be allocated among creditors in that class, *pro rata*.

Four changes to § 380.21 of the Final Rule are recommended. The introduction to subparagraph (a) now uses the defined term “allowed claims” for consistency and to clarify that this rule applies only to unsecured claims, including the unsecured portion of under secured claims. This change is in response to the request of several commenters that this important point be made even clearer in recognition of the mandate of section 210(b)(5) that section 210 shall not affect secured claims except to the extent that the security is insufficient to satisfy the claim. Also, § 380.21(a)(3) was modified to make clear that the class of claims for “amounts owed to the United States” does not include obligations included as administrative expenses as defined in § 380.22. A corresponding clarification has been made to § 380.23. A technical change to § 380.21(a)(4) and (5) substitutes the word “within” for the phrase “not later than” to make clear that the relevant employees’ claims must arise during the time period within 180 days before the date of the appointment of the receiver.

A comment also requested clarification of the impact of contractual agreements on priorities. The last sentence of § 380.21(c) responds to that comment, to make clear that enforceable contractual subordination agreements will be respected. This is

consistent with section 510(a) of the Bankruptcy Code, which provides that subordination agreements enforceable under applicable non-bankruptcy law will be respected by the trustee in bankruptcy.

Administrative expenses of the receiver

Section 380.22 of the Proposed Rule expanded and clarified the statutory definition of the term “administrative expenses of the receiver” by consolidating various statutory references to administrative expenses in a single section² and by making clear that administrative expenses can include costs and expenses incurred by the FDIC prior to the appointment as receiver, as well as post-appointment expenses if the expenses are necessary and appropriate to facilitate the smooth and orderly liquidation of the covered financial company.

The changes to § 380.22 of the Proposed Rule are intended to provide clarity. A commenter questioned how expenses of the receiver might pre-date the appointment of the receiver. The change to “pre- and post-failure costs and expenses of the FDIC in connection with its role as receiver” clarifies that costs incurred in anticipation of and preparation for the role as receiver are administrative expenses. Similarly, comments revealed some confusion about debt accorded super priority status ahead of administrative expenses under § 380.21(a)(1) of the Proposed Rule. The language of the Final Rule more closely tracks the statutory language with respect to debt that qualifies for super priority status.

² Claims for certain expenses incurred in connection with the liquidation of a covered broker or dealer that qualify for administrative expense priority are not addressed in the Proposed or Final Rule because matters relating to the liquidation of a covered broker-dealer under section 205(f) of the Act are required to be addressed in a separate rule being prepared jointly with the Securities and Exchange Commission.

Amounts owed to the United States

Section 380.23 of the Proposed Rule established a definition of “amounts owed to the United States” that are entitled to be paid at the level of priority immediately following administrative expenses. The Proposed Rule contained a definition of “amounts owed to the United States” that includes amounts advanced by any department, instrumentality or agency of the United States, whether such sums are advanced before or after the appointment of the receiver. The definition includes advances by the FDIC for the funding of the orderly liquidation of the covered financial company pursuant to section 204(d)(4) of the Act and also includes other sums advanced by departments, agencies and instrumentalities of the United States such as payments on FDIC corporate guarantees, including the Temporary Liquidity Guarantee Program and unsecured claims for net realized losses by a Federal reserve bank and unsecured accrued and unpaid taxes owed to the United States.

Several comments requested clarification with respect to the relationship between pre- and post-receivership administrative expenses incurred by the Corporation that are described in § 380.22 of the Final Rule and are included in the administrative expense class of claims under § 380.21(a)(2). For the sake of clarity, in the Final Rule, § 380.23 states that amounts owed to the United States do not include any amounts included in the administrative expense classes of claims at § 380.21(a)(1) and (2).

All of the comments addressing § 380.23 of the Proposed Rule reflected concern that expressly including amounts owed to all “departments, agencies and instrumentalities” of the United States in the regulatory definition of “amounts owed to the United States” was vague and potentially overbroad. Clarification was requested with

respect to specific examples of amounts that might be deemed to be included in the broad definition under the Proposed Rule, such as amounts owed to the Pension Benefit Guaranty Corporation arising out of underfunded pension obligations, amounts owed to the Environmental Protection Agency arising out of superfund cleanup obligations, and fees payable to the Securities and Exchange Commission or other regulatory agencies, to name a few. In the Final Rule, the phrase “departments, agencies and instrumentalities” of the United States found in the Proposed Rule is omitted in favor of the simpler statutory reference to the “United States.” This change is not intended to limit the definition strictly to amounts owed to the U.S. Treasury, and the Final Rule expressly provides in § 380.23(a) that amounts owed to agencies or instrumentalities other than the U.S. Treasury for certain purposes will be included as “amounts owed to the United States.”

Section 380.23(a) adds language to make clear that the priority for amounts owed to the United States relates to amounts advanced in connection with the purposes and mandates of Title II of the Act, namely to conduct the orderly resolution of a covered financial company, or to avoid or mitigate adverse consequences to the financial stability of the United States arising out of the failure of the covered financial company, and to ensure that outstanding tax obligations to the U.S. Treasury are repaid to protect the taxpayers. These include obligations such as advances under the Temporary Liquidity Guaranty Program that was created by the FDIC to address a systemic liquidity crisis, as well as the obligation to repay loans advanced by any Federal reserve bank pursuant to the Federal Reserve Act that were included in the definition contained in the Proposed

Rule, and unpaid unsecured federal income tax obligations of the covered financial company.

Although the language of the Dodd-Frank Act does not provide much elaboration of the intent of the phrase “amounts owed to the United States,” it is clear that it is not intended to include all amounts owed to the United States of any kind or nature. The fact that the Act specifically includes some obligations,³ suggests that others must be excluded, and that it is not the intent of the Act to elevate liabilities for unsecured amounts due to government departments, agencies or instrumentalities arising in the covered financial company’s ordinary course of business over other general or senior liabilities. Thus, the Final Rule includes a new paragraph (b) to establish the general rule that obligations incurred prior to the appointment of the receiver that are unrelated to the particular mandates of the Dodd-Frank Act will not be included among the class of claims described in § 380.21(a)(3). That paragraph provides that unsecured obligations such as any unsecured portion of a Federal Home Loan Bank advance, payments due under guarantees from government sponsored entities such as the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation are not included among “amounts owed to the United States.” These exclusions were identified in the preamble to the Proposed Rule. Similarly, the Final Rule adds to the text of the rule that unsecured unpaid filing or registration fees due to any federal agency would not be classified as “amounts owed to the United States” because they are unrelated to the mandates of the Dodd-Frank Act. These unsecured amounts would be included among the priority class otherwise applicable to such claims under § 380.21(a)(7).

³ For example, section 204(d)(4) (funding for orderly liquidation), section 210(c)(6)(C) (certain advances from the SIPC Fund), and section 1101(a)(6)(E) (net realized losses on certain loans by a Federal reserve bank) all are specifically designated as receiving the priority for “amounts owed to the United States.”

New subparagraph (5) in § 380.23(a) was added to clarify that government departments, agencies, and instrumentalities may, for avoidance of doubt, expressly designate amounts advanced as amounts intended to be included as amounts owed to the United States for the purpose of the priorities established in § 380.21. Such designation would be used in the case of advances to a financial company to avoid or mitigate adverse effects on the financial stability of the United States or to liquidate a covered financial company.⁴ Any such designation would be in writing by the appropriate department, agency or instrumentality in a form acceptable to the FDIC.

In addition, some commenters requested clarification that the rule does not affect the rights of secured creditors. No change in the Final Rule is necessary to clarify that point. The priorities established under section 210(b) of the Dodd-Frank Act relate only to unsecured claims and do not affect the rights of secured creditors, which are addressed in §§ 380.50-53 of the Final Rule. To underscore this point, the reference to “secured or unsecured” amounts advanced under section 204(d) of the Dodd-Frank Act in § 380.23(a)(1) of the Proposed Rule has been deleted. Although the text of section 204(d) of the Act refers both to the priorities under section 210(b) and to taking liens to secure amounts advanced, it is a clearer, more consistent approach to treat all secured claims under the rules applicable to such claims and not under the priorities applicable to unsecured claims.

Finally, some commenters expressed concern that that the definition of “amounts owed to the United States” may have the effect of increasing the amount of risk-based

⁴ Although not expressly stated in this rule, amounts paid to customers of a covered broker dealer or to the Securities Investors Protection Corporation (SIPC) pursuant to Section 205(f) of the Dodd-Frank Act are entitled to the same priority as amounts owed to the United States pursuant to 12 U.S.C. 210(b)(6). Staff is working with staff of the SEC to address these issues in a joint rulemaking pursuant to Section 205(h) of the Act.

assessments that may be charged by the FDIC under section 210(o)(1)(B) of the Act. That provision of the Dodd-Frank Act authorizes and directs the FDIC to impose risk-based assessments on eligible financial companies “if such assessments are necessary to pay in full the obligations issued by the [FDIC] to the Secretary [of Treasury] under [Title II] within 60 months of the date of issuance of such obligations.” The priority of payments applied by the receiver in the liquidation of the assets of the covered financial company is independent of the assessments imposed by FDIC in its corporate capacity in exercising its authority under section 210(o) of the Act. While only the obligations that are expressly included in section 210(a)(1)(B) of the Act are entitled to the benefit of the assessments, this does not constitute a preferential payment to a similarly situated creditor because it is imposed pursuant to a statutory requirement and cannot be subject to clawback under section 210(o)(1)(D)(i) of the Act. No change to the Final Rule is recommended to clarify this point; however, the preamble to the Final Rule will address the comments received on this point.

No change is recommended to paragraph (c) of § 380.23 that acknowledges that the United States may subordinate its right to repayment behind any class of creditors by express written consent, provided that in any event all amounts due to the United States must be paid prior to any payment to equity holders of the covered financial company. Absent such express written subordination, all amounts owed to the United States will be paid at the priority under § 380.21(a)(3), regardless of whether they are characterized as debt or equity on the books of the covered financial company.

Claims for loss of setoff rights

Section 380.24 of the Proposed Rule addresses the claims of creditors who have lost a right of setoff due to the exercise of the receiver's right to sell or transfer assets of the covered financial company free and clear in a manner consistent with the express provisions of the Act. Any claim for the loss of setoff rights is given a priority above other general unsecured creditors – but below administrative claims, amounts owed to the United States and certain employee-related claims.

Several comments to § 380.24 pointed out that the treatment of setoff under the Proposed Rule is different from the practice in bankruptcy and took issue with the statement in the preamble to the Proposed Rule that treatment of setoff claims under the Dodd-Frank Act “should normally provide value to setoff claimants equivalent to the value of setoff under the Bankruptcy Code.” These commenters agreed with the statement in the preamble that in bankruptcy practice setoff rights are functionally equivalent to a secured claim and pointed out that this is a significantly higher place in the preference scheme than the super-priority general unsecured creditor status that claims arising out of loss of setoff rights are granted under the Dodd-Frank Act. In context, the quoted sentence points out that it is anticipated that in most cases there will be sufficient funds to pay creditors with claims arising out of loss of setoff rights in a Title II orderly resolution, not that the outcome is certain to be identical under either priority scheme. The Dodd-Frank Act provides that a creditor who has lost a right of setoff due to the exercise of the receiver's right to sell or transfer assets of the covered financial company free and clear of the claims of third parties pursuant to section 210(a)(12)(F) is entitled to a claim senior to all unsecured liabilities other than those

described in section 210(b)(A)-(D) of the Act (i.e., immediately behind the class of general unsecured creditors and senior liabilities described in § 380.21(a)(7)). The language of the Proposed Rule respects this clear expression of intent by the legislature, and no change to this language is recommended in the Final Rule with respect to the priority accorded to claims arising from loss of setoff rights.

Commenters also sought clarification that § 380.24 does not affect the contractual rights of netting with respect to qualified financial contracts that are protected under the Dodd-Frank Act. Section 210(c)(8) provides that qualified financial contracts are exempt from provisions of the Act limiting any right to offset in certain circumstances. Accordingly, a new paragraph was added clarifying that the provisions of this section are not intended to disturb such rights with respect to qualified financial contracts. If a qualified financial contract is subject to a master agreement, such master agreement will be treated as a single agreement as provided in section 210(c)(8)(D)(viii).

Post-insolvency interest

Section 380.25 of the Proposed Rule established a post-insolvency interest rate, as required by section 210(a)(7)(D) of the Dodd-Frank Act. Under the Proposed Rule, that rate is based upon the coupon equivalent yield of the average discount rate set on the three-month T-bill, which is consistent with the post-insolvency interest rate applied to claims under the FDI Act.

Six comments pertaining to § 380.25 were received. Commenters variously suggested the use of the federal rate as is the practice in some bankruptcy cases, or the contract rate where one is specified, or any specified contract rate other than a default rate. Two commenters agreed that the use of a post-insolvency interest rate based on the

average discount rate for the three-month Treasuries is appropriate, at least where no contract rate is provided. One commenter pointed out that given the fact that post-insolvency interest is paid only after all creditors have been fully paid, the provision will rarely, as practical matter, materially affect creditors. As was recognized by some commenters, there is no clear rule for treatment of post-insolvency interest under the Bankruptcy Code and applicable case law is not uniform. Accordingly, no change is being made to the method of calculating the post-insolvency interest rate for unsecured claims, in favor of the consistency and ease of administration of the rate that has been applied by the FDIC with respect to claims under the FDI Act.

Bridge financial companies

Section 380.26 was included in the Proposed Rule during the early stages of the rulemaking process because of the importance of addressing two issues that were the subject of several requests for clarification. First, it made clear that any contract or agreement purchased and assumed or entered into *de novo* by the bridge financial company will become the obligation of the bridge financial company, and that the bridge financial company shall enforce and observe the terms of any such contract or agreement. Second, § 380.26 stated that any remaining assets or proceeds of the bridge financial company, after payment of all administrative expenses and other allowed claims, shall be distributed to the receiver of the related covered financial company for the benefit of the creditors of that covered financial company. Commenters have continued to call for additional clarifications with respect to the treatment of bridge financial companies and their assets and liabilities. A more expansive treatment of this topic is beyond the scope of the Final Rule and will be the topic of a future rulemaking. Accordingly, other than

two minor changes to the language intended simply to clarify the text, § 380.26 of the Final Rule is unchanged from the Proposed Rule. The two minor changes are the use of the indefinite “any” in lieu of the definite article “a” before “contract or agreement giving rise to such asset or liability” in paragraph (a), and the use of the defined term “allowed claim” in place of simply the word “claim” in the same paragraph. No substantive changes to the rule are intended by these corrections.

Similarly situated creditors

Section 380.27 contains the provision found at § 380.2 of the IFR, addressing the treatment of similarly situated creditors. This rule makes clear that certain categories of creditors, including creditors holding unsecured debt with a term of more than 360 days, will not be given additional payments compared to other general trade creditors or any general or senior liability of the covered financial company nor will exceptions be made for favorable treatment of holders of subordinated debt, shareholders or other equity holders. Although some commenters have supported this provision, others have consistently objected to it through two rounds of comments. These comments reiterated the objections to this rule that were considered in implementing the IFR, and no changes are recommended in the Final Rule.

Accordingly, we recommend no change to § 380.27(a) and (b). These provisions are consistent with the mandate of the Dodd-Frank Act set forth in sections 204(a) and 210(a)(1)(M) for the orderly resolution of a covered financial company to be undertaken in a manner that ensures that the creditors and shareholders of a covered financial company will appropriately bear the losses of the covered financial company.

Paragraph (c) of §380.2 has been deleted in its entirety from the text of the Final Rule, as the treatment of secured creditors is addressed in §§ 380.50-53 of the Final Rule.

Although not impacting the text of the Final Rule, one new topic was addressed in a joint comment letter from two trade associations representing the banking and securities industries. This letter suggested an alternative approach for the orderly resolution of systemically important financial institutions that would provide for the exchange of certain subordinated debt for equity. The joint working paper prepared by these trade associations describes a recapitalization plan that the FDIC as receiver of a covered financial company could implement via the transfer of the viable assets and businesses of a covered financial company into a bridge financial company established by the FDIC after failure and a conversion of certain creditors of the covered financial company into equity holders in the bridge company. In the view of the commenters, this approach would neither be considered a traditional “bail-in” recapitalization nor contingent capital, nor would it require a taxpayer-funded bailout. The commenters suggest that this approach might also facilitate the discussion of the resolution of a cross-border financial institution. No change to § 380.2 of the Final Rule is recommended in connection with this proposal, as any exchange of debt for equity in the bridge would be accomplished pro rata, and in accordance with the priorities established under § 380.21. Furthermore, although this approach may prove useful in conducting an orderly liquidation of a covered financial company in certain circumstances, comment on this particular approach is outside the scope of the Final Rule. This letter may, however, be seen as an example of the value generated by constructive dialogue between the private financial markets and the federal government on topics such as this one.

Subpart C – Receivership Administrative Claims Process

Scope & Applicability

Subpart C of the Final Rule adopts and interprets where necessary the administrative claims determination process provided for in the Act. Section 380.30 of the Final Rule follows the Dodd-Frank Act in setting forth the authority of the FDIC as receiver of a covered financial company to determine all claims against the company or the receiver in accordance with the statutory procedures.

Section 380.31 has been revised in the Final Rule to address the scope of the claims process. It will clarify that the claims process will not apply to a bridge financial company or to any extension of credit from a Federal reserve bank or the FDIC to a covered financial company. Commenters also sought clarification that the claims process does not affect the contractual rights of netting and setoff with respect to qualified financial contracts that are protected under the Dodd-Frank Act. This concern is addressed in § 380.51(g) of the Final Rule, which excepts qualified financial contracts from the requirement to seek the consent of the receiver before exercising contractual rights against property of the covered financial company. If a party to a qualified financial contract has an unsecured claim after terminating the contract and liquidating any collateral, such claim would be subject to the claims process. The definitions in § 380.31 of the Proposed Rule have been moved into § 380.1 of the Final Rule, which contains the definitions of terms used in Part 380.

Claims bar date

Section 380.32 of the Final Rule follows section 210(a)(2)(B) of the Dodd-Frank Act, authorizing the receiver to establish a “claims bar date” by which creditors of the

covered financial company are to file their claims with the receiver. The claims bar date must be identified in both the published notices and the mailed notices required by the statutory procedures. The Final Rule clarifies that the claims bar date is calculated from the date of the first published notice to creditors, not from the date of appointment of the receiver.

Notice requirements

Section 380.33 of the Final Rule follows the statutory procedures for notice to creditors of the covered financial company. As required by the statute, upon its appointment as receiver of a covered financial company, the FDIC as receiver will promptly publish a first notice; subsequently, the receiver will publish a second and third notice one month and two months, respectively, after the first notice is published. The notices must inform creditors to present their claims to the receiver, together with proof, by no later than the claims bar date. The Final Rule provides that the notices shall be published in one or more newspapers of general circulation in the market where the covered financial company had its principal place of business. In recognition of the public's growing reliance on communication using the Internet as well as the prevalence of online commerce, the Final Rule provides that in addition to the published and mailed notices, the FDIC may post the notice on its public website. Several comments suggested that notices be published in certain specific financial news media both domestically and abroad. The Final Rule does not adopt this suggestion; the FDIC will provide notices in specific media that will be appropriate under the particular circumstances.

In addition to publishing the notice described in § 380.33(a), the receiver also must mail a notice that is similar to the publication notice to each creditor appearing on

the books and records of the covered financial company. The mailed notice will be sent at the same time as the first publication notice to the last address of the creditor appearing on the books or in any claim filed by a claimant. The Final Rule supplements this procedure by providing that after sending the initial mailed notice, the receiver may communicate by electronic media (such as email) with any claimant who agrees to such means of communication.

Section 380.33(d) of the Final Rule clarifies the treatment of creditors that are discovered after the initial publication and mailing has taken place. The FDIC as receiver will mail a notice similar to the publication notice to any claimant not appearing on the books and records of the covered financial company no later than 30 days after the date that the name and address of such claimant is discovered. If the name and address of the claimant is discovered prior to the claims bar date, such claimant will be required to file the claim by the claims bar date. There may be instances when notice to the discovered claimant is sent too close to the claims bar date to reasonably permit timely filing, however. In such a case, the claimant may invoke the statutory exception for late-filed claims set forth in section 210(a)(3)(C)(ii) of the Dodd-Frank Act in order to have its claim considered by the receiver.

Because section 210(a)(2)(C) of the Dodd-Frank Act does not distinguish between claimants discovered before and claimants discovered after the claims bar date, the statute literally would require the receiver to mail a notice of the claims bar date to a claimant discovered after such date. However, such a discovered claimant cannot file a claim timely if the claims bar date has already passed. Therefore, the Final Rule provides that a claimant discovered after the claims bar date will be given 90 days to file a claim.

This time frame is consistent with the time frame set forth in section 210(a)(2)(B) of the Dodd-Frank Act, which provides for the claims bar date to be not less than 90 days after the first publication of the notice to creditors. The receiver will disallow any claim filed by such a “late-discovered” claimant after the 90-day period, however.

Some comments suggested that claimants discovered within 30 days before the claims bar date should not be required to submit a claim by the claims bar date but given additional time to file a claim. This suggestion is unnecessary because the Dodd-Frank Act’s late-filed claim exception (see section 210(a)(3)(C)(ii)) encompasses claimants who are notified before the claims bar date but do not have sufficient time to prepare and file a claim before such date. In such a case, the claimant may show that it did not have notice of the appointment of the receiver in time to file by the claims bar date.

Procedures for filing claims

Section 380.34 of the Final Rule provides guidance to potential claimants regarding certain aspects of filing a claim. The FDIC as receiver has determined to provide creditors with instructions on how to file a claim in several different formats. These will include providing FDIC contact information in the publication notice, providing a proof of claim form and filing instructions with the mailed notice, and posting a link to the FDIC’s non-deposit claims processing web site. A claim will be deemed filed with the receiver as of the date of postmark if the claim is mailed or as of the date of successful transmission if the claim is submitted by facsimile or electronically.

This section also confirms that each individual claimant must submit its own claim and that no single party may assert a claim on behalf of a class of litigants. On the other hand, a trustee named or appointed in connection with a structured financial

transaction or securitization is permitted to file a claim on behalf of the investors as a group because in such a case the trustee legally owns the claim. The suggestion that an agent bank in a syndicated loan arrangement be permitted to file a claim on behalf of the lender group was rejected because each lender in a syndication arrangement has contractual privity with the borrower and therefore should be required to file a claim on its own behalf. The Final Rule follows the statutory provision that the filing of a claim constitutes the commencement of an action for purposes of any applicable statute of limitations and does not prejudice a claimant's right to continue any legal action filed prior to the date of the receiver's appointment. The Final Rule also clarifies that the claimant cannot continue its legal action until after the receiver determines the claim.

Determination of claims

Section 380.35 of the Final Rule follows section 210(a)(3) of the Dodd-Frank Act, authorizing the receiver to allow and disallow claims. The FDIC has added a clarifying clause in the Final Rule to be consistent with section 210(a)(3)(D)(iii) of the Act, which excludes any extension of credit from a Federal reserve bank or the FDIC to a covered financial company.

Section 210(a)(3)(C) of the Dodd-Frank Act instructs the receiver to disallow any claim that is filed after the claims bar date, subject to an exception for certain late-filed claims. Under this exception, a claim filed after the claims bar date may be considered by the receiver if (i) the claimant did not have notice of the appointment of the receiver in time to file by the claims bar date, and (ii) the claim is filed in time to permit payment by the receiver. As in the Proposed Rule, § 380.35(b)(2) of the Final Rule incorporates the statutory exception.

Some comments suggested that an “excusable neglect” exception to late-filed claims similar to the Bankruptcy Code should be used. This suggestion is not pertinent because, as discussed, the Dodd-Frank Act’s late-filed claim exception encompasses claimants who are notified before the claims bar date but do not have sufficient time to prepare and file a claim before such date. In such a case, the claimant may show that it did not have notice of the appointment of the receiver in time to file by the claims bar date. Congress intended for late-filed claims to be disallowed unless the claimant qualifies for the late-filed claim exception. See section 210(a)(3)(C) of the Act.

One comment noted that under section 726(a) of the Bankruptcy Code, late-filed claims are paid ahead of claims for post-petition interest and distributions to the holders of equity interests. It was suggested that a similar treatment be adopted for the payment of late-filed claims in a covered financial company receivership. This suggestion cannot be adopted because Congress has established the order of priority of claims in the Dodd-Frank Act and the FDIC has not been given the authority to alter that priority scheme.

Section 380.35(b)(2)(i) has been revised in the Final Rule in order to accommodate specifically any claim based on an act or omission of the receiver that occurs after the claims bar date. Section 210(a)(9)(D)(ii) of the Dodd-Frank Act deprives a court of jurisdiction over any claim relating to any act or omission of the FDIC as receiver (e.g., a repudiation or breach of contract by the receiver) unless the claimant first complies with the receivership administrative claims process. A party to a contract that is repudiated or breached by the receiver after the claims bar date, however, would be unable to timely file a claim and would not technically qualify for the statutory late-filed claim exception because it would be unable to show that it did not have notice of the

appointment of the receiver prior to the claims bar date; accordingly, this party could neither comply with the claims process nor have a court determine its claim. In order to provide relief to parties in this situation, the Final Rule permits the receiver to consider a claim filed after the claims bar date if the claim is based on an act or omission of the receiver that occurs after the claims bar date. While the Proposed Rule attempted to resolve this situation by providing that the receiver could, under the late-filed claim exception, consider a claim if it did not accrue until after the claims bar date, it was determined after further consideration that this provision would have been too broad because it could have encompassed contingent claims and the FDIC has established a separate procedure for addressing contingent claims in § 380.39 of the Final Rule.

Decision period

Section 380.36 of the Final Rule provides that under the statute the receiver must notify a claimant of its decision to allow or disallow a claim prior to the 180th day after the claim is filed. The Final Rule also provides that the claimant and the receiver may extend the claims determination period by mutual agreement in writing. In accordance with the statute, the receiver must notify the claimant regarding its determination of the claim prior to the end of the extended claims determination period.

Notification of determination

As required by section 210(a)(3)(A)(i) of the Dodd-Frank Act, § 380.37 of the Final Rule provides that the receiver will notify the claimant that the claim is allowed or disallowed. The notification will be mailed to the claimant as set forth in section 210(a)(3)(A)(iii) of the Act, unless the claimant has filed its claim electronically, in which case the receiver may use electronic media for the notification. If the receiver

disallows the claim, the notification will provide the reason(s) for the disallowance and also advise the claimant of the procedure for filing or continuing an action in court.

The Final Rule reiterates the statutory provision of section 210(a)(3)(A)(ii) of the Dodd-Frank Act, that the receiver's failure to notify the claimant of any disallowance within 180 days after the claim is filed, or the end of any extension agreed to by the claimant, the claim will be deemed to be disallowed. The claimant may then file or continue an action in court as provided for by section 210(a)(4) of the Act. The Final Rule has been revised to cite the statutory authority for this provision.

Comments on this aspect of the claims process suggested that after 180 days the claim should be deemed to be allowed instead of disallowed. Other comments suggested that the receiver should provide affirmative notification of the disallowance of a claim at the end of the claims determination period. These suggestions cannot be adopted because they are contrary to the provisions of the Act. Congress adopted the approach that the failure to notify the claimant of a disallowance within 180 days after the claim would be deemed to be a disallowance of the claim in order to impose a clear and reasonable time limit on the receiver's consideration of claims. Without such a time limit, the claims procedure would be inadequate and not subject to exhaustion as a prerequisite for court jurisdiction, which would be contrary to the intent of Congress. Once the claimant enters the receivership claims process by filing a claim, the claimant is on notice of the statutory provisions governing that process and will bear the responsibility to monitor the claims determination period in order to timely file or continue a lawsuit with respect to the claim.

Procedures for seeking judicial review of disallowed claim

Section 380.38 of the Final Rule implements the statutory procedures for a claimant to seek a judicial determination of its claim after the claim has been disallowed or partially disallowed by the FDIC as receiver. Consistent with section 210(a)(4) of the Dodd-Frank Act, a claimant may (i) file a lawsuit on its disallowed claim in the district court where the covered financial company's principal place of business is located, or (ii) continue a previously pending lawsuit. Some comments suggested that the FDIC should designate the district court where the covered financial company's principal office is located as the exclusive forum for judicial review of claims. The FDIC must decline to adopt this suggestion; as discussed, the FDIC must follow the established statutory scheme and cannot alter court jurisdiction or venue when these issues have been decided by Congress. The Final Rule clarifies that if the claimant continues a previously filed action, the claimant may continue such action in the court in which the case was pending before the appointment of the receiver, resolving any uncertainty whether the action should be "continued" in the district court where the covered financial company's principal place of business is located. (In the case of an action pending in state court, the receiver would have the authority to remove the action to federal court if it chose to do so.)

As provided by statute, § 308.38(c) of the Final Rule provides that the claimant has 60 days to commence or continue an action regarding the disallowed claim. The time period for commencing or continuing a lawsuit would be calculated, as applicable, from the date of the notification of disallowance, the end of the 180-day claims determination date, or the end of the extended determination date, if any. If a claimant fails to file suit on a claim (or continue a pre-receivership suit) before the end of the 60-day period, the

claimant will have no further rights or remedies with respect to the claim. This time period is not subject to a tolling agreement between the FDIC and the claimant. The Final Rule affirms that exhaustion of the administrative claims process is a jurisdictional prerequisite for any court to adjudicate a claim against a covered financial company or the receiver, as provided in section 210(a)(9)(D) of the Dodd-Frank Act.

Provability of claims based on contingent obligations

Section 380.39 of the Final Rule addresses contingent claims, which was previously the subject of § 380.4 of the IFR. The holder of a contingent claim against the covered financial company will be required to file its claim by the claims bar date. Section 380.39(a) provides that the receiver will not disallow a claim solely because the claim is based on a contingent obligation. Instead, the receiver will estimate the value of a contingent claim as of the date of the appointment of the receiver. If the receiver repudiates a contingent obligation, repudiation damages will be no less than the estimated value of the claim as of the date of the receiver's appointment. Comments suggested that any estimation of the value of a contingent claim be delayed until just prior to a final distribution by the receiver. This approach would be inconsistent with the statute because section 210(a)(3)(A) of the Dodd-Frank Act instructs the receiver to determine a claim no later than 180-days after the claim is filed, subject to any extension agreed to by the claimant. Therefore, in accordance with the statute, the receiver will estimate the value of a contingent claim before the end of either the 180-day period beginning on the date the claim is filed or any mutually agreed upon extension of this time period. Unless the contingency becomes absolute and fixed prior to the receiver's determination of the estimated value, the estimated value will be recognized as the allowed amount of the

claim. The estimated value of the contingent claim will represent the receiver's determination of the claim for purposes of the exhaustion of administrative remedies by the claimant prior to seeking a judicial determination of the claim.

Secured Claims

Because section 210(b)(5) of the Dodd-Frank Act provides that section 210 of the Act, providing for the powers and duties of the FDIC acting as receiver of a covered financial company, "shall not affect secured claims or security entitlements in respect of assets or property held by the covered financial company," the Final Rule has been revised to more effectively safeguard the rights of secured claimants. Staff believes that the approach taken should provide more legal certainty for the secured lenders of a systemically important financial institution.

A number of comments regarding the Proposed Rule expressed concerns about the valuation of property used as collateral, the ability of a secured claimant to exercise its rights against its collateral or to obtain adequate protection of its interest and the need for expedited judicial review of actions by the receiver affecting a secured claimant. The Final Rule contains several revised provisions to address those concerns, satisfy the statutory directive not to affect secured claims, and harmonize with the relevant provisions of the Bankruptcy Code. With respect to judicial review, however, harmonization with the Bankruptcy Code is not possible. In contrast to a case under the Bankruptcy Code, in which a debtor's or trustee's actions are subject to prior approval by a court, a receivership of a covered financial company is an administrative proceeding conducted by the FDIC as receiver. Under the Act, court jurisdiction is limited and subject to exhaustion of the receivership claims process. A claimant may have its day in

court but only after the receiver has first made a determination regarding the claim or the claimant's rights.

Section 380.50 has been revised in the Final Rule to model Bankruptcy Code section 506. Section 380.50(a) affirms that under section 210(a)(3)(D)(ii) of the Dodd-Frank Act, a claim is secured to the extent of the value of the property securing the claim by incorporating the principle that a claim that is secured by property of the covered financial company may be treated as an unsecured claim to the extent that the claim exceeds the fair market value of the property. Section 380.50(b) provides that the fair market value of such property shall be determined in light of the purpose of the valuation and of the proposed disposition or use of the property and at the time of the proposed disposition or use. To illustrate, if a secured claimant requested the receiver's consent to obtain possession or exercise control of property that secures the claim, the receiver would value the property at the time of the request. If the receiver proposes to sell property that is subject to a security interest, the property will be valued at the time of the sale. By not specifying a particular point in time (such as the date of appointment of the receiver) when property will be valued, the problem of potential windfalls to either the secured claimant or the receiver should be avoided. The approach taken should provide more accurate valuations, protect the rights of secured creditors, and provide flexibility for the receiver.

Section 380.50(c) provides that the receiver may recover from property subject to a security interest any reasonable and necessary costs and expenses of preserving or disposing of the property to the extent the claimant is benefited thereby. Section 380.50(d) recognizes that if the value of property subject to a security interest is greater

than the amount of the claim, the claimant will be allowed interest and any reasonable fees, costs, or charges provided for under the agreement or State statute under which the claim arose. When provided for by agreement or State law, claims for interest, fees, costs, and charges are secured claims to the extent that the property has sufficient value to cover them.

Section 380.51 of the Final Rule addresses relief for a secured claimant from section 210(c)(13)(C) of the Dodd-Frank Act, which would delay any claimant holding a security interest or other lien against any property of a covered financial company from exercising its rights to obtain possession or control of the property for a period of 90 days beginning from the date of the appointment of the receiver for the company, unless the receiver consents.⁵ Secured claims that are not transferred to a bridge financial company or other acquiring entity but are retained in the receivership can be resolved either by the receiver liquidating the collateral and remitting the proceeds to the claimant up to the amount of the claim, or by the claimant liquidating its collateral. In either case, the claimant may file a claim with the receiver for any deficiency that exists after the value of the collateral is applied to the claim. The claimant may obtain judicial review if the receiver disallows the claim in whole or in part. Accordingly, § 380.51 has been revised in the Final Rule to facilitate this process by implementing a procedure for a secured claimant to obtain the receiver's consent to the claimant's taking possession or control of

⁵ The other provision of the Dodd-Frank Act that may affect secured claimants is section 210(q)(1)(B). Pursuant to that provision, the property of a covered financial company in the hands of the FDIC as receiver is not subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the receiver. Staff believes that section 210(q)(1)(B) would be more appropriately addressed in a statement of policy, which the FDIC should undertake to issue in the future. This approach was taken by the FDIC to address the comparable provision in the FDI Act, 12 U.S.C. 1825(b).

its collateral. Under this procedure, a secured claimant may request the consent of the receiver for relief. The request for consent must be in writing and state the amount of the claim, a description of the property that secures the claim, the value of the property, the proposed disposition of the property by the claimant, including the expected date of such disposition, along with supporting documentation for each item, including an appraisal or other evidence establishing the value of the property. The receiver will grant its consent if the receiver determines that it will not use, sell or lease the property and therefore will not need to provide adequate protection of the claimant's interest. (Section 380.52 of the Final Rule describes the different ways that adequate protection may be provided.) If the receiver has not acted on the request for consent within 30 days after the request is made, consent will be deemed to have been granted. Section 380.51(d) affirms that regardless of whether the receiver has decided to withhold consent, the stay of section 210(c)(13)(C) will terminate 90 days after the appointment of the Corporation as receiver. The provisions of § 380.51 shall not apply to a director or officer liability insurance contract, a financial institution bond, the rights of parties to qualified financial contracts or netting contracts, any extension of credit from a Federal reserve bank or the FDIC, or in a case where the receiver repudiates a secured contract.

Adequate protection

Section 380.52 of the Final Rule addresses adequate protection for the interest of a secured claimant if the receiver decides to use or sell property subject to a security interest. If the receiver determines that it will use, sell, or lease such property, the receiver must provide adequate protection by (1) making a cash payment or periodic cash payments to the claimant for the sale, use, or lease of the property or the grant of a

security interest or other lien against the property by the receiver results in a decrease in the value of such claimant's security interest in such property; (2) providing to the claimant an additional or replacement lien to the extent that the sale, use, or lease of the property or the grant of a security interest against the property by the receiver results in a decrease in the value of the claimant's security interest in the property; or (3) providing any other relief that will result in the claimant realizing the equivalent value of its security interest in such property. Adequate protection of the claimant's interest will be presumed if the value of the property is not depreciating or is sufficiently greater than the amount of the claim so that the claimant's security interest is not impaired.

The text of § 380.53 of the Proposed Rule, which reiterated section 210(d)(5) of the Dodd-Frank Act concerning an expedited procedure for the determination of a claim of a secured creditor alleging irreparable harm if the ordinary claims procedure was followed, has been deleted from the Final Rule as unnecessary for purposes of the regulation. The expedited procedure is fully set forth in the statute. The text of § 380.54 of the Proposed Rule, which concerned the sale of secured property by the receiver, has also been deleted from the Final Rule. This subject is addressed in § 380.52 of the Final Rule. The text of § 380.53 of the Proposed Rule, which provided that the receiver may redeem property of the covered financial company from a lien held by a secured creditor by paying the creditor in cash the fair market value of the property up to the value of its lien, has been deleted as unnecessary; the receiver already has the inherent ability to pay a secured claim anytime because such claims are excluded from the statutory order of priority for the payment of unsecured claims.

Section 380.53 of the Final Rule contains the text of § 380.52 of the Proposed Rule. This section confirms that under section 210(c)(12)(A) of the Dodd-Frank Act, the authority of the receiver to repudiate a contract of the covered financial company will not have the effect of avoiding any legally enforceable and perfected security interests in the property (except those avoidable as fraudulent or preferential transfers under section 210(a)(11)). This section also provides that after repudiation the security interest would no longer secure the contract but would instead secure any claim for repudiation damages. Accordingly, the receiver may consent to the claimant's liquidation of the collateral and application of the proceeds to the claim for repudiation damages. Comments supported the inclusion of this provision in the Final Rule.

CONCLUSION

If approved by the Board, the Final Rule will amend Part 380 of the FDIC's rules and regulations (12 C.F.R. Pt. 380). A copy of the notice of the Final Rule that will be published in the Federal Register is attached as Exhibit "A." The Final Rule will be effective 30 days after publication.

STAFF CONTACTS:

DIVISION OF INSURANCE AND RESEARCH:

Marc Steckel
Associate Director
Financial Risk Management Branch
(202) 898-3618

LEGAL DIVISION:

R. Penfield Starke
Senior Counsel
Receivership Policy Unit
(703) 562-2422

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 380

Final Rule Implementing Certain Orderly Liquidation Authority Provisions under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: The FDIC is issuing a final rule ("Final Rule") to implement certain provisions of its authority to resolve covered financial companies under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111-203, 12 U.S.C. 5301 *et seq.*, July 21, 2010) (the "Dodd-Frank Act" or the "Act"). The Final Rule will establish a more comprehensive framework for the implementation of the FDIC's orderly liquidation authority and will provide greater transparency to the process for the orderly liquidation of a systemically important financial institution under the Dodd-Frank Act.

DATES: The effective date of the Final Rule is [**Insert date 30 days after publication in the Federal Register**].

FOR FURTHER INFORMATION CONTACT:

R. Penfield Starke, Senior Counsel, Legal Division, (703) 562-2422; or

Marc Steckel, Associate Director, Division of Insurance and Research, (202) 898-3618.

For questions to the Legal Division concerning the following parts of the Final Rule contact:

Avoidable transfer provisions: Phillip E. Sloan, Counsel (703) 562-6137.

Compensation recoupment: Patricia G. Butler, Counsel (703) 516-5798.

Subpart B - Priorities of Claims: Elizabeth Falloon, Counsel (703) 562-6148.

Subpart C - Receivership Administrative Claims Procedures: Thomas Bolt, Supervisory Counsel (703) 562-2046.

SUPPLEMENTARY INFORMATION

I. Background

The Dodd-Frank Act was enacted on July 21, 2010. Title II of the Act provides for the appointment of the FDIC as receiver of a nonviable financial company that poses significant risk to the financial stability of the United States (a "covered financial company") following the prescribed recommendation, determination, and judicial review process set forth in the Act. Title II outlines the process for the orderly liquidation of a covered financial company following the FDIC's appointment as receiver and provides for additional implementation of the orderly liquidation authority by rulemaking. The Final Rule is being promulgated pursuant to section 209 of the Act, which authorizes the FDIC, in consultation with the Financial Stability Oversight Council, to prescribe such rules and regulations as the FDIC considers necessary or appropriate to implement Title II; section 210(s)(3), which directs the FDIC to promulgate regulations to implement the requirements of the Act with respect to recoupment of compensation from senior executives or directors materially responsible for the failed condition of a covered financial company, which regulation is required to include a definition of the term "compensation;" section 210(a)(7)(D), with respect to the establishment of a post-insolvency interest rate; and section 210(b)(1)(C)-(D), with respect to the index for inflation applied to certain employee compensation and benefit claims. While it is not expected that the FDIC will be appointed as receiver for a covered financial company in

the near future, it is important for the FDIC to have rules in place in a timely manner so that stakeholders may plan transactions going forward.

The Final Rule represents a culmination of an initial phase of rulemaking under Title II of the Dodd-Frank Act with respect to the implementation of its authority to undertake the orderly liquidation of a covered financial company. On October 19, 2010, the FDIC published in the **Federal Register** a notice of proposed rulemaking (75 Fed. Reg. 64173, October 19, 2010). Following consideration of comments received, that proposed rule was implemented as an Interim Final Rule ("IFR") issued on January 25, 2011, to be codified at 12 C.F.R. part 380, consisting of §§ 380.1–380.6 (76 Fed. Reg. 4207, January 25, 2011). The IFR addressed discrete topics that were critical for initial guidance for the financial industry, including the payment of similarly situated creditors, the honoring of personal service agreements, the recognition of contingent claims, the treatment of any remaining shareholder value in the case of a covered financial company that is a subsidiary of an insurance company and limitations on liens that the FDIC may take on the assets of a covered financial company that is an insurance company or a covered subsidiary of an insurance company. The FDIC requested additional general comments on the IFR as well as comments relating to specific provisions. The comment period for the IFR ended on March 28, 2011.

On March 15, 2010, the FDIC issued a notice of proposed rulemaking covering additional subjects pertinent to an orderly liquidation under Title II of the Act (76 Fed. Reg. 16324, March 23, 2011). The purpose of the proposed rule (the "Proposed Rule") that was the subject of this second notice was to continue to build on the framework initially begun with the IFR. The Proposed Rule addressed the recoupment of

compensation from senior executives and directors of a covered financial company; further clarified the definition of "financial company" in Section 201 of the Dodd-Frank Act by detailing what it means to be "predominantly engaged in activities that are financial or incidental thereto;" clarified the receiver's powers to avoid fraudulent and preferential transfers by a covered financial company; addressed the order of priority for the payment of claims, which included clarifying the meaning of "administrative expenses" and "amounts owed to the United States," the priority for setoff claims, how post-insolvency interest is to be paid, the payment of claims for contracts and agreements expressly assumed by a bridge financial company; and addressed the receivership administrative claims process, including the treatment of secured claims. The notice of proposed rulemaking published in the Federal Register requested comments on all aspects of the Proposed Rule as well as comments relating to specific provisions. The comment period ended May 23, 2011.

II. Summary of comments on the IFR and the Proposed Rule

The FDIC received 10 comments in response to the IFR and 21 comments in response to the Proposed Rule. Almost all of the comments were submitted by financial industry trade associations, with others submitted by insurance trade associations, clearing and settlement companies, a foundation for research and advocacy, a committee of bankruptcy attorneys, a group of law and business school faculty, and a group of law school students.

The general themes of comments that did not directly relate to the text of the IFR and Proposed Rule were wide-ranging. Commenters simultaneously urged prompt and comprehensive rulemaking to increase transparency with respect to the implementation of

the orderly liquidation authority and certainty in the implementation of ongoing and future financial transactions, while counseling a deliberate pace to allow input from industry representatives and the benefit of the review of resolution plans prior to the implementation of rules governing the orderly liquidation process.

Many comments urged the greatest possible harmony with bankruptcy laws, rules and processes. These comments sought, among other things: increased input from creditors and creditor committees, deference to bankruptcy case law, adoption of bankruptcy reporting processes, and earlier and broader judicial input and review. In this connection, comments requested greater clarity with respect to the procedures that the FDIC will follow in determining claims and valuations of collateral and assets, as well as an appeals procedure for disputed valuations of property. Commenters also urged clarification with respect to the implementation of the so-called “Chapter 7 minimum” payment to creditors pursuant to section 210(a)(7)(B) of the Act.¹

Commenters from the insurance industry similarly urged the greatest possible deference to state regulators and to state laws, rules and regulations governing insurance companies. One commenter has repeatedly requested clarification that mutual insurance holding companies will be treated as insurance companies for the purposes of the Dodd-Frank Act.

Comments emphasized the importance of maximizing the going concern value of the business and assets of the covered financial company and suggested establishment of standards for the conduct of sales of assets and collateral. A specific concern was the

¹ Section 210(a)(7)(B) provides that “a creditor shall, in no event, receive less than the amount that such creditor is entitled to receive” under a chapter 7 liquidation of such covered financial company in bankruptcy.

need for clarification of the treatment of custodial assets held by non-banks in an orderly liquidation.

Another broad theme was the importance of clarifying the process and criteria for designating systemically important financial companies that may be subject to orderly liquidation. These comments generally sought to limit the scope of such a designation. In addition to general comments on this theme, one commenter took the position that money managers should never be considered systemically important. Another commenter took the same position with respect to money funds. Additional clarification also was sought with respect to the process for the designation of covered financial companies and the appointment of the receiver.

The implementation of special assessments, and the clawback of preferential payments made to similarly situated creditors has been a recurring theme in comments to the IFR and the Proposed Rule. Commenters sought clarity with respect to the designation of preferential payments deemed necessary to essential operations that are exempt from the claw back under section 210(o) of the Dodd-Frank Act. Other comments urged restraint in making preferential payments and suggested additional procedural safeguards with respect to this process. Comments also urged careful consideration of any need for special assessments on the industry to avoid undue burden on well-run companies.

Commenters requested additional clarification of the implementation of the authority to create bridge financial companies, including the processes and procedures for creating and terminating bridge financial companies, the treatment of assets transferred to bridge financial companies, and the treatment of claims against bridge financial

companies. One commenter suggested a rule clarifying that all qualified financial contracts will be transferred to a bridge financial company.

Commenters also expressed concern about the process for resolving an international financial company and stressed the need for international cooperation and coordination.

Finally, one commenter argued that the IFR and the Proposed Rule are unconstitutionally broad and usurp the legislative function constitutionally delegated to Congress.

Comments beyond the scope of the IFR and the Proposed Rule will be considered in connection with future rulemakings. Comments relating to specific provisions of the IFR and Proposed Rule are discussed below in the analysis of the relevant sections of the Final Rule.

III. The Final Rule

A. Overview

The Final Rule will divide Part 380 into subparts A, B, and C. In subpart A, § 380.1 provides definitions of general applicability in part 380. Section 380.3 provides that services rendered by employees to the FDIC as receiver for a covered financial company or during the period where some or all of the operations of the covered financial company are continued by a bridge financial company will be compensated according to the terms and conditions of any applicable personal service agreements, and that such payments will be treated as an administrative expense. Section 380.5 provides that if the FDIC acts as receiver for a direct or indirect subsidiary of an insurance company and that subsidiary is not an insured depository institution or an insurance company itself, the

value realized from the liquidation of the subsidiary will be distributed according to the order of priorities set forth in the Dodd-Frank Act. Section 380.6 provides that the FDIC will avoid taking a lien on some or all of the assets of a covered financial company that is an insurance company or a subsidiary that is an insurance company unless it determines that taking such a lien is necessary for the orderly liquidation of the covered financial company and will not unduly impede or delay the liquidation or rehabilitation of the insurance company or the recovery by its policyholders. Section 380.7 provides that the FDIC as receiver of a covered financial company may recover from senior executives and directors who were substantially responsible for the failed condition of the company any compensation they received during the two-year period preceding the date on which the FDIC was appointed as receiver, or for an unlimited period in the case of fraud.

The Proposed Rule included § 380.8, implementing § 201(b) of the Act. Section 201(b) of the Act requires the Corporation, in consultation with the Secretary of Treasury, to establish by regulation criteria for determining, for the purposes of Title II, if a company is predominantly engaged in activities that are financial in nature or incidental thereto as determined by the Board of Governors of the Federal Reserve System ("Board of Governors") under § 4(k) of the Bank Holding Company Act ("BHC Act"). A company that is predominantly engaged in such activities is a "financial company" under Title II (unless expressly excluded by section 201(a)(11)(C) of the Act) and may be subject to the orderly liquidation provisions of the Dodd-Frank Act. On February 11, 2011, the Board of Governors published a notice of proposed rulemaking entitled "Definitions of 'Predominantly Engaged in Financial Activities' and 'Significant'

Nonbank Financial Company and Bank Holding Company" (76 FR 7731 (February 11, 2011))("Board of Governors' NPR").

The Board of Governors' NPR proposed criteria for determining whether a company is "predominantly engaged in financial activities" for purposes of determining if the company is a nonbank financial company under Title I of the Act. There are substantial similarities between the provisions in Title I of the Act, which the Board of Governors' NPR implements, and section 201(b) of the Act, which § 380.8 of the FDIC's Proposed Rule would implement. In light of those similarities, the FDIC staff coordinated with the staff of the Board of Governors, to the extent practicable, on the proposed criteria in § 380.8. The FDIC staff is continuing to coordinate with the staff of the Board of Governors on this issue and intends to finalize the criteria for determining if a company is predominantly engaged in activities that are financial in nature or incidental thereto through a separate notice within the *Federal Register*. Consequently, § 380.8 is reserved in the Final Rule.

Section 380.9 in subpart A clarifies the interpretation of provisions of the Act authorizing the FDIC as receiver of a covered financial company to avoid fraudulent or preferential transfers in a manner comparable to the relevant provisions of the Bankruptcy Code so that transferees will have the same treatment in a liquidation under the Act as they would have in a bankruptcy proceeding.

Subpart B of the Final Rule addresses the priorities for expenses of the receiver of a covered financial company and other unsecured claims against the covered financial company or the receiver. Subpart B integrates and harmonizes the various provisions of the Dodd-Frank Act that determine the nature and priority of payments. In particular, the

subpart integrates the various statutory references to administrative expenses throughout the Act. It also provides additional context and definition with respect to “amounts owed to the United States” to clarify that unsecured obligations advanced to provide funds for the orderly liquidation of a covered financial company or to avoid or mitigate adverse effects on the financial stability of the United States in the liquidation of the covered financial company are included among the class of claims paid at the higher statutory level accorded to amounts owed to the United States, while unsecured obligations to the United States that were incurred by the covered financial company in the ordinary course of its business prior to the appointment of the receiver will be paid at the priority of general unsecured or senior liabilities of the covered financial company. Additionally, subpart B confirms the statutory treatment of claims arising out of the loss of setoff rights at a priority ahead of other general unsecured creditors if the loss of the setoff is due to the receiver’s sale or transfer of an asset, finalizes the methodology for calculating post-insolvency interest on unsecured claims and clarifies the payment of obligations of bridge financial companies and the rights of receivership creditors to any remaining value upon termination of a bridge financial company. For a more logical organizational flow, subpart B also now includes at § 380.27 the rule originally found at § 380.2 of the IFR, clarifying that the FDIC will not use its discretion to differentiate among similarly situated creditors under section 210 of the Act to give preferential treatment to certain long-term senior debt with a term longer than 360 days, and that subordinated debt and equity never will qualify for preferential treatment..

Subpart C sets forth the administrative process for the determination of claims against a covered financial company as established by relevant provisions of the Dodd-

Frank Act. This process will not apply to any liabilities or obligations assumed by a bridge financial company or other entity or to any extension of credit from a Federal Reserve Bank or the FDIC to a covered financial company. Under the claims procedures, the receiver will publish and mail a notice to advise creditors to file their claims by a bar date that is not less than 90 days after the date of the initial publication. The receiver will have up to 180 days to determine whether to allow or disallow the claim, subject to any extension agreed to by the claimant. The claimant will have 60 days from the earlier of any disallowance of the claim or the end of the 180-day period (or any period extended by agreement) to file a lawsuit in federal court for a judicial determination. No court has jurisdiction over any claim, however, unless the claimant has exhausted its administrative remedies through the claims process.

Subpart C also includes provisions concerning contingent claims and secured claims. With respect to claims based on a contingent obligation of a covered financial company, the receiver will estimate the value of the contingent claim at the end of either the 180-day claim determination period or any extended period agreed to by the claimant. If the claim becomes fixed before it has been estimated, it may be allowed in the fixed amount; otherwise, the estimated value will be used to calculate the claimant's pro rata distribution. With respect to secured claims, subpart C provides that property of a covered financial company that secures a claim will be valued at the time of the proposed use or disposition of the property. Secured claimants may request the consent of the receiver to obtain possession of or exercise control over their collateral. The Final Rule provides that the receiver will grant consent unless it decides to use, sell or lease the property, in which case it must provide adequate protection of the claimant's security

interest in the property. This provision will not apply in a case where the receiver repudiates or disaffirms a secured contract, however.

B. Summary of changes from the IFR and the Proposed Rule

The Final Rule will contain substantive revisions and technical corrections to the provisions of the IFR and the Proposed Rule responsive to the comments received. The changes are discussed in more detail in the section-by-section analysis of the Final Rule. In summary, the substantive revisions in the Final Rule are as follows:

(1) In the Proposed Rule, § 380.2(c) provided that collateral securing claims against the covered financial company would be valued as of the date of the appointment of the receiver. This provision has been moved to § 380.50(b) of the Final Rule, which states that such property will be valued at the time of the proposed use or disposition of the property. This approach to the valuation of collateral follows the comparable provision of the Bankruptcy Code.

(2) Section 380.4 of the IFR concerning contingent claims has been moved to § 380.39 of the Final Rule. The original text of this section has been retained and new provisions have been added to provide that the receiver will estimate the value of a contingent claim no later than 180 days after the claim is filed or any extended period agreed to by the claimant.

(3) Section 380.7 addresses the recoupment of compensation from former and current senior executives and directors who are substantially responsible for the failed condition of the covered financial company. The Proposed Rule provided a standard of conduct in which, among other things, a senior executive or director would be deemed "substantially responsible" if he or she failed to conduct his or her responsibilities with

the requisite degree of skill and care required by that position. The Final Rule clarifies the standard and provides that a senior executive or director would be deemed "substantially responsible" if he or she failed to conduct his or her responsibilities with the degree of skill and care an ordinarily prudent person in a like position would exercise under similar circumstances. The revision clarifies that the standard of care that will trigger section 210(s) is a negligence standard; a higher standard, such as gross negligence, is not required. The Final Rule was also revised to reflect that the FDIC as receiver may commence an action to seek recoupment and has a "savings clause" to preserve the rights of the FDIC as receiver to recoup compensation under all applicable laws.

(4) As discussed, the provision in § 380.8 of the Proposed Rule regarding the criteria for determining if a company is predominantly engaged in activities that are financial in nature or incidental thereto will be the subject of future rulemaking. Section 380.8 is reserved in the Final Rule.

(5) Section 380.21 of the Proposed Rule enumerated the priorities of payments to unsecured creditors. A new sentence is added in the Final Rule to provide that contractual subordination agreements will be respected, which is consistent with the practice in bankruptcy.

(6) The Proposed Rule contained a definition of "amounts owed to the United States" that would be entitled to the priority of claims immediately following administrative expenses, that included all amounts of any kind owed to any department, agency or instrumentality of the United States. Under the Final Rule, the definition of "amounts owed to the United States" in § 380.23 has been revised to clarify that the

obligations entitled to the priority afforded to "amounts owed to the United States" include only amounts advanced to the covered financial company to promote the orderly resolution of the covered financial company or to avoid or mitigate adverse effects on the financial stability of the United States in the resolution of the covered financial company. Consistent with the goal of the Dodd-Frank Act to end any taxpayer bail-out of a nonviable financial company, unpaid unsecured federal income tax obligations also are repaid at the priority afforded to amounts owed to the United States. In response to comments and to provide clearer guidance, this section also sets forth a non-exclusive list of included types of advances, and a similar list of excluded types of advances. The level of priority afforded to amounts owed to the United States is not applicable to administrative expenses, which are dealt with in § 380.22 nor to secured obligations, which are dealt with in §§ 380.50-53 regarding secured claims.

(7) Section 380.24, which addresses the priority granted to creditors who have lost setoff rights due to the exercise of the receiver's right to sell or transfer assets free and clear of such rights, has been modified to make clear that the provisions of that section do not affect the provisions of the Dodd-Frank Act relating to rights of netting with respect to qualified financial contracts.

(8) Section 380.31 addresses the scope and applicability of the receivership administrative claims process by providing that the claims process does not apply to claims against a bridge financial company or involving its assets or liabilities, or extensions of credit from a Federal Reserve Bank or the FDIC to a covered financial company.

(9) Section 380.35(b)(2)(i) of the Final Rule permits the receiver to consider a claim filed after the claims bar date if the claimant did not have notice of the appointment of the receiver in time to file its claim because the claim is based on an act or omission of the receiver that occurs after the claims bar date. The Proposed Rule addressed claims that did not "accrue" until after the claims bar date. It was decided, however, that this was too broad because it could cover contingent claims, which are addressed in § 380.39 of the Final Rule.

(10) Sections 380.50 – 380.53 of the Proposed Rule have been extensively modified to more fully protect the rights of secured claimants. Property of a covered financial company will be valued at the time of any proposed disposition or use of the property. A secured claimant may request the receiver's consent to exercise its rights against its collateral, which the receiver will grant unless it decides to use, sell or lease the collateral, in which case the receiver must provide adequate protection of the claimant's security interest in the property.

C. Section-by-section analysis of the Final Rule

1. Subpart A – General and miscellaneous provisions

Definitions. Section 380.1 of the Final Rule contains definitions of the following terms of general applicability to part 380: "allowed claim," "Board of Governors," "bridge financial company," "compensation," "corporation," "covered financial company," "covered subsidiary," "director," "Dodd-Frank Act," "employee benefit plan," "insurance company," and "senior executive." Some of these terms are terms that are defined in the Act which were not included in the IFR or the Proposed Rule, and others had been included among the substantive provisions of those rules but are now

moved to § 380.1 because those terms are, or may be, used on more than one occasion throughout part 380. All of the definitions are consistent with the language of the Dodd-Frank Act. By and large, definitions that had been included in the IFR and the Proposed Rule have not been changed. The terms “Board of Governors,” “Dodd-Frank Act” and “employee benefits plan” were added for ease of reference and the avoidance of doubt. A clarifying change was made to the definition of “director” to make clear that the term includes individuals serving entities that may have a different legal form than a corporation, such as a limited liability company, in a capacity similar to a director for a corporation.

Few comments were received on these definitions. One commenter argued that the definition of “compensation” should use only the precise language of section 210(s)(3) of the Act, and not include any additional language. The Proposed Rule provided greater clarity to the industry by providing a non-exclusive list of the types of compensation that would be subject to recoupment that is consistent with the intent of section 210(s). Accordingly, no change to this definition is being made in the Final Rule.

Section 380.2 is reserved; the content of § 380.2 of the IFR has been moved to § 380.27 of the Final Rule and is discussed below.

Personal service agreements. Section 380.3 of the Final Rule assures that an employee who provides services to the covered financial company after appointment of the receiver, or to the bridge financial company, will be paid for such services according the terms of any applicable personal service agreement, and such payment shall be treated as an administrative expense of the receiver. This provision does not restrict the receiver’s ability to repudiate a personal services agreement, nor does it impair the ability

of the receiver to negotiate different terms of employment by mutual agreement. Section 380.3 does not apply to senior executives or directors of a covered financial company and it does not limit the power to recover compensation previously paid to senior executives or directors under section 210(s) of the Dodd-Frank Act and the regulations promulgated thereunder.

Only one comment addressed the treatment of personal service agreements under § 380.3 of the IFR. That comment pointed out that the reference to covered subsidiaries in the IFR was confusing, because covered subsidiaries are, by definition, not in receivership and therefore contracts to which the subsidiary is a party cannot be repudiated by the Corporation as receiver pursuant to section 210(c) of the Act. Section 380.3 of the IFR was intended to address the possibility that an agreement entered into by a parent company may cover employees of an affiliate or subsidiary of the covered financial company. It is the intent of the rule that employees be paid for work performed under a contract with a covered financial company or, if applicable, a bridge financial company, in accordance with the terms of the agreement until such time as the contract is assumed by a third party or repudiated by the Corporation as receiver. To the extent that the Corporation as receiver for the covered financial company has the power to exercise control over a subsidiary, it will ensure that employees of the subsidiary continue to be paid in accordance with the personal services agreement. However, the reference to covered subsidiaries has been deleted from § 380.3 in the Final Rule to clarify that this section does not imply that the Corporation as receiver has the power to repudiate a contract entered into by a covered subsidiary nor does it have the power to enforce the

terms of such a contract except by virtue of its role as parent to such subsidiary, unless or until the Corporation is appointed as receiver of a subsidiary.

As a technical revision to the IFR, § 380.3 of the Final Rule does not include the definition of the term “senior executive” as the IFR had. The definition of that term has been moved into the general definitions of § 380.1. In addition, a reference is included in last sentence of § 380.3(c) to the rules regarding recoupment of executive compensation included in this Final Rule at § 380.7.

Section 380.4 is Reserved as the content of that Proposed Rule has been moved to § 380.39 and is discussed below.

Insurance company subsidiaries. The IFR provides at § 380.5 that where the Corporation acts as receiver for a direct or indirect subsidiary of an insurance company, the value realized from the liquidation of the subsidiary will be distributed according to the priorities established in the Dodd-Frank Act and will be available to the policy holders of the parent insurance company. No comments were received recommending changes to § 380.5 of the IFR. The sole revision to that section in the Final Rule is to include a reference to the regulations promulgated under section 210(b)(1) of the Act that are included in subpart B of this Final Rule.

Liens on insurance company assets. Section 380.6 of the IFR limits the ability of the FDIC to take liens on insurance company assets and assets of the insurance company’s covered subsidiaries under certain circumstances after the FDIC has been appointed as receiver. As discussed in the preamble of the notice of proposed rulemaking with respect to this rule, section 204 of the Dodd-Frank Act provides that in the event that the FDIC as receiver of a covered financial company determines it to be necessary or

appropriate, it may provide funding for the orderly liquidation of covered financial companies and covered subsidiaries by, among other things, making loans, acquiring debt, purchasing assets or guaranteeing them against loss, assuming or guaranteeing obligations, making payments, or entering into certain transactions. In particular, pursuant to section 204(d)(4) of the Dodd-Frank Act, the FDIC is authorized to take liens “on any or all assets of the covered financial company or any covered subsidiary, including a first priority lien on all unencumbered assets of the covered financial company or any covered subsidiary to secure repayment” of any advances made.

Commenters to the IFR questioned the reference to liens on assets of an affiliate of a covered financial company as well as assets of a covered subsidiary. The FDIC as receiver has clear authority under section 204(d)(4) of the Act to take a lien on the “assets of the covered financial company or any covered subsidiary to secure repayment of any transactions conducted” under that section. While section 203(e) of the Act contemplates that the FDIC could be appointed as receiver for an affiliate of an insurance company that is not itself a subsidiary, it is clear that upon appointment, the affiliate would become a covered financial company, rendering the reference to “affiliates” in § 380.6 superfluous. The Final Rule has been revised accordingly to eliminate the reference to “affiliates” of the covered financial company and to make clear that the rule applies only to covered subsidiaries of insurance companies.

Recoupment of Compensation. Section 380.7 of the Final Rule implements section 210(s) of the Dodd-Frank Act, which authorizes the FDIC as receiver to recoup compensation when a current or former senior executive or director is “substantially responsible” for the failed condition of a covered financial company. The Final Rule

provides, in pertinent part, that a senior executive or director would be deemed “substantially responsible” if he or she failed to conduct his or her responsibilities with the degree of skill and care required by that position. Comments received on § 380.7 of the Proposed Rule sought clarification or made recommendations regarding this standard. Some comments took the position that substantial responsibility should be based on state law or established legal standards. One commenter took the position that substantial responsibility should exist based solely on the failure of the covered financial company with no inquiry into conduct. In response to the comments, the Final Rule clarifies the standard and provides that a senior executive or director would be deemed “substantially responsible” if he or she failed to conduct his or her responsibilities with the degree of skill and care an ordinarily prudent person in a like position would exercise under similar circumstances. The revision clarifies that the standard of care that will trigger Section 210(s) is a negligence standard; a higher standard, such as gross negligence, is not required. In the event that a covered financial company is liquidated under Title II, the FDIC as receiver will undertake an analysis of whether the individual has breached his or her duty of care, including an assessment of whether the individual exercised his or her business judgment. The burden of proof, however, will be on the former senior executive or director to establish that he or she exercised his or her business judgment. State “business judgment rules” and “insulating statutes” will not shift the burden of proof to the FDIC or increase the standard of care under which the FDIC as receiver may recoup compensation.

The Final Rule provides that, in certain limited circumstances, a senior executive or director would be presumed to be substantially responsible for the failed condition of

the covered financial company. Some commenters objected to the use of the rebuttable presumption of substantial responsibility that was based on the position or the duties of the current or former senior executive or director. Those commenters argued that a presumption based solely on an individual's position in a company would be a disincentive for any individual to take that position and would be detrimental to the financial industry. Other commenters objected to the presumption of substantial responsibility that was based on an individual's removal from his or her position under section 206 of the Act. One commenter argued that the presumption exception for "white knights" was too narrow and would serve as a disincentive for individuals to take positions with financially impaired companies. The statutory language of the Dodd-Frank Act provides for the recoupment of compensation from current or former senior executives or directors of covered financial companies when they have not performed their duties and responsibilities. The use of rebuttable presumptions for those individuals under the limited circumstances described in the Proposed Rule is aligned with the intent shown in the statutory language; thus, the presumptions remain unchanged in the Final Rule.

Some comments requested clarification of the procedure that would be used for pursuing recoupment of compensation. The FDIC anticipates that it will seek recoupment of compensation through the court system using a procedure similar to the procedure that it currently uses when it seeks recovery from individuals whose negligent actions have caused losses to failed financial institutions. In those situations, the FDIC as receiver undertakes an investigation to determine if there are meritorious and cost-effective claims and, if so, staff requests authority to sue from the FDIC Board of

Directors or the appropriate delegated authority. Similarly, under section 210(s) of the Act, the FDIC anticipates that it will investigate whether the statutory criteria for compensation recoupment are met and, if so, staff will request authorization of a suit for recoupment. The Final Rule reflects this procedure by indicating that the FDIC as receiver may file an action to seek recoupment of compensation.

The Final Rule has a "savings clause" to preserve the rights of the FDIC as receiver to recoup compensation under all applicable laws.

Treatment of fraudulent and preferential transfers. Section 380.9 of the Proposed Rule addressed the powers granted to the FDIC as receiver in section 210(a)(11) of the Dodd-Frank Act to avoid certain fraudulent and preferential transfers and sought 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 Title II as they would in a bankruptcy proceeding.

One commenter noted that § 380.9(b)(2) of the Proposed Rule provided that the term "fixture" shall be interpreted in accordance with federal bankruptcy law, and stated that a bankruptcy court would look to applicable non-insolvency law when determining what constitutes a fixture. The commenter pointed out that typically under non-insolvency law, the law of the state in which a fixture is located would govern the determination of what constitutes a fixture, and suggested that the FDIC need not apply a federal rule to determine what a fixture is for preference purposes. By providing in the Proposed Rule that the term "fixture" is to be interpreted in accordance with federal bankruptcy law, it was intended that the term be interpreted in the same manner as under federal bankruptcy law. Thus, to the extent that bankruptcy courts continue to define

“fixture” by reference to applicable non-insolvency law, including state law, the same analysis would be applied to define “fixture” under § 380.9. Therefore, the provision does not create a new federal rule to define “fixture,” and no clarifying change to the Final Rule is necessary.

2. Subpart B – Priorities

Subpart B addresses the priority for expenses and unsecured claims established under section 210(b) of the Act. It organizes and clarifies provisions throughout the Act dealing with the relative priorities of various creditors with unsecured claims against a failed financial company.

Priorities. Section 380.21 lists each of the eleven priority classes of claims established under the Dodd-Frank Act in the order of its relative priority. In addition to the specified priorities listed in section 210(b) of the Act, the Final Rule integrates additional levels of priority established under section 210(b)(2) (certain post-receivership debt); section 210(a)(13) (claims for loss of setoff rights); and section 210(a)(7)(D) (post insolvency interest).

Section § 380.21(b) conforms the method of adjusting certain payments for inflation to the similar provisions of the Bankruptcy Code. Section 380.21(c) provides that each class will be paid in full before payment of the next priority, and that if funds are insufficient to pay any class of creditors, the funds will be allocated among creditors in that class, *pro rata*.

Section 380.21 of the Final Rule contains four changes from the language of the Proposed Rule. The introduction to paragraph (a) now uses the defined term “allowed claims” for consistency and to clarify that this rule applies only to unsecured claims,

including the unsecured portion of under-secured claims. This change is in response to the request of several commenters that this important point be made even clearer and more express in recognition of the mandate of section 210(b)(5) that section 210 of the Act shall not affect a secured claim except to the extent that the security is insufficient to satisfy the claim. Also, § 380.21(a)(3) was modified to clarify that the class of claims for "amounts owed to the United States" does not include obligations that meet the definition of administrative expenses in § 380.22. A corresponding clarification has been made to § 380.23. A technical change to § 380.21(a)(4) and (5) substitutes the word "within" for the phrase "not later than" to make clear that the relevant employees' claims must arise during the time period within 180 days before the date of the appointment of the receiver.

A comment also requested clarification of the impact of contractual agreements on priorities. The last sentence of § 380.21(c) is added in response to that comment, to make clear that enforceable contractual subordination agreements will be respected. This is consistent with section 510(a) of the Bankruptcy Code, which provides that subordination agreements enforceable under applicable non-bankruptcy law will be respected by the trustee in bankruptcy.

Administrative expenses of the receiver. Section 380.22 of the Proposed Rule expanded and clarified the statutory definition of the term "administrative expenses of the receiver" by consolidating various statutory references to administrative expenses in a single section and by making clear that administrative expenses of the receiver can include costs and expenses incurred by the FDIC prior to the appointment as receiver, as

well as post-appointment expenses if the expenses are necessary and appropriate to facilitate the smooth and orderly liquidation of the covered financial company.²

The changes to § 380.22 of the Proposed Rule are intended solely to provide clarity. A commenter questioned how expenses of the receiver might pre-date the appointment of the receiver. The change to “pre- and post-failure costs and expenses of the FDIC in connection with its role as receiver” clarifies that costs incurred in anticipation of and preparation for the role as receiver are administrative expenses of the receiver. Similarly, comments revealed some confusion about debt accorded super priority status ahead of administrative expenses under § 380.21(a)(1) of the Proposed Rule. The language of the Final Rule more closely tracks the statutory language with respect to debt that qualifies for super priority status.

Amounts owed to the United States. Section 380.23 of the Proposed Rule established a definition of “amounts owed to the United States” that are entitled to be paid at the level of priority immediately following administrative expenses. It defined that class of claims to include amounts advanced by the Department of Treasury, or by any other department, instrumentality or agency of the United States, whether such sums are advanced before or after the appointment of the receiver. It expressly included advances by the FDIC for funding of the orderly liquidation of the covered financial company pursuant to section 204(d)(4) of the Act but also included other sums advanced by departments, agencies and instrumentalities of the United States such as payments on FDIC corporate guarantees, including the Temporary Liquidity Guarantee Program and

² Claims for certain expenses incurred in connection with the liquidation of a covered broker or dealer that qualify for administrative expense priority are not addressed in the Proposed or Final Rule because matters relating to the liquidation of a covered broker-dealer under section 205(f) of the Act are required to be addressed in a separate rule being prepared jointly with the SEC.

unsecured claims for net realized losses by a federal reserve bank in connection with loans made under section 13(3) of the Federal Reserve Act, 12 U.S.C. 343, and unsecured accrued and unpaid taxes owed to the United States.

Several comments requested clarification with respect to the relationship between pre- and post-receivership administrative expenses incurred by the Corporation that were described in § 380.22 of the Proposed Rule and are included in the administrative expense class of claims under § 380.21(a)(2). For the sake of clarity, § 380.23 of the Final Rule states that amounts owed to the United States do not include any amounts included in the administrative expense classes of claims at § 380.21(a)(1) and (a)(2).

All of the comments specifically addressing § 380.23 of the Proposed Rule reflected concerns that expressly including amounts owed to all "departments, agencies and instrumentalities" of the United States in the regulatory definition of "amounts owed to the United States" was vague and potentially overbroad. Clarification was requested with respect to a specific examples of amounts that might be deemed to be included in the broad definition under the Proposed Rule, such as amounts owed to the Pension Benefit Guaranty Corporation arising out of underfunded pension obligations, amounts owed to the Environmental Protection Agency arising out of superfund cleanup obligations, and fees payable to the Securities and Exchange Commission or other regulatory agencies, to name a few. In the Final Rule, the phrase "departments, agencies and instrumentalities" of the United States found in the Proposed Rule is omitted in favor of the simpler statutory reference to the "United States." This change is not intended to limit the definition strictly to amounts owed to Treasury and the Final Rule expressly provides in §

380.23(a) that amounts owed to agencies or instrumentalities other than Treasury for certain purposes will be included as “amounts owed to the United States.”

Section 380.23(a) adds language to make clear that the priority for amounts owed to the United States relates to amounts advanced in connection with the purposes and mandates of Title II of the Act, namely, to conduct the orderly resolution of a covered financial company, to avoid or mitigate adverse consequence to the financial stability of the United States arising out of the failure of the covered financial company and to ensure that outstanding tax obligations to the Treasury are repaid to protect the taxpayers. These include obligations such as advances under the Temporary Liquidity Guaranty Program that was created by the FDIC to address a systemic liquidity crisis, repayment of the amount of any debt owed to a Federal reserve bank related to loans made through programs or facilities authorized under the Federal Reserve Act, 12 U.S.C. 221 *et seq.*, as well as repayment of unpaid unsecured federal income tax obligations of the covered financial company.

Although the language of the Dodd-Frank Act does not provide elaborate on the intent of the phrase “amounts owed to the United States,” it is clear that it is not intended to include all amounts owed to the United States of any kind or nature. The fact that the Act specifically mentions the inclusion of some obligations,³ suggests that others must be excluded, and that it is not the intent of the Act to elevate liabilities for unsecured amounts due to government departments, agencies or instrumentalities arising in the covered financial company’s ordinary course of business over other general or senior liabilities. Thus, the Final Rule includes a new paragraph (b) to establish the general rule

³ For example, section 204(d)(4) (funding for orderly liquidation), section 210(c)(6)(C) (certain advances from the SIPC Fund), and section 1101(a)(6)(E) (net realized losses on certain loans by a Federal reserve bank) all are specifically designated as receiving the priority for “amounts owed to the United States.”

that obligations incurred prior to the appointment of the receiver that are unrelated to the particular mandates of the Dodd-Frank Act will not be included among the class of claims described in § 380.21(a)(3). The Final Rule expressly provides that unsecured obligations such as any unsecured portion of a Federal Home Loan Bank advance or payments due under guarantees from government sponsored entities such as the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation are not included among "amounts owed to the United States." These exclusions were identified in the preamble to the Proposed Rule. Similarly, the Final Rule provides that unsecured unpaid filing or registration fees due to any federal agency would not be classified as "amounts owed to the United States" because they are unrelated to the mandates of the Dodd-Frank Act. These unsecured amounts would be included among the priority class otherwise applicable to such claims under § 380.21(a)(7).

New paragraph (5) in § 380.23(a) was added to clarify that government departments, agencies, and instrumentalities may, for avoidance of doubt, expressly designate amounts advanced as amounts intended to be included as amounts owed to the United States for the purpose of the priorities established in § 380.21. Such designation would be used in the case of advances to a financial company to avoid or mitigate adverse effects on the financial stability of the United States or to liquidate a covered financial company.⁴ Any such designation would be in writing by the appropriate department, agency or instrumentality in a form acceptable to the FDIC.

⁴ Although not expressly stated in this rule, amounts paid to customers of a covered broker dealer or to the Securities Investors Protection Corporation (SIPC) pursuant to section 205(f) are entitled to the same priority as amounts owed to the United States pursuant to section 210(b)(6). These issues will be addressed in a joint rulemaking with the SEC as required by to section 205(h) of the Act.

In addition, some commenters requested clarification that the rule does not affect the rights of secured creditors. No change to the rule is necessary to clarify that point. The priorities established under section 210(b) of the Act relate only to unsecured claims and do not affect the rights of secured creditors, which are addressed in §§ 380.50-53 of the Final Rule. To underscore this point, the reference to “secured or unsecured” amounts advanced under section 204(d) of the Act in § 380.23(a)(1) of the Proposed Rule has been deleted in the Final Rule. Although the text of section 204(d) of the Act refers both to the priorities under section 210(b) and to taking liens to secure amounts advanced, it is a clearer, more consistent approach to treat all secured claims under the rules applicable to such claims and not under the priorities applicable to unsecured claims.

Finally, some commenters expressed concern that that the definition of “amounts owed to the United States” may have the effect of increasing the amount of risk-based assessments that may be charged by the FDIC under section 210(o)(1)(B) of the Dodd-Frank Act. That provision authorizes and directs the FDIC to impose risk-based assessments on eligible financial companies “if such assessments are necessary to pay in full the obligations issued by the [FDIC] to the Secretary [of Treasury] under [Title II] within 60 months of the date of issuance of such obligations.” The priority of payments applied by the receiver in the liquidation of the assets of the covered financial company is independent of the assessments imposed by FDIC in its corporate capacity in exercising its authority under section 210(o) of the Act. While only the obligations that are expressly included in section 210(a)(1)(B) of the Act are entitled to the benefit of the assessments, this does not constitute a preferential payment to a similarly situated

creditor because it is imposed pursuant to a statutory requirement and cannot be subject to claw back under section 210(o)(1)(D)(i)

Paragraph (c) of § 380.23 is unchanged. It acknowledges that the United States may subordinate its right to repayment behind any class of creditors by express written consent, provided that in any event all amounts due to the United States must be paid prior to any payment to equity holders of the covered financial company. Absent such express written subordination, all amounts owed to the United States will be paid at the priority under § 380.21(a)(3), regardless of whether they are characterized as debt or equity on the books of the covered financial company.

Claims for loss of setoff rights. Section 380.24 of the Final Rule addresses the claims of creditors who have lost a right of setoff due to the exercise of the receiver’s right to sell or transfer assets of the covered financial company free and clear in a manner consistent with the express provisions of the Act. Any claim for the loss of setoff rights is given a priority above other general unsecured creditors but below administrative claims, amounts owed to the United States and certain employee-related claims.

Several comments to § 380.24 pointed out that the treatment of setoff under the Proposed Rule is different from the practice in bankruptcy and took issue with the statement in the preamble to the Proposed Rule that treatment of setoff claims under the Dodd-Frank Act “should normally provide value to setoff claimants equivalent to the value of setoff under the Bankruptcy Code.” These commenters agreed with the statement in the preamble that in bankruptcy setoff rights are functionally equivalent to a secured claim and pointed out that this is a significantly higher place in the preference scheme than the super-priority general unsecured creditor status that claims arising out of

loss of setoff rights are granted under the Dodd-Frank Act. In context, the quoted sentence points out that it is anticipated that in most cases there will be sufficient funds to pay creditors with claims arising out of loss of setoff right in a Title II orderly liquidation, Dodd-Frank orderly resolution, not that the outcome is certain to be identical under either priority scheme. The Dodd-Frank Act provides that a creditor who has lost a right of setoff due to the exercise of the receiver's right to sell or transfer assets of the covered financial company free and clear of the claims of third parties pursuant to section 210(a)(12)(F) is entitled to a claim senior to all unsecured liabilities other than those described in section 210(b)(A)-(D) of the Act (i.e., immediately behind the class of general unsecured creditors and senior liabilities described in § 380.21(a)(7)). The language of the Proposed Rule respected this clear expression of intent by the legislature, and no change to this language is made in the Final Rule with respect to the priority accorded to claims arising from loss of setoff rights.

Commenters also sought clarification that § 380.24 does not affect the contractual rights of netting with respect to qualified financial contracts that are protected under the Dodd-Frank Act. Section 210(c)(8) of the Act provides that qualified financial contracts are exempt from provisions of the Act limiting any right to offset in certain circumstances. Accordingly, a new paragraph (c) was added to § 380.24 in the Final Rule to clarify that the provisions of this section are not intended to disturb such rights with respect to qualified financial contracts. If a qualified financial contract is subject to a master agreement, such master agreement will be treated as a single agreement as provided in section 210(c)(8)(D)(viii).

Post-insolvency interest. Section 380.25 of the Final Rule establishes a post-insolvency interest rate, as required by section 210(a)(7)(D) of the Dodd-Frank Act. That rate is based upon the coupon equivalent yield of the average discount rate set on the three-month T-bill, which is consistent with the post-insolvency interest rate applied to claims under section 11(d)(10)(C) of the Federal Deposit Insurance Act (the "FDI Act"), 12 U.S.C. 1821(d)(10)(C). (See 12 CFR 360.7.)

Six comments pertaining to § 380.25 of the Proposed Rule were received. Commenters variously suggested the use of the federal rate as is the practice in some bankruptcy cases, or the contract rate where one is specified, or any specified contract rate other than a default rate. Two commenters agreed that the use of a post-insolvency interest rate based on the average discount rate for the three-month Treasuries is appropriate, at least where no contract rate is provided. One commenter pointed out that given the fact that post-insolvency interest is paid only after all creditors have been fully paid, the provision will rarely, as practical matter, materially affect creditors. As was recognized by some commenters, there is no express rule for treatment of post-insolvency interest under the Bankruptcy Code and applicable case law is not uniform. The Final Rule adopts the language of the Proposed Rule with respect to the method of calculating the post-insolvency interest rate for unsecured claims without change, in favor of the consistency and ease of administration of the rate that has been applied by the FDIC with respect to claims under the FDI Act.

Bridge financial companies. Section 380.26 was included in the Proposed Rule during the early stages of the rulemaking process because of the importance of addressing two issues that were the subject of several requests for clarification. First, it made clear

that any contract or agreement purchased and assumed or entered into *de novo* by the bridge financial company become the obligations of the bridge financial company and that the bridge financial company shall enforce and observe the terms of any such contract or agreement. Secondly, it stated that any remaining assets or proceeds of the bridge after payment of all administrative expenses and other claims shall be distributed to the receiver of the related covered financial company for the benefit of the creditors of that covered financial company.

Commenters have continued to call for additional clarifications with respect to the treatment of bridge financial companies and their assets and liabilities. A more expansive treatment of this topic is beyond the scope of the Final Rule and will be the topic of a future rulemaking. Accordingly, other than two minor changes to the language intended simply to clarify the text, the Final Rule is unchanged from the Proposed Rule. The two minor changes are the use of the indefinite “any” in lieu of the definite article “a” before “contract or agreement giving rise to such asset or liability” in paragraph (a), and the use of the defined term “allowed claim” in place of simply the word “claim” in the same paragraph. No substantive changes to the rule are intended by these corrections.

Similarly situated creditors. Section 380.27 contains the provision found at § 380.2 of the IFR addressing the treatment of similarly situated creditors. This provision makes clear that certain categories of creditors, including creditors holding unsecured debt with a term of more than 360 days, will not be given additional payments compared to other general trade creditors or any general or senior liability of the covered financial company nor will exceptions be made for favorable treatment of holders of subordinated debt, shareholders or other equity holders. Although some commenters have supported

this rule, others have consistently objected to it through two rounds of comments. These comments reiterated the objections to this rule that were considered in implementing the IFR. Accordingly, the Final Rule contains no change to the language of the IFR now set forth in § 380.27(a) and (b). These provisions are clearly consistent with the mandate of the Dodd-Frank Act expressed in sections 204(a) and 210(a)(1)(M) that the orderly resolution of covered financial companies is to be undertaken in a manner that ensures that the creditors and shareholders of a covered financial company will bear the losses of the covered financial company.

Paragraph (c) of § 380.2 of the IFR has been deleted in its entirety from § 380.27 of the Final Rule, and is moved to § 380.50(b), as the subject of the treatment of secured creditors is addressed in §§ 380.50-53.

Although not impacting the text of the rule, one new topic was addressed in a joint comment letter from two trade associations representing the banking and securities industries. This letter suggested an alternative approach for the orderly resolution of systemically important financial institutions that would provide for the exchange of certain subordinate debt for equity. The joint working paper prepared by these trade associations describes a recapitalization plan that the FDIC could implement following its appointment as receiver of a covered financial company via the transfer of the viable assets and businesses of a failed institution into a bridge company established after failure and a conversion of certain creditors of the failed institution into equity holders in the bridge company. In the view of the commenters, this approach would neither be considered a traditional "bail-in" recapitalization nor contingent capital, nor would it require a taxpayer-funded bailout. The commenters suggest that this approach might also

facilitate the discussion of the resolution of a failed cross-border financial institution. No change to § 380.2 of the Proposed Rule is made in connection with this proposal, as any exchange of debt for equity in the bridge would be accomplished pro rata and in accordance with the priorities established under § 380.21. Furthermore, although this approach may prove to be useful in conducting an orderly liquidation of a covered financial company in certain circumstances, comment on this particular approach is outside the scope of the Final Rule. This letter may, however, be seen as an example of the value generated by constructive dialogue between the private financial markets and the federal government on topics such as this one.

3. Subpart C – Receivership administrative claims process

Subpart C of the Final Rule adopts and interprets where necessary the administrative claims determination process provided for in the Act.

Receivership administrative claims process. Section 380.30 of the Final Rule reflects the authorization under the Dodd-Frank Act that the FDIC as receiver of the covered financial company shall determine all claims in accordance with the statutory procedures set forth in sections 210(a)(2) – (5) of the Act and with the regulations promulgated by the FDIC.

Scope & Applicability. Section 380.31 of the Final Rule addresses the scope of the claims process. It clarifies that the claims process will not apply to a bridge financial company or to any extension of credit from a Federal reserve bank or the FDIC to a covered financial company. Commenters sought clarification that the claims process does not affect the contractual rights of netting and setoff with respect to qualified financial contracts that are protected under the Dodd-Frank Act. This concern is

addressed in § 380.51(g) of the Final Rule, which excepts qualified financial contracts from the requirement to seek the consent of the receiver before exercising contractual rights against property of the covered financial company. If a party to a qualified financial contract has an unsecured claim after terminating the contract and liquidated any collateral, such claim would be subject to the claims process.

The definitions in § 380.31 of the Proposed Rule have been moved into the general definitions of § 380.1 of the Final Rule.

Claims bar date. Section 380.32 of the Final Rule follows section 210(a)(2)(B) of the Dodd-Frank Act authorizing the receiver to establish a "claims bar date" by which creditors of the covered financial company are to file their claims with the receiver. The claims bar date must be identified in both the published notices and the mailed notices required by the statutory procedures. Section 380.32 clarifies that the claims bar date is calculated from the date of the *first* published notice to creditors, not from the date of appointment of the receiver.

Notice requirements. Section 380.33 of the Final Rule follows the statutory procedures for notice to creditors of the covered financial company. As required by the statute, upon its appointment as receiver of a covered financial company, the FDIC as receiver will promptly publish a notice; subsequently, the receiver will publish a second and third notice one month and two months, respectively, after the first notice is published. The notices must inform creditors to present their claims to the receiver, together with proof, by no later than the claims bar date. The Final Rule provides that the notices shall be published in one or more newspapers of general circulation in the market where the covered financial company had its principal place of business. In recognition

of the public's growing reliance on communication using the Internet as well as the prevalence of online commerce, the FDIC may also post the notice on its public website. Several comments suggested that notices be published in certain specific financial news media both domestically and abroad. The Final Rule does not adopt this suggestion; the FDIC will provide notices in specific media that will be appropriate under the particular circumstances.

Discovered claimants. In addition to publishing the notice described in § 380.33(a), the receiver also must mail a notice that is similar to the publication notice to each creditor appearing on the books and records of the covered financial company. The mailed notice will be sent at the same time as the first publication notice to the last address of the creditor appearing on the books or in any claim filed by a claimant. The Final Rule supplements this procedure by providing that after sending the initial mailed notice, the receiver may communicate by electronic media (such as email) with any claimant who agrees to such means of communication. This provisions will facilitate the filing of claims electronically if a claimant chooses to do so.

Section 380.33(d) of the Final Rule clarifies the treatment of creditors that are discovered after the initial publication and mailing has taken place. The FDIC as receiver will mail a notice similar to the publication notice to any claimant not appearing on the books and records of the covered financial company no later than 30 days after the date that the name and address of such claimant is discovered. If the name and address of the claimant is discovered prior to the claims bar date, such claimant will be required to file the claim by the claims bar date. There may be instances when notice to the discovered claimant is sent too close before the claims bar date to reasonably permit timely filing,

however. In such a case, the claimant may invoke the statutory exception for late-filed claims set forth in section 210(a)(3)(C)(ii) of the Dodd-Frank Act in order to have its claim considered by the receiver.

Because section 210(a)(2)(C) of the Dodd-Frank Act does not distinguish between claimants discovered before and claimants discovered after the claims bar date, the statute literally would require the receiver to mail a notice of the claims bar date to a claimant discovered after such date. However, such a discovered claimant cannot file a claim timely if the claims bar date has already passed. Therefore, the Final Rule provides that a claimant discovered after the claims bar date will be given 90 days to file a claim. This time frame is consistent with the time frame set forth in section 210(a)(2)(B) of the Dodd-Frank Act, which provides for the claims bar date to be not less than 90 days after the first publication of the notice to creditors. The receiver will disallow any claim filed by such a “late-discovered” claimant after the 90-day period, however.

Some comments suggested that claimants discovered within 30 days before the claims bar date should not be required to submit a claim by the claims bar date but given additional time to file a claim. This suggestion is unnecessary because the Dodd-Frank Act’s late-filed claim exception (see section 210(a)(3)(C)(ii)) encompasses claimants who are notified before the claims bar date but do not have sufficient time to prepare and file a claim before such date. In such a case, the claimant must show that it did not have notice of the appointment of the receiver in time to file by the claims bar date.

Procedures for filing claims. Section 380.34 of the Final Rule provides guidance to potential claimants regarding certain aspects of filing a claim. The FDIC as receiver has determined to provide creditors with instructions on how to file a claim in several

different formats. These will include providing FDIC contact information in the publication notice, providing a proof of claim form and filing instructions with the mailed notice, and posting a link to the FDIC's non-deposit claims processing web site. A claim will be deemed filed with the receiver as of the date of postmark if the claim is mailed or as of the date of successful transmission if the claim is submitted by facsimile or electronically.

This section also confirms that each individual claimant must submit its own claim and that no single party may assert a claim on behalf of a class of litigants. On the other hand, a trustee named or appointed in connection with a structured financial transaction or securitization is permitted to file a claim on behalf of the investors as a group because in such a case the trustee legally owns the claim. The suggestion that an agent bank in a syndicated loan arrangement be permitted to file a claim on behalf of the lender group was rejected because each lender in a syndication arrangement has contractual privity with the borrower and therefore should be required to file a claim on its own behalf. The Final Rule follows the statutory provision that the filing of a claim constitutes the commencement of an action for purposes of any applicable statute of limitations and does not prejudice a claimant's right to continue any legal action filed prior to the date of the receiver's appointment. The Final Rule also clarifies that the claimant cannot continue its legal action until after the receiver determines the claim.

Determination of claims. Section 380.35 of the Final Rule follows the requirements of section 210(a)(3) of the Dodd-Frank Act authorizing the receiver to allow and disallow claims. The FDIC has added a clarifying clause in the Final Rule to be

consistent with section 2100(a)(3)(D)(iii) of the Act, which excludes any extension of credit from a Federal reserve bank or the FDIC to a covered financial company.

Late filed claim exception. Section 210(a)(3)(C) of the Dodd-Frank Act instructs the receiver to disallow any claim that is filed after the claims bar date subject to an exception for certain late-filed claims. Under this exception, a claim filed after the claims bar date may be considered by the receiver if (i) the claimant did not have notice of the appointment of the receiver in time to file by the claims bar date and (ii) the claim is filed in time to permit payment by the receiver. As in the Proposed Rule, § 380.35(b)(2) of the Final Rule incorporates the statutory exception.

Some comments suggested that an “excusable neglect” exception to late filed claims similar to the Bankruptcy Code should be used. This suggestion is inapposite because, as discussed, the Dodd-Frank Act’s late-filed claim exception encompasses claimants who are notified before the claims bar date but do not have sufficient time to prepare and file a claim before such date. In such a case, the claimant may show that it did not have notice of the appointment of the receiver in time to file by the claims bar date. Congress intended for late-filed claims to be disallowed unless the claimant qualifies for the late-filed claim exception. (See section 210(a)(3)(C) of the Act.)

One comment noted that under section 726(a) of the Bankruptcy Code, late-filed claims are paid ahead of claims for post-petition interest and distributions to the holders of equity interests. It was suggested that a similar treatment be adopted for the payment of late-filed claims in covered financial company receiverships. This suggestion cannot be adopted because Congress has established the order of priority of claims in the Dodd-Frank Act and the FDIC has not been given the authority to alter that priority scheme.

Section 380.35(b)(2)(i) has been revised in the Final Rule in order to accommodate specifically claims based on an act or omission of the receiver, such as a repudiation or breach of a contract, that occurs after the claims bar date. Section 210(a)(9)(D)(ii) of the Dodd-Frank Act deprives a court of jurisdiction over any claim relating to any act or omission of the FDIC as receiver unless the claimant first complies with the receivership administrative claims process. A party to a contract that is repudiated or breached by the receiver after the claims bar date, however, would be unable to timely file a claim and would not technically qualify for the statutory late-filed claim exception because it would be unable to show that it did not have notice of the appointment of the receiver prior to the claims bar date; accordingly, this party could neither comply with the claims process nor have a court determine its claim. In order to provide relief to a party in this situation, the Final Rule permits the receiver to consider a claim filed after the claims bar date if the claim is based on an act or omission of the receiver that occurs after the claims bar date. In the Proposed Rule, the late-filed claim exception had been expanded to encompass any claim that did not accrue until after the claims bar date. After consideration, it was determined that this provision would have been too broad because it could be read to encompass contingent claims which are addressed separately in § 380.39.

Decision period. Section 380.36 of the Final Rule provides that under the statute the receiver must notify a claimant of its decision to allow or disallow a claim prior to the 180th day after the claim is filed. The Final Rule also provides that the claimant and the receiver may extend the claims determination period by mutual agreement in writing. In accordance with the statute, the receiver must notify the claimant regarding its determination of the claim prior to the end of the extended claims determination period.

Notification of determination. As required by section 210(a)(3)(A)(i) of the Dodd-Frank Act, § 380.37 of the Final Rule provides that the receiver will notify the claimant that the claim is allowed or disallowed. The notification will be mailed to the claimant as set forth in section 210(a)(3)(A)(iii) of the Act, unless the claimant has filed its claim electronically, in which case the receiver may use electronic media for the notification. If the receiver disallows the claim, the notification will provide the reason(s) for the disallowance and also advise the claimant of the procedure for filing or continuing an action in court.

The Final Rule reiterates the provisions of section 210(a)(3)(A)(ii) of the Dodd-Frank Act that if the receiver fails to notify the claimant of any disallowance within 180 days after the claim is filed, or the end of any extension agreed to by the claimant, the claim will be deemed to be disallowed. The claimant may then file or continue an action in court as provided in section 210(a)(4) of the Act. The Final Rule has been revised to cite the statutory authority for this provision. Comments on this aspect of the rule suggested that after 180 days the claim should be deemed to be allowed instead of disallowed. Other comments suggested that the receiver should provide affirmative notification of the disallowance of a claim at the end of the claims determination period. These suggestions cannot be adopted because they are contrary to the provisions of the Act. In section 210(a)(3)(D)(ii) of the Act, Congress adopted the approach that the failure to notify the claimant of a disallowance within 180 days after the claim is filed is deemed to be disallowed in order to impose a clear and reasonable time limit on the receiver's consideration of claims. Without such a time limit, the claims procedure would be inadequate and not subject to exhaustion as a prerequisite for judicial

determination, which would be contrary to the intent of Congress. Once the claimant enters the receivership claims process by filing a claim, the claimant is on notice of the statutory provisions governing that process and will bear the responsibility to monitor the claims determination period in order to timely file or continue a lawsuit with respect to the claim.

Procedures for seeking judicial review of disallowed claim. Section 380.38 of the Final Rule implements the statutory procedures for a claimant to seek a judicial determination of its claim after the claim has been disallowed or partially disallowed by the FDIC as receiver. Consistent with section 210(a)(4) of the Dodd-Frank Act, a claimant may (i) file a lawsuit on its disallowed claim in the district court where the covered financial company's principal place of business is located, or (ii) continue a previously pending lawsuit.

The Final Rule clarifies that if the claimant continues a previously filed action, the claimant may continue such action in the court in which the case was pending before the appointment of the receiver, resolving any uncertainty whether the action should be "continued" in the district court where the covered financial company's principal place of business is located. (In the case of an action pending in state court, the receiver would have the authority to remove the action to federal court if it chose to do so.) Some comments suggested that the FDIC should designate the district court where the covered financial company's principal office is located as the exclusive forum for judicial review of claims. The FDIC must decline to adopt this suggestion; as discussed, the FDIC must follow the established statutory scheme and cannot alter court jurisdiction or venue when these issues have been decided by Congress.

As provided by statute, § 308.38(c) of the Final Rule provides that the claimant has 60 days to commence or continue an action regarding the disallowed claim. The time period for commencing or continuing a lawsuit would be calculated, as applicable, from the date of the notification of disallowance, the end of the 180-day claims determination date, or the end of the extended determination date, if any. If a claimant fails to file suit on a claim (or continue a pre-receivership lawsuit) before the end of the 60-day period, the claimant will have no further rights or remedies with respect to the claim. This time period is not subject to a tolling agreement between the FDIC and the claimant. The Final Rule affirms that exhaustion of the administrative claims process is a jurisdictional prerequisite for any court to adjudicate a claim against a covered financial company or the receiver, as provided in section 210(a)(9)(D) of the Dodd-Frank Act.

Provability of claims based on contingent obligations. Section 380.39 of the Final Rule addresses contingent claims, which was previously the subject of § 380.4 of the IFR. The holder of a contingent claim against the covered financial company will be required to file its claim by the claims bar date. Section 380.39(a) provides that the receiver will not disallow a claim solely because the claim is based on a contingent obligation. Instead, the receiver will estimate the value of a contingent claim as of the date of the appointment of the receiver. If the receiver repudiates a contingent obligation, repudiation damages shall be no less than the estimated value of the claim as of the date of the receiver's appointment. Comments suggested that any estimation of the value of a contingent claim be delayed until just prior to a final distribution by the receiver. This approach would be inconsistent with the statute because section 210(a)(3)(A) of the Dodd-Frank Act instructs the receiver to determine whether to allow a claim no later than

180-days after the claim is filed, subject to any extension agreed to by the claimant. Therefore, in accordance with the statute, the receiver will estimate the value of a contingent claim before the end of either the 180-day period beginning on the date the claim is filed or any mutually agreed-upon extension of this time period. Unless the contingency becomes absolute and fixed prior to the receiver’s determination of the estimated value, the estimated value will be recognized as the allowed amount of the claim. The estimated value of the contingent claim will represent the receiver’s determination of the claim for purposes of the exhaustion of administrative remedies by the claimant prior to seeking a judicial determination of the claim.

Secured claims. Because section 210(b)(5) of the Dodd-Frank Act provides that section 210 of the Dodd-Frank Act, which sets forth for the powers and duties of the FDIC acting as receiver of a covered financial company, “shall not affect secured claims or security entitlements in respect of assets or property held by the covered financial company,” the Final Rule has been revised to more effectively safeguard the rights of secured claimants. The approach taken in the Final Rule should provide more legal certainty for the secured lenders of a systemically important financial institution.

A number of comments regarding the Proposed Rule expressed concerns about the valuation of property used as collateral, the ability of a secured claimant to exercise its rights against its collateral or to obtain adequate protection of its interest and the need for expedited judicial review of actions by the receiver affecting a secured claimant. The Final Rule contains several revised provisions to address those concerns, satisfy the statutory directive not to affect secured claims, and harmonize with the relevant provisions of the Bankruptcy Code. With respect to judicial review, however,

harmonization with the Bankruptcy Code is not possible. In contrast to a case under the Bankruptcy Code, in which a debtor's or trustee's actions are subject to prior approval by a court, a receivership of a covered financial company is an administrative proceeding conducted by the FDIC as receiver. Under the Act, court jurisdiction is limited and subject to exhaustion of the receivership claims process. A claimant may have its day in court but only after the receiver has first made a determination regarding the claim or the claimant's rights.

Determination of secured claims. Section 380.50 has been revised in the Final Rule to model Bankruptcy Code section 506. Section 380.50(a) affirms that under section 210(a)(3)(D)(ii) of the Dodd-Frank Act, a claim is secured to the extent of the value of the property securing the claim by incorporating the principle that a claim that is secured by property of the covered financial company may be treated as an unsecured claim to the extent that the claim exceeds the fair market value of the property. Section 380.50(b) provides that the fair market value of such property shall be determined in light of the purpose of the valuation and of the proposed disposition or use of the property and at the time of the proposed disposition or use. To illustrate, if a secured claimant requests the receiver's consent to obtain possession of or exercise control over property that secures the claim, the receiver would value the property at the time of the request. If the receiver proposes to sell property that is subject to a security interest, the property will be valued at the time of the sale. By not specifying a particular point in time (such as the date of appointment of the receiver) when property will be valued, the problem of potential windfalls to either the secured claimant or the receiver should be avoided. The

approach taken should provide more accurate valuations, protect the rights of secured creditors, and provide flexibility for the receiver.

Recovery of fees, etc. Section 380.50(c) provides that the receiver may recover from property subject to a security interest any reasonable and necessary costs and expenses of preserving or disposing of the property to the extent the claimant is benefited thereby. When provided for by agreement or State law, claims for interest, fees, costs, and charges are secured claims to the extent that the property has sufficient value to cover them. Section 380.50(d) recognizes that if the value of property subject to a security interest is greater than the amount of the claim, the claimant will be allowed, to the extent of the value of the property, interest and any reasonable fees, costs, or charges provided for under the agreement or State statute under which the claim arose.

Consent to certain actions. Section 380.51 of the Final Rule addresses relief for a secured claimant from the effect of section 210(c)(13)(C) of the Dodd-Frank Act. Section 210(c)(13)(C) would delay any claimant holding a security interest or other lien against any property of a covered financial company from exercising its rights to obtain possession or control of the property for a period of 90 days beginning on the date of the appointment of the receiver for the company, unless the receiver consents. Secured claims that are not transferred to a bridge financial company or other acquiring entity but are retained in the receivership can be resolved either by the receiver selling the collateral and remitting the proceeds to the secured claimant up to the amount of the claim, or by the claimant liquidating any collateral itself. In either case, the claimant may file a claim with the receiver for any deficiency that exists after the value of the collateral is applied to the claim. The claimant may obtain judicial review if the receiver disallows the claim

in whole or in part. Accordingly, § 380.51 has been revised in the Final Rule to facilitate this process by implementing a procedure for a secured claimant to obtain the receiver's consent to the claimant's taking possession or control of collateral. Under this procedure, a secured claimant may request the consent of the receiver for relief. The request for consent must be in writing and state the amount of the claim, a description of the property that secures the claim, the value of the property, the proposed disposition of the property by the claimant, including the expected date of such disposition, along with supporting documentation for each item, including an appraisal or other evidence establishing the value of the property. The receiver will grant its consent if the receiver determines that it will not use, sell or lease the property and therefore will not need to provide adequate protection of the claimant's interest. (Section 380.52 of the Final Rule describes the different ways that adequate protection may be provided.) If the receiver has not acted on the request for consent within 30 days after the request is made, consent will be deemed to have been granted. Section 380.51(d) affirms that regardless of whether the receiver has decided to withhold consent, the stay of section 210(c)(13)(C) will terminate 90 days after the appointment of the FDIC as receiver. The provisions of § 380.51 shall not apply to a director or officer liability contract, a financial institution bond, the rights of parties to qualified financial contracts or netting contracts, any extension of credit from a Federal reserve bank or the FDIC, or in a case where the receiver repudiates a secured contract.

The other provision of the Dodd-Frank Act that may affect secured claimants is section 210(q)(1)(B), pursuant to which property of a covered financial company in the hands of the Corporation as receiver is not subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the receiver. While this statutory provision was

addressed in the consent provision that appeared in the Proposed Rule, the FDIC believes that it would be more appropriate to address this provision with a Statement of Policy that would be issued in the future by the FDIC. This approach was taken by the FDIC to address the comparable provision in the FDI Act, 12 U.S.C. 1825(b).

Adequate protection. Section 380.52 of the Final Rule addresses adequate protection for the interest of a secured claimant if the receiver decides to use or sell property subject to a security interest. If the receiver determines that it will use, sell, or lease such property, the receiver must provide adequate protection by (1) making a cash payment or periodic cash payments to the claimant if the sale, use, or lease of the property or the grant of a security interest or other lien against the property by the receiver results in a decrease in the value of such claimant's security interest in such property; (2) providing to the claimant an additional or replacement lien to the extent that the sale, use, or lease of the property or the grant of a security interest against the property by the receiver results in a decrease in the value of the claimant's security interest in the property; or (3) providing any other relief that will result in the realization by the claimant of the indubitable equivalent of the claimant's security interest in such property. Adequate protection of the claimant's security interest will be presumed if the value of the property is not depreciating or is sufficiently greater than the amount of the claim so that the claimant's security interest is not impaired.

The text of § 380.54 of the Proposed Rule, which concerned the sale of secured property by the receiver, has been deleted from the Final Rule. This subject is addressed in § 380.52 of the Final Rule.

The text of § 380.53 of the Proposed Rule, which reiterated section 210(a)(5) of the Dodd-Frank Act concerning an expedited procedure for the determination of a claim of a secured creditor alleging irreparable harm if the ordinary claims procedure was followed, has been deleted from the Final Rule as unnecessary for purposes of the regulation. The expedited procedure is fully set forth in section 210(a)(5) of the Act.

Repudiation of secured contract. Section 380.53 of the Final Rule contains the text of § 380.52 of the Proposed Rule. This section confirms that under section 210(c)(12)(A) of the Dodd-Frank Act, the authority of the receiver to repudiate a contract of the covered financial company will not have the effect of avoiding any legally enforceable and perfected security interests in the property (except those avoidable as fraudulent or preferential transfers under section 210(a)(11)). This section also provides that after repudiation the security interest would no longer secure the contract but would instead secure any claim for repudiation damages. Accordingly, the receiver may consent to the claimant's liquidation of the collateral and application of the proceeds to the claim for repudiation damages. Comments supported the inclusion of this provision in the Final Rule. The text of § 380.53 of the Proposed Rule, which provided that the receiver may redeem property of the covered financial company from a lien held by a secured creditor by paying the creditor in cash the fair market value of the property up to the value of its lien, has been deleted as unnecessary. The receiver already has the inherent ability to pay a secured claim anytime because such claims are excluded from the statutory order of priority for the payment of unsecured claims.

IV. Regulatory Analysis and Procedure

A. *Paperwork Reduction Act*

The Final Rule would not involve any new collections of information pursuant to the Paperwork Reduction Act (44 U.S.C. § 3501 *et seq.*). Consequently, no information has been submitted to the Office of Management and Budget for review.

B. *Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. § 601 *et seq.*) requires an agency that is issuing a final rule to prepare and make available a regulatory flexibility analysis that describes the impact of the final rule on small entities. (5 U.S.C. § 603(a)). The Regulatory Flexibility Act provides that an agency is not required to prepare and publish a regulatory flexibility analysis if the agency certifies that the final rule will not have a significant economic impact on a substantial number of small entities. Pursuant to section 605(b) of the Regulatory Flexibility Act, the FDIC certifies that the Final Rule will not have a significant economic impact on a substantial number of small entities. The Final Rule will clarify rules and procedures for the liquidation of a nonviable systemically important financial company, which will provide internal guidance to FDIC personnel performing the liquidation of such a company and will address any uncertainty in the financial system as to how the orderly liquidation of such a company would operate. As such, the Final Rule will not have a significant economic impact on small entities.

C. *Small Business Regulatory Enforcement Fairness Act*

TBD [The Office of Management and Budget has determined that the Final Rule is not a "major rule" within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), (5 U.S.C. 801 et seq.) As required by the SBREFA, the FDIC will file the appropriate reports with Congress and the General Accounting Office so that the Final Rule may be reviewed.]

D. The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

The FDIC has determined that the Final Rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Public Law 105-277, 112 Stat. 2681).

E. Plain Language

Section 722 of the Gramm-Leach-Bliley Act (Pub. L. 106-102, 113 Stat. 1338, 1471) requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The FDIC has sought to present the Final Rule in a simple and straightforward manner.

List of Subjects in 12 C.F.R. Part 380

Holding companies, Insurance companies.

For the reasons stated above, the Board of Directors of the Federal Deposit Insurance Corporation amends title 12 part 380 of the Code of Federal Regulations as follows:

Part 380---ORDERLY LIQUIDATION AUTHORITY

1. The authority citation for part 380 is revised to read as follows:

Authority: 12 U.S.C. 5389; 12 U.S.C. 5390(s)(3); 12 U.S.C. 5390(b)(1)(C); 12 U.S.C. 5390(a)(7)(D)

2. Sections 380.1 through 380.9 are placed under a new subpart A, and the heading for new subpart A is added to read as follows:

Subpart A – General and Miscellaneous Provisions

- § 380.1 **Definitions.**
- § 380.2 **[Reserved]**
- § 380.3 **Treatment of personal service agreements.**
- § 380.4 **[Reserved]**
- § 380.5 **Treatment of covered financial companies that are subsidiaries of insurance companies.**
- § 380.6 **Limitation on liens on assets of covered financial companies that are insurance companies or covered subsidiaries of insurance companies.**
- § 380.7 **Recoupment of compensation from senior executives and directors.**
- § 380.8 **[Reserved].**
- § 380.9 **Treatment of fraudulent and preferential transfers.**
- § 380.10-.19 **[Reserved]**

2. Amend § 380.1 to read as follows:

§ 380.1 Definitions

For purposes of this part, the following terms are defined as follows:

Allowed claim. The term "allowed claim" means a claim against the covered financial company or receiver that is allowed by the Corporation as receiver or upon which a final non-appealable judgment has been entered in favor of a claimant against a receivership by a court with jurisdiction to adjudicate the claim.

Board of Governors. The term "Board of Governors" means the Board of Governors of the Federal Reserve System.

Bridge financial company. The term “bridge financial company” means a new financial company organized by the Corporation in accordance with 12 U.S.C. 5390(h) for the purpose of resolving a covered financial company.

Claim. The term “claim” means any right to payment from either the covered financial company or the Corporation as receiver, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

Compensation. The term “compensation” means any direct or indirect financial remuneration received from the covered financial company, including, but not limited to, salary; bonuses; incentives; benefits; severance pay; deferred compensation; golden parachute benefits; benefits derived from an employment contract, or other compensation or benefit arrangement; perquisites; stock option plans; post-employment benefits; profits realized from a sale of securities in the covered financial company; or any cash or non-cash payments or benefits granted to or for the benefit of the senior executive or director.

Corporation. The term “Corporation” means the Federal Deposit Insurance Corporation.

Covered financial company. The term “covered financial company” means (1) a financial company for which a determination has been made under 12 U.S.C. 5383(b) and (2) does not include an insured depository institution.

Covered subsidiary. The term “covered subsidiary” means a subsidiary of a covered financial company other than: (1) an insured depository institution, (2) an insurance company, or (3) a covered broker or dealer.

Creditor. The term “creditor” means a person asserting a claim.

Director. The term “director” means a member of the board of directors of a company or of a board or committee performing a similar function to a board of directors with authority to vote on matters before the board or committee.

Dodd-Frank Act. The term “Dodd-Frank Act” shall mean the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 12 U.S.C. 5301 *et seq.* (2010).

Employee benefit plan. The term “employee benefit plan” has the meaning set forth in the Employee Retirement Income Security Act, 29 U.S.C. 1002(3).

Insurance company. The term “insurance company” means any entity that is: (1) engaged in the business of insurance, (2) subject to regulation by a State insurance regulator, and (3) covered by a State law that is designed to specifically deal with the rehabilitation, liquidation or insolvency of an insurance company.

Senior executive. The term “senior executive” means any person who participates or has authority to participate (other than in the capacity of a director) in major policymaking functions of the company, whether or not: the person has an official title; the title designates the officer an assistant; or the person is serving without salary or other compensation. The chairman of the board, the president, every vice president, the secretary, and the treasurer or chief financial officer, general partner and manager of a company are considered senior executives, unless the person is excluded, by resolution of the board of directors, the bylaws, the operating agreement or the partnership agreement of the company, from participation (other than in the capacity of a director) in major policymaking functions of the company, and the person does not actually participate therein.

4. Remove and reserve § 380.2.
5. Amend § 380.3 to read as follows:

§ 380.3 Treatment of personal service agreements.

(a) For the purposes of this section, the term "personal service agreement" means a written agreement between an employee and a covered financial company or a bridge financial company setting forth the terms of employment. This term also includes an agreement between any group or class of employees and a covered financial company, or a bridge financial company, including, without limitation, a collective bargaining agreement.

(b)(1) If before repudiation or disaffirmance of a personal service agreement, the Corporation as receiver of a covered financial company, or a bridge financial company accepts performance of services rendered under such agreement, then:

- (i) The terms and conditions of such agreement shall apply to the performance of such services; and
- (ii) Any payments for the services accepted by the Corporation as receiver shall be treated as an administrative expense of the receiver.

(2) If a bridge financial company accepts performance of services rendered under such agreement, then the terms and conditions of such agreement shall apply to the performance of such services.

(c) No party acquiring a covered financial company or any operational unit, subsidiary or assets thereof from the Corporation as receiver or from any bridge financial company shall be bound by a personal service agreement unless the acquiring party expressly assumes the personal service agreement.

(d) The acceptance by the Corporation as receiver for a covered financial company, or by any bridge financial company or the Corporation as receiver of a bridge financial company of services subject to a personal service agreement shall not limit or impair the authority of the Corporation as receiver to disaffirm or repudiate any personal service agreement in the manner provided for the disaffirmance or repudiation of any agreement under 12 U.S.C. 5390(c).

(e) Paragraph (b) of this section shall not apply to any personal service agreement with any senior executive or director of the covered financial company or covered subsidiary, nor shall it in any way limit or impair the ability of the receiver to recover compensation from any senior executive or director of a covered financial company under 12 U.S.C. 5390 and the regulations promulgated thereunder.

6. Remove and reserve § 380.4.

7. Amend § 380.5 to read as follows:

§ 380.5 Treatment of covered financial companies that are subsidiaries of insurance companies.

The Corporation shall distribute the value realized from the liquidation, transfer, sale or other disposition of the direct or indirect subsidiaries of an insurance company, that are not themselves insurance companies, solely in accordance with the order of priorities set forth in 12 U.S.C. 5390(b)(1) and the regulations promulgated thereunder.

8. Amend § 380.6 to read as follows:

§ 380.6 Limitation on liens on assets of covered financial companies that are insurance companies or covered subsidiaries of insurance companies.

(a) In the event that the Corporation makes funds available to a covered financial company that is an insurance company or to any covered subsidiary of an insurance company, or enters into any other transaction with respect to such covered entity under

12 U.S.C. 5384(d), the Corporation will exercise its right to take liens on any or all assets of the covered entities receiving such funds to secure repayment of any such transactions only when the Corporation, in its sole discretion, determines that:

- (1) Taking such lien is necessary for the orderly liquidation of the entity; and
 - (2) Taking such lien will not either unduly impede or delay the liquidation or rehabilitation of such insurance company, or the recovery by its policyholders.
- (b) This section shall not be construed to restrict or impair the ability of the Corporation to take a lien on any or all of the assets of any covered financial company or covered subsidiary in order to secure financing provided by the Corporation or the receiver in connection with the sale or transfer of the covered financial company or covered subsidiary or any or all of the assets of such covered entity.

9. Add § 380.7 to subpart A to read as follows:

§ 380.7 Recoupment of compensation from senior executives and directors.

(a) *Substantially Responsible.* The Corporation, as receiver of a covered financial company, may file an action to recover from any current or former senior executive or director substantially responsible for the failed condition of the covered financial company any compensation received during the 2-year period preceding the date on which the Corporation was appointed as the receiver of the covered financial company, except that, in the case of fraud, no time limit shall apply. A senior executive or director shall be deemed to be substantially responsible for the failed condition of a covered financial company that is placed into receivership under the orderly liquidation authority of the Dodd-Frank Act if:

(1) He or she failed to conduct his or her responsibilities with the degree of skill and care an ordinarily prudent person in a like position would exercise under similar circumstances, and

(2) As a result, individually or collectively, caused a loss to the covered financial company that materially contributed to the failure of the covered financial company under the facts and circumstances.

(b) *Presumptions.* The following presumptions shall apply for purposes of assessing whether a senior executive or director is substantially responsible for the failed condition of a covered financial company:

(1) It shall be presumed that a senior executive or director is substantially responsible for the failed condition of a covered financial company that is placed into receivership under the orderly liquidation authority of the Dodd-Frank Act under any of the following circumstances:

(i) The senior executive or director served as the chairman of the board of directors, chief executive officer, president, chief financial officer, or in any other similar role regardless of his or her title if in this role he or she had responsibility for the strategic, policymaking, or company-wide operational decisions of the covered financial company prior to the date that it was placed into receivership under the orderly liquidation authority of the Dodd-Frank Act;

(ii) The senior executive or director is adjudged liable by a court or tribunal of competent jurisdiction for having breached his or her duty of loyalty to the covered financial company;

- (iii) The senior executive was removed from the management of the covered financial company under 12. U.S.C. 5386(4); or
 - (iv) The director was removed from the board of directors of the covered financial company under 12 U.S.C. 5386(5).
- (2) The presumption under paragraph (b)(1)(i) of this section may be rebutted by evidence that the senior executive or director conducted his or her responsibilities with the degree of skill and care an ordinarily prudent person in a like position would exercise under similar circumstances. The presumptions under paragraphs (b)(1)(ii), (b)(1)(iii) and (b)(1)(iv) of this section may be rebutted by evidence that the senior executive or director did not cause a loss to the covered financial company that materially contributed to the failure of the covered financial company under the facts and circumstances.
- (3) The presumptions do not apply to:
- (i) A senior executive hired by the covered financial company during the two years prior to the Corporation's appointment as receiver to assist in preventing further deterioration of the financial condition of the covered financial company; or
 - (ii) A director who joined the board of directors of the covered financial company during the two years prior to the Corporation's appointment as receiver under an agreement or resolution to assist in preventing further deterioration of the financial condition of the covered financial company.
- (4) Notwithstanding that the presumption does not apply under paragraphs (b)(3)(i) and (ii) of this section, the Corporation as receiver still may pursue recoupment of compensation from a senior executive or director in paragraphs (b)(3)(i) or (ii) if they are substantially responsible for the failed condition of the covered financial company.

(c) *Savings Clause.* Nothing in this section shall limit or impair any rights of the Corporation as receiver under other applicable law, including any rights under Title II of the Dodd-Frank Act to pursue any other claims or causes of action it may have against senior executives and directors of the covered financial company for losses they cause to the covered financial company in the same or separate actions.

10. Reserve § 380.8.

11. Add § 380.9 to subpart A to read as follows:

§ 380.9 Treatment of fraudulent and preferential transfers.

(a) *Coverage.* This section shall apply to all receiverships in which the FDIC is appointed as receiver under 12 U.S.C. 5382(a) or 5390(a)(1)(E) of a covered financial company or a covered subsidiary, respectively, as defined in 12 U.S.C. 5381(a)(8) and (9).

(b) *Avoidance Standard for Transfer of Property.*

(1) In applying 12 U.S.C. 5390(a)(11)(H)(i)(II) to a transfer of property for purposes of 12 U.S.C. 5390(a)(11)(A), the Corporation, as receiver of a covered financial company or a covered subsidiary, which is thereafter deemed to be a covered financial company pursuant to 12 U.S.C. 5390(a)(1)(E)(ii), shall determine whether the transfer has been perfected such that a *bona fide* purchaser from such covered financial company or such covered subsidiary, as applicable, against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee.

(2) In applying 12 U.S.C. 5390(a)(11)(H)(i)(II) to a transfer of real property, other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of

real property, for purposes of 12 U.S.C. 5390(a)(11)(B), the Corporation, as receiver of a covered financial company or a covered subsidiary, which is thereafter deemed to be a covered financial company pursuant to 12 U.S.C. 5390(a)(1)(E)(ii), shall determine whether the transfer has been perfected such that a *bona fide* purchaser from such covered financial company or such covered subsidiary, as applicable, against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee. For purposes of this section, the term fixture shall be interpreted in accordance with U.S. Federal bankruptcy law.

(3) In applying 12 U.S.C. 5390(a)(11)(H)(i)(II) to a transfer of a fixture or property, other than real property, for purposes of 12 U.S.C. 5390(a)(11)(B), the Corporation, as receiver of a covered financial company or a covered subsidiary which is thereafter deemed to be a covered financial company pursuant to 12 U.S.C. 5390(a)(1)(E)(ii), shall determine whether the transfer has been perfected such that a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee, and the standard of whether the transfer is perfected such that a *bona fide* purchaser cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee of such property shall not apply to any such transfer under this paragraph (b)(3).

(c) *Grace period for perfection.* In determining when a transfer occurs for purposes of 12 U.S.C. 5390(a)(11)(B), the Corporation, as receiver of a covered financial company or a covered subsidiary, which is thereafter deemed to be a covered financial company pursuant to 12 U.S.C. 5390(a)(1)(E)(ii), shall apply the following standard:

(1) Except as provided in paragraph (c)(2) of this section, a transfer shall be deemed to have been made

(i) At the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time, except as provided in paragraph (c)(1)(ii) of this section;

(ii) At the time such transfer takes effect between the transferor and the transferee, with respect to a transfer of an interest of the transferor in property that creates a security interest in property acquired by the transferor (A) to the extent such security interest secures new value that was (1) given at or after the signing of a security agreement that contains a description of such property as collateral; (2) given by or on behalf of the secured party under such agreement; (3) given to enable the transferor to acquire such property; and (4) in fact used by the transferor to acquire such property; and (B) that is perfected on or before 30 days after the transferor receives possession of such property;

(iii) at the time such transfer is perfected, if such transfer is perfected after the 30-day period described in paragraph (c)(1)(i) or (ii) of this section, as applicable; or

(iv) immediately before the appointment of the Corporation as receiver of a covered financial company or a covered subsidiary which is thereafter deemed to be a covered financial company pursuant to 12 U.S.C. 5390(a)(1)(E)(ii), if such transfer is not perfected at the later of—

(A) the earlier of (1) the date of the filing, if any, of a petition by or against the transferor under Title 11 of the United States Code and (2) the date of the appointment of the Corporation, as receiver of such covered financial company or such covered subsidiary;

or

(B) 30 days after such transfer takes effect between the transferor and the transferee.

(2) For the purposes of this paragraph (c), a transfer is not made until the covered financial company or a covered subsidiary, which is thereafter deemed to be a covered financial company pursuant to 12 U.S.C. 5390(a)(1)(E)(ii), has acquired rights in the property transferred.

(d) *Limitations.* The provisions of this section do not act to waive, relinquish, limit or otherwise affect any rights or powers of the Corporation in any capacity, whether pursuant to applicable law or any agreement or contract.

12. New subpart B is added to read as follows:

Subpart B – PRIORITIES

§ 380.20 [Reserved]

§ 380.21 **Priorities.**

§ 380.22 **Administrative expenses of the receiver.**

§ 380.23 **Amounts owed to the United States.**

§ 380.24 **Priority for loss of setoff rights.**

§ 380.25 **Post-insolvency interest.**

§ 380.26 **Effect of transfer of assets and obligations to a bridge financial company.**

§ 380.27 **Treatment of similarly situated claimants.**

§ 380.28-29 **Reserved**

Subpart B – PRIORITIES

§ 380.20 [Reserved]

§ 380.21 **Priorities.**

(a) The unsecured amount of allowed claims shall be paid in the following order of priority:

(1) Repayment of debt incurred by or credit obtained by the Corporation as receiver for a covered financial company, provided that the Corporation as receiver has determined that it is otherwise unable to obtain unsecured credit for the covered financial company from commercial sources.

(2) Administrative expenses of the receiver, as defined in § 380.22, other than those described in paragraph (a)(1) of this section.

(3) Any amounts owed to the United States, as defined in § 380.23 (which is not an obligation described in paragraphs (a)(1) or (2) of this section).

(4) Wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual (other than an individual described in paragraph (a)(9) of this section), but only to the extent of \$11,725 for each individual (as adjusted for inflation in accordance with paragraph (b) of this section) earned within 180 days before the date of appointment of the receiver.

(5) Contributions owed to employee benefit plans arising from services rendered within 180 days before the date of appointment of the receiver, to the extent of the number of employees covered by each such plan multiplied by \$11,725 (as adjusted for inflation in accordance with paragraph (b) of this section); less the sum of (i) the aggregate amount paid to such employees under paragraph (a)(4) of this section, plus (ii) the aggregate amount paid by the Corporation as receiver on behalf of such employees to any other employee benefit plan.

- (6) Any amounts due to creditors who have an allowed claim for loss of setoff rights as described in § 380.24.
 - (7) Any other general or senior liability of the covered financial company (which is not a liability described under paragraphs (a)(8), (9) or (11) of this section).
 - (8) Any obligation subordinated to general creditors (which is not an obligation described under paragraphs (a)(9) or (11) of this section).
 - (9) Any wages, salaries, or commissions, including vacation, severance, and sick leave pay earned, that is owed to senior executives and directors of the covered financial company.
 - (10) Post-insolvency interest in accordance with § 380.25, provided that interest shall be paid on allowed claims in the order of priority of the claims set forth in paragraphs (a)(1) through (9) of this section.
 - (11) Any amount remaining shall be distributed to shareholders, members, general partners, limited partners, or other persons with interests in the equity of the covered financial company arising as a result of their status as shareholders, members, general partners, limited partners, or other persons with interests in the equity of the covered financial company, in proportion to their relative equity interests.
- (b) All payments under paragraphs (a)(4) and (a)(5) of this section shall be adjusted for inflation in the same manner that claims under 11 U.S.C. 507(a)(1)(4) are adjusted for inflation by the Judicial Conference of the United States pursuant to 11 U.S.C. 104.
- (c) All unsecured claims of any category or priority described in paragraphs (a)(1) through (a)(10) of this section shall be paid in full or provision made for such payment before any claims of lesser priority are paid. If there are insufficient funds to pay all

claims of a particular category or priority of claims in full, then distributions to creditors in such category or priority shall be made *pro rata*. A subordination agreement is enforceable with respect to the priority of payment of allowed claims within any creditor class or among creditor classes to the extent that such agreement is enforceable under applicable noninsolvency law.

§ 380.22 Administrative expenses of the receiver.

(a) The term "administrative expenses of the receiver" includes those actual and necessary pre- and post-failure costs and expenses incurred by the Corporation in connection with its role as receiver in liquidating the covered financial company; together with any obligations that the Corporation as receiver for the covered financial company determines to be necessary and appropriate to facilitate the smooth and orderly liquidation of the covered financial company. Administrative expenses of the Corporation as receiver for a covered financial company include:

- (1) Contractual rent pursuant to an existing lease or rental agreement accruing from the date of the appointment of the Corporation as receiver until the later of
 - (i) the date a notice of the disaffirmance or repudiation of such lease or rental agreement is mailed, or
 - (ii) The date such disaffirmance or repudiation becomes effective; provided that the lesser of such lease is not in default or breach of the terms of the lease.
- (2) Amounts owed pursuant to the terms of a contract for services performed and accepted by the receiver after the date of appointment of the receiver up to the date the receiver repudiates, terminates, cancels or otherwise discontinues such contract or notifies the counterparty that it no longer accepts performance of such services;

(3) Amounts owed under the terms of a contract or agreement executed in writing and entered into by the Corporation as receiver for the covered financial company after the date of appointment, or any contract or agreement entered into by the covered financial company before the date of appointment of the Corporation as receiver that has been expressly approved in writing by the Corporation as receiver after the date of appointment; and

(4) Expenses of the Inspector General of the Corporation incurred in carrying out its responsibilities under 12 U.S.C. 5391(d).

(b) Obligations to repay any extension of credit obtained by the Corporation as receiver through enforcement of any contract to extend credit to the covered financial company that was in existence prior to appointment of the Corporation as receiver pursuant to 12 U.S.C. 5390(c)(13)(D) shall be treated as administrative expenses of the receiver. Other unsecured credit extended to the receivership shall be treated as administrative expenses except with respect to debt incurred by, or credit obtained by, the Corporation as receiver for a covered financial company as described in § 380.21(a)(1).

§ 380.23 Amounts owed to the United States.

(a) The term "amounts owed to the United States" as used in § 380.21(a)(3) includes all unsecured amounts owed to the United States, other than expenses included in the definition of administrative expenses of the receiver under § 380.22 that are related to funds provided for the orderly liquidation of a covered financial company, funds provided to avoid or mitigate adverse effects on the financial stability of the United States or unsecured amounts owed to the Department of Treasury on account of tax liabilities of the covered financial company, without regard for whether such amounts are included as

debt or capital on the books and records of the covered financial company. Such amounts shall include obligations incurred before and after the appointment of the Corporation as receiver. Without limitation, "amounts owed to the United States" include all of the following, which all shall have equal priority under section 380.21(a)(3):

- (1) unsecured amounts owed to the Corporation for any extension of credit by the Corporation, including any amounts made available under 12 U.S.C. 5384(d);
 - (2) unsecured amounts owed to the Department of Treasury on account of unsecured tax liabilities of the covered financial company;
 - (3) unsecured amounts paid or payable by the Corporation pursuant to its guarantee of any debt issued by the covered financial company under the Temporary Liquidity Guaranty Program, 12 C.F.R. Part 370, any widely available debt guarantee program authorized under 12 U.S.C. 5612, or any other debt or obligation of any kind or nature that is guaranteed by the Corporation;
 - (4) the unsecured amount of any debt owed to a Federal reserve bank including loans made through programs or facilities authorized under the Federal Reserve Act, 12 U.S.C. 221 *et seq.*; and
 - (5) any unsecured amount expressly designated in writing in a form acceptable to the Corporation by the appropriate United States department, agency or instrumentality that shall specify the particular debt, obligation or amount to be included as an "amount owed to the United States" for the purpose of this rule at the time of such advance, guaranty or other transaction.
- (b) Other than those amounts included in paragraph (a) of this section, unsecured amounts owed to a department, agency or instrumentality of the United States that are

obligations incurred in the ordinary course of the business of the covered financial company prior to the appointment of the receiver generally will not be in the class of claims designated as "amounts owed to the United States" under section 380.21(a)(3), including, but not limited to:

- (1) unsecured amounts owed to government sponsored entities including, without limitation, the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Corporation;
 - (2) unsecured amounts owed to Federal Home Loan Banks; and
 - (3) unsecured amounts owed as satisfaction of filing, registration or permit fees due to any government department, agency or instrumentality.
- (c) The United States may, in its sole discretion, consent to subordinate the repayment of any amount owed to the United States to any other obligation of the covered financial company provided that such consent is provided in writing in a form acceptable to the Corporation by the appropriate department, agency or instrumentality and shall specify the particular debt, obligation or other amount to be subordinated including the amount thereof and shall reference this paragraph (c) or 12 U.S.C. 5390(b)(1); and provided further that unsecured claims of the United States shall, at a minimum, have a higher priority than liabilities of the covered financial company that count as regulatory capital on the books and records of the covered financial company.

§ 380.24 Priority of claims arising out of loss of setoff rights.

- (a) Notwithstanding any right of any creditor to offset a mutual debt owed by such creditor to any covered financial company that arose before the date of appointment of the receiver against a claim by such creditor against the covered financial company, the

Corporation as receiver may sell or transfer any assets of the covered financial company to a bridge financial company or to a third party free and clear of any such rights of setoff.

(b) If the Corporation as receiver sells or transfers any asset free and clear of the setoff rights of any party, such party shall have 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, provided that the setoff rights meet all of the criteria established under 12 U.S.C. 3590(a)(12).

(c) Any allowed claim pursuant to 12 U.S.C. 5390(a)(12) shall be paid prior to any other general or senior liability of the covered financial company described in section 380.21(a)(7). In the event that the setoff amount is less than the amount of the allowed claim, the balance of the allowed claim shall be paid at the otherwise applicable level of priority for such category of claim under § 380.21.

(d) Nothing in this section shall modify in any way the treatment of qualified financial contracts under Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

§ 380.25 Post-insolvency interest.

(a) *Date of accrual.* Post-insolvency interest shall be paid at the post-insolvency interest rate calculated on the principal amount of an allowed claim from the later of (i) the date of the appointment of the Corporation as receiver for the covered financial company; or (ii) in the case of a claim arising or becoming fixed and certain after the date of the appointment of the receiver, the date such claim arises or becomes fixed and certain.

(b) *Interest rate.* Post-insolvency interest rate shall equal, for any calendar quarter, the coupon equivalent yield of the average discount rate set on the three-month Treasury bill at the last auction held by the United States Treasury Department during the preceding calendar quarter. Post-insolvency interest shall be computed quarterly and shall be computed using a simple interest method of calculation.

(c) *Principal amount.* The principal amount of an allowed claim shall be the full allowed claim amount, including any interest that may have accrued to the extent such interest is included in the allowed claim.

(d) *Post-insolvency interest distributions.*

(1) Post-insolvency interest shall only be distributed following satisfaction of the principal amount of all creditor claims set forth in § 380.21(a)(1) through 380.21(a)(9) and prior to any distribution pursuant to § 380.21(a)(11).

(2) Post-insolvency interest distributions shall be made at such time as the Corporation as receiver determines that such distributions are appropriate and only to the extent of funds available in the receivership estate. Post-insolvency interest shall be calculated on the outstanding principal amount of an allowed claim, as reduced from time to time by any interim distributions on account of such claim by the Corporation as receiver.

§ 380.26 Effect of transfer of assets and obligations to a bridge financial company.

(a) The purchase of any asset or assumption of any asset or liability of a covered financial company by a bridge financial company, through the express agreement of such bridge financial company, constitutes assumption of any contract or agreement giving rise to such asset or liability. Such contracts or agreements, together with any contract the bridge financial company may through its express agreement enter into with any other

party, shall become the obligation of the bridge financial company from and after the effective date of the purchase, assumption or agreement, and the bridge financial company shall have the right and obligation to observe, perform and enforce their terms and provisions. In the event that the Corporation shall act as receiver of the bridge financial company any allowed claim arising out of any breach of such contract or agreement by the bridge financial company shall be paid as an administrative expense of the receiver of the bridge financial company.

(b) In the event that the Corporation as receiver of a bridge financial company shall act to dissolve the bridge financial company, it shall wind up the affairs of the bridge financial company in conformity with the laws, rules and regulations relating to the liquidation of covered financial companies, including the laws, rules and regulations governing priorities of claims, subject however to the authority of the Corporation to authorize the bridge financial company to obtain unsecured credit or issue unsecured debt with priority over any or all of the other unsecured obligations of the bridge financial company, provided that unsecured debt is not otherwise generally available to the bridge financial company.

(c) Upon the final dissolution or termination of the bridge financial company whether following a merger or consolidation, a stock sale, a sale of assets, or dissolution and liquidation at the end of the term of existence of such bridge financial company, any proceeds that remain after payment of all administrative expenses of the bridge financial company and all other claims against such bridge financial company will be distributed to the receiver for the related covered financial company.

§ 380.27 Treatment of similarly situated claimants.

(a) For the purposes of this section, the term "long-term senior debt" means senior debt issued by the covered financial company to bondholders or other creditors that has a term of more than 360 days. It does not include partially funded, revolving or other open lines of credit that are necessary to continuing operations essential to the receivership or any bridge financial company, nor to any contracts to extend credit enforced by the receiver under 12 U.S.C. 5390(c)(13)(D).

(b) In applying any provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act permitting the Corporation to exercise its discretion, upon appropriate determination, to make payments or credit amounts, pursuant to 12 U.S.C. 5390(b)(4), (d)(4), or (h)(5)(E) to or for some creditors but not others similarly situated at the same level of payment priority, the Corporation shall not exercise such authority in a manner that would result in the following recovering more than the amount established and due under 12 U.S.C. 5390(b)(1), or other priorities of payment specified by law:

(1) Holders of long-term senior debt who have a claim entitled to priority of payment at the level set out under 12 U.S.C. 5390(b)(1)(E);

(2) Holders of subordinated debt who have a claim entitled to priority of payment at the level set out under 12 U.S.C. 5390(b)(1)(F);

(3) Shareholders, members, general partners, limited partners, or other persons who have a claim entitled to priority of payment at the level set out under 12 U.S.C. 5390

(b)(1)(H); or

(4) Other holders of claims entitled to priority of payment at the level set out under 12 U.S.C. 5390(b)(1)(E) unless the Corporation, through the affirmative vote of a majority the members of the Board of Directors then serving, and in its sole discretion, specifically

determines that additional payments or credit amounts to such holders are necessary and meet all of the requirements under 12 U.S.C. 5390(b)(4), (d)(4), or (h)(5)(E), as applicable. The authority of the Board to make the foregoing determination cannot be delegated.

13. New subpart C is added to read as follows:

Subpart C – RECEIVERSHIP ADMINISTRATIVE CLAIMS PROCESS

- § 380.30 Receivership administrative claims process.
- § 380.31 Scope.
- § 380.32 Claims bar date.
- § 380.33 Notice requirements.
- § 380.34 Procedures for filing claim.
- § 380.35 Determination of claims.
- § 380.36 Decision period.
- § 380.37 Notification of determination.
- § 380.38 Procedures for seeking judicial review of disallowed claim.
- § 380.39 Contingent claims.
- § 380.40-.49 [Reserved]
- § 380.50 Determination of secured claims.
- § 380.51 Consent to certain actions.
- § 380.52 Adequate protection.
- § 380.53 Repudiation of secured contract.

Subpart C – RECEIVERSHIP ADMINISTRATIVE CLAIMS PROCESS

- § 380.30 Receivership administrative claims process.

The Corporation as receiver of a covered financial company shall determine claims against the covered financial company and the receiver of the covered financial company in accordance with the procedures set forth in 12 U.S.C. 5390(a)(2) – (5) and the regulations promulgated by the Corporation.

§ 380.31 Scope.

Nothing in this subpart C shall apply to any liability or obligation of a bridge financial company or its assets or liabilities, or to any extension of credit from a Federal Reserve Bank or the Corporation to a covered financial company.

§ 380.32 Claims bar date.

Upon its appointment as receiver for a covered financial company, the Corporation shall establish a claims bar date by which date creditors of the covered financial company shall present their claims, together with proof, to the receiver. The claims bar date shall be not less than 90 days after the date on which the notice to creditors to file claims is first published under § 380.33(a).

§ 380.33 Notice requirements.

(a) *Notice by publication.* Promptly after its appointment as receiver for a covered financial company, the Corporation shall publish a notice to the creditors of the covered financial company to file their claims with the receiver no later than the claims bar date. The Corporation as receiver shall republish such notice 1 month and 2 months, respectively, after the date the notice is first published. The notice to creditors shall be published in one or more newspapers of general circulation where the covered financial company has its principal place or places of business. In addition to such publication in a newspaper, the Corporation may post the notice on the FDIC's website at www.fdic.gov.

(b) *Notice by mailing.* At the time of the first publication of the notice to creditors, the Corporation as receiver shall mail a notice to present claims no later than the claims bar date to any creditor shown in the books and records of the covered financial company. Such notice shall be sent to the last known address of the creditor appearing in the books and records or appearing in any claim found in the records of the covered financial company.

(c) *Notice by electronic media.* After publishing and mailing notice as required by paragraphs (a) and (b) of this section, the Corporation as receiver may communicate by electronic media with any claimant who expressly agrees to such form of communication.

(d) *Discovered claimants.* Upon discovery of the name and address of a claimant not appearing in the books and records of the covered financial company, the Corporation as receiver shall, not later than 30 days after the discovery of such name and address, mail a notice to such claimant to file claims no later than the claims bar date. Any claimant not appearing on the books and records that is discovered before the claims bar date shall be required to file a claim before the claims bar date, subject to the exception of § 380.35(b)(2). If a claimant not appearing on the books and records is discovered after the claims bar date, the Corporation shall notify the claimant to file a claim by a date not later than 90 days from the date appearing on the notice that is mailed to such creditor. Any claim filed after such date shall be disallowed, and such disallowance shall be final.

§ 380.34 Procedures for filing claim.

(a) *In general.* The Corporation as receiver shall provide, in a reasonably practicable manner, instructions for filing a claim, including by the following means:

- (1) Providing contact information in the publication notice;
 - (2) Including in the mailed notice a proof of claim form that has filing instructions; and
 - (3) Posting filing instructions on the Corporation's public website at www.fdic.gov.
- (b) *When claim is deemed filed.* A claim that is mailed to the receiver in accordance with the instructions established under paragraph (a) of this section shall be deemed to be filed as of the date of postmark. A claim that is sent to the receiver by electronic media or fax in accordance with the instructions established under paragraph (a) shall be deemed to be filed as of the date of transmission by the claimant.
- (c) *Class claimants.* If a claimant is a member of a class for purposes of a class action lawsuit, whether or not the class has been certified by a court, each claimant must file its claim with the Corporation as receiver separately.
- (d) *Indenture trustee.* A trustee appointed under an indenture or other applicable trust document related to investments or other financial activities may file a claim on behalf of the persons who appointed the trustee.
- (e) *Legal effect of filing.*
- (1) Pursuant to 12 U.S.C. 5390(a)(3)(E)(i), the filing of a claim with the receiver shall constitute a commencement of an action for purposes of any applicable statute of limitations.
 - (2) *No prejudice to continuation of action.* Pursuant to 12 U.S.C. 5390(a)(3)(E)(ii) and subject to 12 U.S.C. 5390(a)(8), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue, after the receiver's determination of the claim, any action which was filed before the date of appointment of the receiver for the covered financial company.

§ 380.35 Determination of claims.

(a) *In general.* The Corporation as receiver shall allow any claim received by the receiver on or before the claims bar date if such claim is proved to the satisfaction of the Corporation. Except as provided in 12 U.S.C. 5390(a)(3)(D)(iii), the Corporation as receiver may disallow any portion of any claim by a creditor or claim of a security, preference, setoff, or priority which is not proved to the satisfaction of the Corporation.

(b) *Disallowance of claims filed after the claims bar date.*

(1) Except as otherwise provided in this section, any claim filed after the claims bar date shall be disallowed, and such disallowance shall be final, as provided by 12 U.S.C.

5390(a)(3)(C)(i).

(2) *Certain exceptions.* Paragraph (b)(1) shall not apply with respect to any claim filed by a claimant after the claims bar date and such claim shall be considered by the receiver if:

(i) the claimant did not receive notice of the appointment of the receiver in time to file such claim before the claims bar date, or the claim is based upon an act or omission of the Corporation as receiver that occurs after the claims bar date has passed, and

(ii) the claim is filed in time to permit payment. A claim is "filed in time to permit payment" when it is filed before a final distribution is made by the receiver.

§ 380.36 Decision period.

(a) *In general.* Prior to the 180th day after the date on which a claim against a covered financial company or the Corporation as receiver is filed with the Corporation, the Corporation shall notify the claimant whether it allows or disallows the claim.

(b) *Extension of time.* The 180-day period described in paragraph (a) of this section may be extended by a written agreement between the claimant and the Corporation executed not later than 180 days after the date on which the claim against the covered financial company or the Corporation as receiver is filed with the Corporation. If an extension is agreed to, the Corporation shall notify the claimant whether it allows or disallows the claim prior to the end of the extended claims determination period.

§ 380.37 Notification of determination.

(a) *In general.* The Corporation as receiver shall notify the claimant by mail of the decision to allow or disallow the claim. Notice shall be mailed to the address of the claimant as it last appears on the books, records, or both of the covered financial company; in the claim filed by the claimant with the Corporation as receiver; or in documents submitted in the proof of the claim. If the claimant has filed the claim electronically, the receiver may notify the claimant of the determination by electronic means.

(b) *Contents of notice of disallowance.* If the Corporation as receiver disallows a claim, the notice to the claimant shall contain a statement of each reason for the disallowance, and the procedures required to file or continue an action in court.

(c) *Failure to notify deemed to be disallowance.* If the Corporation as receiver does not notify the claimant before the end of the 180-day claims determination period, or before the end of any extended claims determination period, the claim shall be deemed to be disallowed, and the claimant may file or continue an action in court pursuant to 12 U.S.C. 5390(a)(4)(A).

§ 380.38 Procedures for seeking judicial determination of disallowed claim.

(a) *In general.* In order to seek a judicial determination of a claim that has been disallowed, in whole or in part, by the Corporation as receiver, the claimant, pursuant to 12 U.S.C. 5390(a)(4)(A), may either:

(1) File suit on such claim in the district or territorial court of the United States for the district within which the principal place of business of the covered financial company is located; or

(2) Continue an action commenced before the date of appointment of the receiver, in the court in which the action was pending.

(b) *Timing.* Pursuant to 12 U.S.C. 5390(a)(4)(B), a claimant who seeks a judicial determination of a claim disallowed by the Corporation as receiver must file suit on such claim before the end of the 60-day period beginning on the earlier of:

(1) The date of any notice of disallowance of such claim;

(2) The end of the 180-day claims determination period; or

(3) If the claims determination period was extended with respect to such claim under § 380.36(b), the end of such extended claims determination period.

(c) *Statute of limitations.* Pursuant to 12 U.S.C. 5390(a)(4)(C), if any claimant fails to file suit on such claim (or to continue an action on such claim commenced before the date of appointment of the Corporation as receiver) prior to the end of the 60-day period described in 12 U.S.C. 5390(a)(4)(B), the claim shall be deemed to be disallowed (other than any portion of such claim which was allowed by the receiver) as of the end of such period, such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

(d) *Jurisdiction.* Pursuant to 12 U.S.C. 5390(a)(9)(D), unless the claimant has first exhausted its administrative remedies by obtaining a determination from the receiver regarding a claim filed with the receiver, no court shall have jurisdiction over:

(1) Any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any covered financial company for which the Corporation has been appointed receiver, including any assets which the Corporation may acquire from itself as such receiver; or

(2) Any claim relating to any act or omission of such covered financial company or the Corporation as receiver.

§ 380.39 Contingent claims.

(a) The Corporation as receiver shall not disallow a claim based on an obligation of the covered financial company solely because the obligation is contingent. To the extent the obligation is contingent, the receiver shall estimate the value of the claim, as such value is measured based upon the likelihood that such contingent obligation would become fixed and the probable magnitude thereof.

(b) If the receiver repudiates a contingent obligation of a covered financial company consisting of a guarantee, letter of credit, loan commitment, or similar credit obligation, the actual direct compensatory damages for repudiation shall be no less than the estimated value of the claim as of the date the Corporation was appointed receiver of the covered financial company, as such value is measured based upon the likelihood that such contingent claim would become fixed and the probable magnitude thereof.

(c) The receiver shall estimate the value of a claim under paragraphs (a) or (b) of this section no later than 180 days after the claim is filed, unless such period is extended by a written agreement between the claimant and the Corporation.

(d) Except for a contingent claim that becomes absolute and fixed prior to the receiver's determination of the estimated value, such estimated value of a contingent claim shall be recognized as the allowed amount of the claim for purposes of distribution.

(e) The estimated value of a contingent claim shall constitute the receiver's determination of the claim for purposes of § 380.38(d) and 12 U.S.C. 5390(a)(9)(D).

§ 380.40-.49 Reserved

§ 380.50 Determination of secured claims.

(a) In the case of a claim against a covered financial company that is secured by any property of the covered financial company, the Corporation as receiver shall determine the amount of the claim, whether the claimant's security interest is legally enforceable and perfected, the priority of the claimant's security interest, and the fair market value of the property that is subject to the security interest. The Corporation as receiver may treat the portion of the claim which exceeds an amount equal to the fair market value of such property as an unsecured claim.

(b) The fair market value of any property of a covered financial company that secures a claim shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property and at the time of such proposed disposition or use.

(c) The Corporation as receiver may recover from any property of a covered financial company that secures a claim the reasonable and necessary costs and expenses of

preserving or disposing of such property to the extent of any benefit to the claimant, including the payment of all ad valorem property taxes with respect to such property.

(d) To the extent that a claim is secured by property of a covered financial company and the value of such property, after any recovery under paragraph (c) of this section, is greater than the amount of such claim, there shall be allowed to the claimant a secured claim for interest on such claim and any reasonable fees, costs, or charges provided for under the agreement or State statute under which the claim arose to the extent of the value of such property.

§ 380.51 Consent to certain actions.

(a) *In general.* Any claimant alleging a legally valid and enforceable or perfected security interest in property of a covered financial company or control of any legally valid and enforceable security entitlement in respect of any asset held by the covered financial company for which the Corporation has been appointed receiver may seek the consent of the Corporation as receiver for relief from the provisions of 12 U.S.C. 5390(c)(13)(C).

(b) *Contents of request.* A request for consent of the Corporation as receiver for relief from the provisions of 12 U.S.C. 5390(c)(13)(C) shall be in writing and contain the following information:

- (1) the amount of the claim, with supporting documentation;
- (2) a description of the property that secures the claim, with supporting documentation of the claimant's interest in the property;
- (3) the value of the property, as established by an appraisal or other supporting documentation; and

(4) the proposed disposition of the property by the claimant, including the expected date of such disposition.

(c) *Determination by receiver.* The Corporation as receiver shall grant its consent to a request for relief from the provisions of 12 U.S.C. 5390(c)(13)(C) if it determines that (1) the claimant has a legally valid and enforceable or perfected security interest or other lien against the property of a covered financial company and (2) the Corporation as receiver will not use, sell, or lease the property. If the Corporation as receiver determines that it will use, sell, or lease such property and that adequate protection is necessary and appropriate, the Corporation as receiver may provide adequate protection instead of granting consent.

(d) *Consent deemed granted.* If the Corporation as receiver has not notified the claimant of the determination whether to grant or withhold consent under this section within 30 days after a request for consent has been submitted, consent shall be deemed to be granted.

(e) *Expiration by operation of law.* Notwithstanding any determination by the Corporation as receiver to withhold consent under this section, the prohibitions described in 12 U.S.C. 5390(c)(13)(C)(i) are no longer applicable 90 days after the appointment of the Corporation as receiver.

(f) *Limitations.* Any consent granted by the Corporation as receiver under this section shall not act to waive or relinquish any rights granted to the Corporation in any capacity, pursuant to any other applicable law or any agreement or contract, and shall not be construed as waiving, limiting or otherwise affecting the rights or powers of the Corporation as receiver to take any action or to exercise any power not specifically

mentioned, including but not limited to any rights, powers or remedies of the Corporation as receiver regarding transfers taken in contemplation of the covered financial company's insolvency or with the intent to hinder, delay or defraud the company or the creditors of such company, or that is a fraudulent transfer under applicable law.

(g) *Exceptions.* (1) This section shall not apply in the case of a contract that is repudiated or disaffirmed by the Corporation as receiver.

(2) This section shall not apply to a director or officer liability insurance contract, a financial institution bond, the rights of parties to certain qualified financial contracts pursuant to 12 U.S.C. 5390(c)(8), the rights of parties to netting contracts pursuant to 12 U.S.C. 4401 et. seq., or any extension of credit from any Federal reserve bank or the Corporation to any covered financial company or any security interest in the assets of a covered financial company securing any such extension of credit.

§380.52 Adequate protection.

(a) If the Corporation as receiver determines that it will use, sell, or lease or grant a security interest or other lien against property of the covered financial company that is subject to a security interest of a claimant, the Corporation as receiver shall provide adequate protection by any of the following means:

(1) making a cash payment or periodic cash payments to the claimant to the extent that the sale, use, or lease of the property or the grant of a security interest or other lien against the property by the Corporation as receiver results in a decrease in the value of such claimant's security interest in the property;

(2) providing to the claimant an additional or replacement lien to the extent that the sale, use, or lease of the property or the grant of a security interest against the property by the

Corporation as receiver results in a decrease in the value of the claimant's security interest in the property; or

(3) providing any other relief that will result in the realization by the claimant of the indubitable equivalent of the claimant's security interest in the property.

(b) Adequate protection of the claimant's security interest will be presumed if the value of the property is not depreciating or is sufficiently greater than the amount of the claim so that the claimant's security interest is not impaired.

§ 380.53 Repudiation of secured contract.

To the extent that a contract to which a covered financial company is a party is secured by property of the company, the repudiation of the contract by the Corporation as receiver shall not be construed as permitting the avoidance of any legally enforceable and perfected security interest in the property, and the security interest shall secure any claim for repudiation damages.

By order of the Board of Directors.

Dated at Washington, D.C., this ___ day of July, 2011

Federal Deposit Insurance Corporation

Robert E. Feldman

Executive Secretary